

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**  
**Labor Standards Bureau**

**Office of Hearings and Adjudication**  
**COMPENSATION REVIEW BOARD**



(202) 671-1394-Voice  
(202) 673-6402-Fax

**CRB No. 09-032**

**LARRY BRAXTON,**

**Claimant-Respondent,**

**v.**

**MARTY'S RESTAURANT AND GUARD INSURANCE COMPANY,**

**Employer-Petitioner.**

Appeal from a Compensation Order on Remand of  
Administrative Law Judge Anand K. Verma  
AHD No. 06-092; OWC No. 618029

Todd S. Sapiro, Esquire, for the Employer-Petitioner (hereinafter "Petitioner")

James E. Turner, Esquire, for the Claimant-Respondent (hereinafter "Respondent")

Before MELISSA LIN KLEMENS,<sup>1</sup> JEFFREY P. RUSSELL, and LESLIE A. MEEK,<sup>2</sup> *Administrative Appeals Judges.*

MELISSA LIN KLEMENS, *Administrative Appeals Judge*, for the Compensation Review Panel:

**DECISION AND ORDER**

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 250, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

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<sup>1</sup>Administrative Law Judge Klemens is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Issuance No. 09-02 (December 8, 2008) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

<sup>2</sup>Administrative Law Judge Meek is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Issuance No. 09-01 (October 10, 2008) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

## OVERVIEW

On October 12, 2005, Respondent allegedly slipped and fell down wet stairs at work. As a result, Respondent purported injured his back, and he filed a claim for workers' compensation benefits.

On February 23, 2006, a formal hearing was held before Administrative Hearings Division. In a Compensation Order issued on May 7, 2008 (hereinafter "CO"), the presiding administrative law judge (hereinafter "ALJ") concluded Respondent is entitled to temporary total disability benefits from October 14, 2005 at a compensation rate to be calculated based on an average weekly wage of Three Hundred Seventy-nine Dollars and Fifty Cents (\$379.50).

The CRB vacated and remanded the CO in a Decision and Order dated November 25, 2008. This tribunal directed the ALJ to clarify whether or not "accidental injury" was at issue and, if it was, to make the necessary findings of fact regarding that issue. The ALJ also was directed to make the necessary findings of fact regarding Respondent's average weekly wage.

In response, on December 12, 2008, the ALJ issued a Compensation Order on Remand (hereinafter "COR"). The COR reaches the same conclusions as the CO.

An Application for Review (hereinafter "AFR") was filed by Petitioner on December 22, 2008; as grounds for this appeal, Petitioner alleges as error the COR is unsupported by substantial evidence and is contrary to law. Specifically, Petitioner argues the ALJ failed to properly apply the presumption of compensability by failing to consider the evidence in its entirety and failed to follow the CRB's directives regarding the issue of average weekly wage.

On the other hand, Respondent asserts Petitioner merely disagrees with the weight the ALJ gave the evidence. Respondent also asserts the issues raised by Petitioner are without merit, and the COR should be affirmed.

Upon review of the record, for the reasons set forth herein, the Panel, again, remands this matter to the ALJ.

## ANALYSIS

As an initial matter, the scope of review by the CRB and this Panel, as established by the Act, *infra*, and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the COR 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 Ann. §32-1501 to 32-1545 (2005) (hereinafter "Act"), at §32-1521.01(d)(2)(A). "Substantial evidence" is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Panel are 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 reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In a contested case, in order to conform to the requirements of the D.C. Administrative Procedures Act, D.C. Official Code §2-501 *et seq.* (2006) (hereinafter “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, 402 (D.C. 1984). Thus, when an administrative law judge 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 finding. *King v. DOES*, 742 A.2d. 460, 465 (Basic findings of fact on all material issues are required; [o]nly 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, WMATA v. DOES*, 926 A.2d 140 (D.C. 2007). Moreover, the determination of whether an administrative law judge’s decision complies with the foregoing APA requirements is a determination that is limited in scope to the four corners of the Compensation Order under review. Thus, where an administrative law judge 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 administrative law judge to make the necessary findings. *See, Mack v. DOES*, 651 A.2d 804, 806 (D.C. 1994).

On November 25, 2008, the CRB reversed and remanded the CO with the directive that the ALJ

clarify whether accidental injury is at issue in this case. If accidental injury is at issue, the ALJ must make the necessary findings of fact. *Braxton v. Marty’s Restaurant*, CRB No. 08-166, AHD No. 06-092, OWC No. 618029 (November 25, 2008) at p.3.

In the COR, the ALJ indicates the parties stipulated “claimant sustained an accidental injury on October 12, 2005.” COR at p.2. Nonetheless, the ALJ goes on in an attempt to analyze this very issue. Consequently, this Panel accepts the stipulation is noted in the COR in error.<sup>3</sup>

In conducting his analysis of this issue, the ALJ absolutely declares

Claimant’s testimony that immediately after regaining his composure from the fall, he informed the cook, Carla Martinez of his injury, is uncontradicted. (COR at p.3) (Emphasis added.)

and

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<sup>3</sup>*See also, Braxton v. Marty’s Restaurant*, CRB No. 88-166, AHD No. 06-92, OWC No. 618029 (November 25, 2008) at p.3 (“[A] reading of the transcript fails to reveal the parties stipulated to accidental injury and fails to reveal accidental injury was at issue. (Citations omitted.) Moreover, the Stipulation Form attached to the Joint Pre-Hearing Statement in the AHD official file indicates accidental injury was at issue.”)

in light of the opinions of claimant's treating physician as well as the consulting neurosurgeon, absent any contradictory medical or factual opinion, claimant's injury of October 12, 2005 remains unassailable. *Id.* (Emphasis added.)

As explained in the previous Decision and Order, the requirement of an accidental injury is satisfied when something unexpectedly goes wrong with the human frame. *Washington Metropolitan Area Transit Authority v. DOES*, 506 A.2d 1127 (D.C. 1986). Moreover, the issues of accidental injury and injury arising out of and in the course of employment are inextricably intertwined; a claimant "has the initial burden of introducing persuasive evidence of basic facts tending to establish coverage under the Act before the other facts necessary to establish the claimant's coverage under the Act are presumed." *Booker v. George Hyman Construction Co.*, H&AS No. 85-5, OWC No. 049406 (Director's Decision August 2, 1988). In other words, in order to benefit from the presumption of compensability set forth at §32-1521 of the Act (hereinafter "Presumption"), a claimant initially must show some credible evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability. *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

Then, after a claimant presents sufficient evidence to trigger the Presumption, the burden shifts to the employer to submit substantial evidence<sup>4</sup> showing the disability did not arise out of and in the course of the claimant's employment. *Parodi v. DOES*, 560 A.2d 524, 526 (D.C. 1989); *Ferreira, supra*, at 655. The employer must 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.) Rebutting the Presumption requires more than the difficult task of proving a negative because the inquiry on this issue focuses on whether the employer has provided substantial evidence of a non-employment related basis to sever the potential employment connection (*Ferreira, supra*, at 659), but as intricate as the analysis may be, it must be followed.<sup>5</sup>

When applying the Presumption, the ALJ certainly is not required to comment upon every exhibit and all testimony admitted into evidence, but when evidence is contradictory, the contradiction must be addressed. In the case under review, Respondent's testimony that he immediately told Ms. Martinez he had injured himself when he slipped and fell on soapy water being used to mop approximately three (3) steps is contradicted, contrary to the ALJ's declaration in the COR. Similarly, although Respondent's treating physician and consulting neurosurgeon render opinions, those opinions also are contradicted, again, contrary to the ALJ's declaration in the COR.

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<sup>4</sup>"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Children's Defense Fund v. DOES*, 726 A.2d 1242, 1247 (D.C. 1999) (Citations omitted.)

<sup>5</sup>Petitioner asserts the ALJ also failed to analyze the issue of medical causal relationship in the COR. See, Memorandum of Points and Authorities in Support of Employer's Application for Review at pp.3 and 8. Pursuant to *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995), "causation as it relates to a determination of whether an accidental injury arose out of and in the course of employment" and "causation as it relates to whether a particular medical condition is a result of the compensable work injury" are unified. As such, the Presumption applies to the issue of causal relationship as well as to the issue of accidental injury.

In addition, although opinions of Respondent's treating physician as well as those of his consulting neurosurgeon may assist in determining causal relationship and the nature and extent of Respondent's disability, if any, it seems those opinions are of limited value when determining accidental injury inasmuch as they essentially are but a recitation of history provided by Respondent.

Respondent's credibility is of crucial consideration in this matter, and while it is well settled that credibility determinations of the fact-finder are entitled to great weight, *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985), here, any such determination is only implicit. In the face of the unaddressed, contradictory evidence of record, an implicit finding is insufficient.

Finally, turning to the issue regarding Respondent's average weekly wage, in the November 25, 2008 Decision and Order, this tribunal also noted

the ALJ failed to make the necessary findings of fact relating to the Respondent's average weekly wage, thereby making the Compensation Order legally defective. *Braxton v. Marty's Restaurant*, CRB No. 08-166, AHD No. 06-092, OWC No. 618029 (November 25, 2008) at p.4.

The totality of the ALJ's response to this directive is

[t]he question of claimant's average weekly wage and the rationale surrounding the calculation of the weekly amount of \$379.50 was fully discussed in the original Compensation Order of May 7, 2008, and, therefore, any further elaboration thereto becomes unnecessary. COR at p.4.

If further elaboration were unnecessary, this tribunal would not have remanded the case for that issue to be addressed. As this ALJ is well aware,

[w]hile an ALJ in AHD is free to state disagreement with a CRB decision, the ALJ is not free to ignore, disregard, or refuse to follow the specific instructions of the CRB in connection with remands to AHD. This is so because (1) as a matter of policy as discussed above relating to the need for an orderly and efficient system of adjudicatory functioning, permitting the ALJ to ignore the CRB directive is deleterious to the adjudicatory functioning of the agency, [2] the law of the case is subject to determination by the CRB as discussed in *Munson [v. Hardy & Son Trucking]*, CRB No. 07-017, AHD No. 96-176B, OWC No. 029805 (February 5, 2007), and is not subject to reversal by the ALJ, (3) the powers of the Director, who is the ultimate superior authority within the agency over the ministerial actions of the OHA, including both AHD and CRB, have been delegated to the CRB under the directive issued as Administrative Policy Issuance No. 05-01, dated February 5, 2005, . . . and (4) because the Court of Appeals has held that the CRB may not issue compensation orders itself, but can, may, and in appropriate instances, must remand to the ALJ with *instructions* as to how to proceed, where the

CRB detects error in the actions of the ALJ; *see, Washington Metropolitan Area Transit Authority v. DOES*, 926 A.2d 140 (D.C. 2007). *Coleman v. Community Alliance, Inc.*, CRB No. 08-023, AHD No. 03-046A, OWC No. 574318 (February 19, 2008).

Thus, once again, on remand, the ALJ must make the necessary findings of fact relating to Respondent's average weekly wage, specifically, a mathematical calculation is not the required findings of fact- In the record there is conflicting yet unreconciled evidence regarding Respondent's work status (*i.e.* full time or part time), position, schedule, hours, and actual wages received that must be resolved in order to make a determination as to his average weekly wage.

Petitioner's arguments have an appearance of inappropriately retrying the case until examined in light of the COR wherein the ALJ, for a second time, has not addressed critical issues. We make no decision regarding the ultimate outcome of this matter; the ALJ remains free to draw any conclusions from the evidence which can be supported by the facts and by the proper application of the law, but the ALJ is urged to thoroughly explain the bases for all findings of fact and conclusions of law and to refrain from language which is so overreaching without qualification as to require remanding the case.

#### CONCLUSION

The December 12, 2008 Compensation Order on Remand is not supported by substantial evidence and is not in accordance with the law.

#### ORDER

The December 12, 2008 Compensation Order on Remand is VACATED AND REMANDED.

FOR THE COMPENSATION REVIEW BOARD:

  
MELISSA LIN KLEMENS  
Administrative Appeals Judge

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January 29, 2009  
DATE