

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-123

**REGINA MICHAEL,
Claimant–Petitioner,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF BEHAVIORAL HEALTH,
Employer–Respondent.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 DEC 29 PM 2 34

Appeal from a July 21, 2015 Compensation Order by
Administrative Law Judge Gwenlynn D’Souza
AHD No. PBL 15-009, DCP No. 0468-WC-0000168

(Decided December 29, 2015)

Harold L. Levi for Claimant
Sonia L. Weil for Employer

Before: JEFFREY P. RUSSELL and LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This is an appeal from a July 21, 2015 Compensation Order (the CO) by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia Department of Employment Services (DOES).

Regina Michael (Claimant) is employed by the District of Columbia Department of Behavioral Health (Employer) as a registered nurse and, on November 13, 2014, she sustained an injury to her left hand and wrist. The injury occurred at approximately 11:10 p.m. in the employee parking lot at St. Elizabeth’s Hospital, where Claimant was scheduled to begin working at 11:15 p.m. The injury occurred while Claimant was walking through the lot and had an encounter with a fast moving sport utility vehicle (SUV). As described in the Compensation Order under review (the CO), she either “hyperextended her hand while running toward a stopped SUV... or while she was pushing away from a fast-moving SUV to save her life.” CO, at 5. Regardless of which description most accurately describes the incident, it is undisputed that, as the ALJ found in the

CO, “Claimant sustained a left hand and left wrist injury when her left wrist hyperextended as a result of contact with the SUV.” CO, at 2.

Claimant’s claim for workers’ compensation benefits was denied by Employer when the Public Sector Workers’ Compensation Program (PSWCP) issued a Notice of Determination, giving the reason for the denial as follows: “Because your employment was not the ‘but for’ cause of your injury, the Program finds that your injury is not compensable based upon the ‘positional risk’ doctrine.” CE 3.

Claimant filed an Application for Formal Hearing in AHD, seeking to have her injury deemed compensable and requesting an award of temporary total disability and medical care. A formal hearing was conducted before the ALJ on June 18, 2015, following which the ALJ issued the CO, denying the claim on the same grounds as did the PSWCP.

Claimant filed an Application for Review of the CO and a memorandum of points and authorities in support thereof (Claimant’s Brief), arguing that the ALJ erred in denying the claim, because, she argues, “but for” her employment as a nurse at St. Elizabeth’s hospital, she would not have been at the place where she was injured at the time it occurred. Employer filed an Opposition to the Application for Review and memorandum of points and authorities in support thereof (Employer’s Brief) and argues that the CO is supported by substantial evidence and is in accordance with the law. Claimant filed a Reply to Employer’s Opposition, repeating the same arguments contained in Claimant’s Brief.

Because the ALJ misapplied the law as established in *Grayson v. DOES*, 516 A.2d 909 (D.C. 1986) (*Grayson*), we reverse and vacate the denial of the award and remand the matter to AHD with instructions to issue a new Compensation Order granting Claimant’s claim for relief.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended, D. C. Code § 1-623.01(the Act) and as contained in the governing regulations, is 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 flow rationally from those facts and are in accordance with applicable law. D. C. Code §1- 623.28(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). 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 reviewing authority might have reached a different conclusion. *Id.*, at 885.

ANALYSIS

The PSWCP and the ALJ both properly recognized that this case is governed by *Grayson*. The operative language from that case, in which the District of Columbia Court of Appeals (DCCA)

affirmed the adoption of the “positional risk” doctrine by the Director of DOES when appellate review of compensation orders was vested in that office, is as follows:

The positional-risk standard as set forth by Larson [at 1 Larson, *The Law of Workmen's Compensation* § 6.10 (1984)] and the Director's slightly varied standard are both similar to a "but for test." "An injury arises out of the employment if it would not have occurred *but for* the fact that conditions and obligations of the employment placed claimant in a position where he was injured." 1 Larson, *supra*, § 6.50 (emphasis in original).

Grayson, at 911.

The reasoning or rationale employed by the ALJ in denying this claim is as follows:

In assessing whether the injury arose out of employment, I find that conditions and obligations of the employment did not place Claimant in the position where she was injured. In assessing what happened when Claimant's left hand made contact with the car, I note that Dr. [Desmond] Johnson did not identify the mechanism of injury which resulted in hyperextension of the hand. It appears, however, that since Claimant's left hand was hyperextended, that her hand was fully extended backward when it made contact with the vehicle. Assuming that the SUV was moving quickly, it appears unlikely that Claimant would have had time to extend her full hand on the front of the vehicle as it passed.

Moreover, Claimant's first statement [to her supervisor after the incident] was that she was able to run and hit her hand on the truck. (CE 4) Although Claimant testified that she was walking between two cars and she ran “out”, I am not persuaded that “but for” Claimant walking to report to work that Claimant's hand would have hyperextended because it is unclear whether Claimant hyperextended her hand while she was running towards a stopped SUV to retrieve her purse or while she was pushing away from a fast moving SUV to save her life.

In assessing whether the injury occurred in the course of employment, I note that the injury occurred on Employer's premises during a short interval prior to the beginning of Claimant's shift. Therefore, it appears Claimant was approaching the vehicle in the course of employment, particularly to the extent that she needed to retrieve her purse, which was under the SUV. The requirement for an injury to arise out of employment, however, must also be met before an injured employee can be compensated.

CO, at 5 (emphasis in original).

We are at a loss to understand why the ALJ was “not persuaded” that “but for” Claimant's obligation to walk through the parking lot to get to work, Claimant encountered a fast moving vehicle which indisputably resulted in the injury. There appears to be no other possible reason for Claimant to have been in the employee parking lot at St. Elizabeth's Hospital at 11:00 p.m.

on November 13, 2014, and no one disputes that her reason for being there at that time was to go to work. In fact, the ALJ wrote the following in the Findings of Fact: “Claimant sustained a left hand and wrist injury when her left wrist hyperextended as a result of contact with the SUV.” CO, p. 2. This finding of fact is undisputed by Employer in this appeal, as it was at the formal hearing. We also note that the DCCA has approved the concept of employer-owned parking lots being part of an employer’s premises. *See Clark v. DOES*, 743 A.2d 722, (D.C. 2000).

Employer argues that “the ALJ found Claimant’s testimony as to the sequence of events incredible”, but does not dispute any of the salient facts: Claimant was injured as a result of an encounter of some kind which resulted in injurious contact with a fast moving SUV. As Claimant points out in Claimant’s Brief, Employer does not argue and the record contains no evidence that any of the disqualifying conditions found in D.C. Code § 1-623.02 (a)(1), (2) or (3) (willful misconduct, intentional self-inflicted injury, or intoxication) are present in this case.

The mere assertion that it is “unclear whether Claimant hyperextended her hand while she was running towards a stopped SUV to retrieve her purse or while she was pushing away from a fast moving SUV to save her life” is not a rational basis to find that Claimant has not met her burden of establishing by a preponderance of the evidence that but for the obligations and conditions of employment as a night shift nurse at St. Elizabeth’s Hospital, the encounter with the SUV would not have occurred. Simply put, it doesn’t matter which of the two possibilities the ALJ postulates may have been the case. The claim is compensable in either scenario.

Employer raised no other objections to the compensability of this claim or to the claim for relief. Accordingly, Claimant is entitled to the award she sought.

CONCLUSION AND ORDER

The finding that Claimant did not adduce sufficient evidence to demonstrate by a preponderance thereof that her left wrist and hand injuries arose out of and in the course of her employment is unsupported by substantial evidence and is contrary to established law. The denial of the claim is REVERSED and VACATED, and the matter is remanded to AHD with instructions to grant Claimant’s Claim for Relief.

So ordered.