

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-112**

**RICHARD L. WARWICK,  
Claimant-Petitioner,**

v.

**HOWARD UNIVERSITY and  
SEDGWICK CLAIMS MANAGEMENT SERVICES,  
Self-Insured Employer/Third-Party Administrator-Respondent.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 FEB 10 PM 12 44

Appeal from an August 28, 2014 Compensation Order by  
Administrative Law Judge Gerard D. Roberson  
AHD No. 12-440A, OWC No. 691925

Michael J. Kitzman for Claimant  
William H. Schladt for Employer

Before, LINDA F. JORY, HEATHER C. LESLIE, and MELISSA LIN JONES *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Panel.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Claimant worked in the employer's television station for over 30 years. His job duties primarily included carrying equipment, such as cameras, lights and cables. Claimant began receiving treatment for his back in 2007. His primary care physician, Dr. Ricardo Caldera, recommended an MRI of the lumbar spine. The MRI revealed degenerative disc disease. Dr. Caldera put Claimant on a strict diet due to his weight and indicated his concern about Claimant's consumption of alcohol. Claimant voluntarily retired on December 13, 2011 without notifying employer of his back condition. On April 16, 2012, claimant underwent an anterior lumbar interbody fusion L4-5 and L5-S1.

A full evidentiary hearing occurred on August 4, 2014. The claimant sought an award of temporary total disability benefits from December 13, 2011 to the present and continuing as well as causally related medical expenses. Following a formal hearing before an administrative law judge (ALJ), a Compensation Order (CO) issued on August 28, 2014. The ALJ concluded the

claimant failed to prove he sustained an accidental injury or aggravation on December 1, 2008 and claimant's claim for relief was denied.

Claimant timely appealed. Claimant asserts that the CO's findings that an accidental injury did not occur are not supported by substantial evidence and must be reversed. Employer opposed Claimant's appeal, asserting the ALJ applied the law correctly and relied on substantial evidence in reaching his conclusions.

#### STANDARD OF REVIEW

The scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by 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 drawn from those facts are 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, 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. App. 2003). Consistent with this scope of review, the CRB and this panel are 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 contrary conclusion. *Marriott*, 834 A.2d at 885.

#### ISSUES ON APPEAL

1. Is the August 28, 2014 Compensation Order supported by substantial evidence and in accordance with the law?
2. Did the ALJ properly apply the presumption of compensability?

#### ANALYSIS

In support of his request for review, Claimant asserts that the medical opinion of the treating physician, Dr. Fasusi, establishes that Claimant's employment and work, particularly the carrying of camera equipment for years contributed to the degeneration in his lumbar spine and that this evidence is sufficient to establish that accidental injury occurred.

Employer asserts that the only mention of a causal connection between Claimant's complaints and his employment in all of Dr. Fasusi's reports is a checked "Yes" in a letter from Claimant's counsel asking if Claimant's condition was causally related to his employment. Employer further asserts that the letter directly conflicts with a November 8, 2011 pain management report from Dr. Fasusi that states Claimant's back complaints are not work related and instead listed "Fall" as the source of the trauma and "Chronic" as the duration.

The ALJ initially acknowledged that under the Act, an accidental injury for compensation purposes is satisfied where it is shown "something unexpectedly goes wrong within the human

frame” and citing *WMATA v. DOES*, 506 A.2d 1127, 1129 (D.C. 1986) and there is no requirement that an unusual incident occur and an accidental injury may occur notwithstanding the injured employee was engaged in his usual and ordinary work. *Id.* at 1130. The ALJ correctly noted the issues of accidental injury and injury arising out of and in the course of employment are inextricably intertwined and 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) *see also* *Majors v. WMATA*. CRB No. 10-160, AHD No. 10-139, OWC 657877 (January 26, 2012). In other words, in order to benefit from the presumption of compensability set forth at § 32-1521 of the Act, 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).

The ALJ utilized a burden shifting analysis to determine whether Claimant sustained an accidental injury. . The ALJ held that “Claimant has offered sufficient evidence that something unexpectedly went wrong within the human frame to meet the requirements of accidental injury”. CO at 4. The ALJ found however:

Employer offered substantial credible evidence to refute Claimant’s allegations that he sustained an accidental injury on December 1, 2008. Employer provided sufficient evidence to question whether Claimant had a work related event on December 1, 2008, or at any other time. Employer relied on Claimant’s testimony and exhibits to question whether Claimant sustained an accidental injury on December 1, 2008 as alleged.

While this panel agrees the issue is not whether the work incident occurred on December 1, 2008 (as opposed to another date in December 2008), Claimant selected December 1, 2008 as his date of alleged injury and while counsel noted in his opening statement that Claimant doesn’t really remember the exact date but at some point in 2008, Claimant began to have problems in his low back specifically when he was moving television monitors for a set up at Howard University. The ALJ went into great detail with regard to the substantial credible evidence employer offered as well as claimant’s testimony which contradicted his counsel’s opening statement. As a result, the ALJ found claimant lacked credibility with respect to any representation made that he had an event in December 2008 which caused an injury or an aggravation of a preexisting condition,

...During cross-examination, Claimant readily admitted he could not recall an incident occurring in December 2008. He stated “I don’t recall exactly” when I started having problems with my back. HT p. 21. His statement contradicts his attorney’s representation that a specific event took place on or about December 1, 2008. HT p. 21. His statement contradicts his attorney’s representation that a specific event took place on about December 1, 2008. HT p. 12. Claimant also testified he experienced back problems during a strike. Claimant testified he performed a strike, taking down all the equipment, before he first notice

numbness in his legs and feet. HT p.21. When questioned further, Claimant stated the strike occurred during one of those big events like commencement or homecoming, where you have multi-camera shoots, HT p. 42. Claimant testified he could not recall the exact date or year when this took place. HT p. 43. Claimant did not testify the strike took place in December 2008 as alleged.

Despite Claimant's admission he does not know when his symptoms began, he testified he told his supervisor about his problems in 2007 and 2011. During the hearing, Claimant's attorney referenced the date of January 2007, and asked Claimant ["] was it about that time you reported to your supervisor you were having problems with your back["?]. HT p.32. Claimant responded "I complained not just to her but my co-workers and everything because it was a strange feeling of numbness." HT p.32. With respect to his inability to perform his job duties at the time of his December 13, 2011 retirement, Claimant responded "Ms. Beckford, Cassandra" to the question do you remember who, specifically you told. HT p. 39.

During the course of the hearing, Claimant claimed he told Ms. Beckford when he first started having symptoms, but he does not know what year he told her or when he first started having symptoms. He does not recall the exact date or year when he started having symptoms. HT p. 41. Claimant failed to offer any testimony regarding an event taking place in December 2008. HT p. 21. While Claimant could not recall when he first started having symptoms, the record reveals Dr. Fasusi provided medical treatment on July 17, 2007. Dr. Fasusi noted Claimant suffered from numbness in the lower extremities. Dr. Fasusi diagnosed lumbar disc displacement and reported the prior steroid blocks provided 70% improvement in overall pain. Claimant rated his pain as 2-3/10, and Dr. Fasusi recommended physical therapy. CE 3. Given Claimant testified he told Ms. Beckford about his problems when he first started having symptoms and at the time of his retirement, his testimony is inconsistent with the evidence of record, and does not establish he had an event in December 2008. Employer presented evidence of Ms. Beckford's retirement. In a letter dated April 22, 2005, Ms. Beckford stated "This letter is to formally announce my resignation from the position of Director of Operations at Howard University Television, WHUT-TV. My last day will be May 6, 2005." As such, the evidence does not support Claimant's contentions he had a work event [on] December 1, 2008. Clearly, Claimant has offered a date inconsistent with the evidence of record. Therefore, he lacks credibility with respect to any representations made that he had an event in December 2008 which caused an injury or an aggravation of a preexisting condition.

Additionally, Claimant has not offered any contemporaneous medical evidence to support his contentions that an event took place in December 2008. The initial medical report from Dr. Fasusi, dated July 17, 2007, does not offer any corroborative evidence to support Claimant's contentions. Following the July 17, 2007 examination, Claimant had follow-up treatment with Dr. Fasusi on February

12, 2008 due to complaints of bilateral toe numbness. Dr. Fasusi offered physical therapy with heat treatment and ultrasound. The report contains the word “No” for trauma, work related and auto related. CE 3. Claimant returned to Dr. Fasusi on February 22, 2010 due to the primary complaint “Pain right top”. Dr. Fasusi diagnosed lumbar spondylosis without myelopathy, lumbar radicular pain. The planned procedure included right L3-4, L4-5, L5-S1 facets, median branch block and if positive radiofrequency ablation. This report includes the word “No” for trauma, work related and auto related. CE3. These initial reports from Dr. Fasusi do not mention any employment factors which may have contributed to claimant’s back condition. In fact, Dr. Fasusi indicates Claimant did not have a work related event. Claimant has not provided any other contemporaneous evidence to establish he had an event on December 1, 2008 as alleged.

CO at unnumbered 4-6.

Keeping in mind that at this juncture the ALJ found claimant had established that “something unexpectedly goes wrong within the human frame” or an accidental injury, nothing in the above discussion or employer’s evidence establishes that claimant did not have symptoms in his back in 2007, when he sought treatment from Dr. Fasusi. Whether or not he sustained an injury that arose out of and in the course his employment in December 2008 or any time is a matter that requires the application of the presumption pursuant to § 32-1521, which when invoked, the employers evidence shall then be examined to determine if it is sufficient to rebut the presumption.

The facts of the instant matter actually mirror those of the often cited Court of Appeals decision of *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987)(*Ferreira I*). The ALJ in *Ferreira I* discredited *Ferreira’s* testimony that a specific lifting incident occurred on a certain date, focusing almost entirely on the discrepancies between the statements petitioner made at the hearing and those made before the hearing particularly that she could not remember the exact date or precise trauma resulting in in the injury and denied *Ferreira’s* request for compensation. In addition to its well settled mandate to provide injured workers the benefit of the statutory presumption of compensability, the Court held that the nature of the potential cause of the alleged disability need not be a discrete, particularized event. The Court explained:

The Employee’s Claim Application in the record before us, which DOES furnished to petitioner, perhaps contributes to the misapprehension that a particular incident must be isolated as the source of the disability. The claim form requires that the claimant state the “Date and Time of Injury”. Obviously, for disabilities which gradually manifest themselves, cf., *Howrey & Simon [v. DOES*, 531 A.2d 254 (D.C. 1987).], *supra* at 258. (accidents which appear minor at the time they occur may result in greater injury than anticipated) or result from repeated trauma or cumulative exposure to work-related activities, conditions, or requirements, it is often the case that no specific date and time of injury can be given. In such a case, claimants would behoove themselves to state a period of time during which the symptoms started manifesting themselves or the exposure or repeated trauma occurred. Clearly, a claimant may not be penalized for

approximating a date when the form itself provides no alternative to a 'single date and time theory' of injury.

*Ferreira I, supra at 657, n.6 (citation added)*<sup>1</sup>

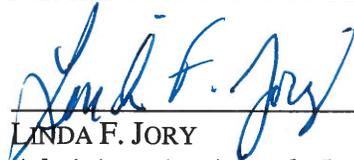
*Ferreira* was provided with the opportunity to benefit from the Act's presumption of compensability which the instant claimant was not. As the ALJ found claimant had established that something went wrong with the human frame to meet the requirements of accidental injury, the ALJ determined claimant sustained an accidental injury regardless of whether it occurred in 2007, 2008 or 2010. The next step should have been a determination of whether claimant invoked the presumption that claimant sustained an injury which arose out of and in the course of his employment.

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#### CONCLUSION AND ORDER

The ALJ erred in not applying the presumption analysis to the facts and evidence of record once claimant established an accidental injury under the Act. The Compensation Order is therefore not in accordance with the law and is vacated. The matter is remanded to the Administrative Hearings Division to determine if Claimant is able to invoke the presumption of compensability that he has sustained a work related injury, and if so whether employer has submitted sufficient rebuttal evidence. If the ALJ determines the accidental injury did arise out of and in the course of employment, the ALJ must address the remaining issues raised at the formal hearing.

FOR THE COMPENSATION REVIEW BOARD:

  
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LINDA F. JORY  
*Administrative Appeals Judge*

February 10, 2015

DATE

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<sup>1</sup> The panel is mindful that in a subsequent decision the Court of Appeals affirmed DOES' conclusion that *Ferreira's* disability resulted from a gradual degenerative process and refused to accept *Ferreira's* claim that her employment, specifically the lifting incident in question caused her asymptomatic cervical disability to become symptomatic. *Ferreira v. DOES*, 667 A.2d 310 (D.C. 1995) (*Ferreira II*).