

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-100

TERRY WRIGHT,
Claimant-Petitioner,

v.

GALLAUDET UNIVERSITY and
PMA INSURANCE GROUP,
Employer/Carrier-Respondent.

Appeal from a July 1, 2016 Compensation Order by
Administrative Law Judge Donna J. Henderson
AHD No. 16-137 OWC No. 733448

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 DEC 9 AM 11 12

(Decided December 9, 2016)

Douglas A. Datt for Employer
David J. Kapson for Claimant

Before GENNET PURCELL, JEFFREY P. RUSSELL and LINDA F. JORY, *Administrative Appeals*
Judges

GENNET PURCELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Terry Wright ("Claimant") was employed as a bus operator by Gallaudet University ("Employer"). Claimant's job was to drive a school bus for Kendall School located on Employer's campus.

On or about March 4, 2015, unrelated to his job duties, Claimant injured his low back lifting a couch. The injury caused intermittent left low back pain radiating into the left leg for which Claimant sought treatment at Kaiser Permanente. Claimant was diagnosed with sciatica and back spasm and prescribed muscle relaxants and cyclobenzaprine, the prescriptions for which expired on August 28, 2015.

On August 17, 2015, Claimant stood on the roadway next to a bus pulling away from the curb while at work. Claimant arched his back and quickly stepped away from the moving bus, onto the curb. Saharita Laster ("Ms. Laster"), a witness who appeared at a formal hearing held at the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES") testified to "laughing quite hard" after witnessing the incident, to seeing Claimant jump up onto the curb, and to the fact that she could not definitely say that the bus did not come into contact with Claimant. Claimant alleged the he was struck by the bus. The incident was captured on an Employer video recording.

On August 24, 2015, Claimant again sought treatment at Kaiser Permanent and was diagnosed with flank pain. On September 2, 2015, Claimant complained of back pain and was diagnosed with a lumbar muscle strain.

Claimant was unable to work from August 25, 2015, to September 6, 2015, during which time he came under the care of Drs. Mininberg & Fechter, his treating orthopedic physicians. Claimant was diagnosed with a lumbosacral spine sprain with myofascial pain, secondary to the work injury of August 24, 2015. Claimant was prescribed ibuprofen and physical therapy and released to full duty work on October 19, 2015.

A full evidentiary hearing occurred on May 23, 2016.¹ The issues raised were whether Claimant's injuries arose out of and in the course of his employment, the medical causal relationship of Claimant's injuries and the nature and extent of Claimant's disability. A Compensation Order ("CO") was issued on July 1, 2016 in which the Administrative Law Judge ("ALJ") concluded that Claimant failed to prove, by a preponderance of the evidence, that there was a work-related event which resulted in an injury, and denied his claim.

Claimant timely appealed the CO by filing Claimant Application for Review and Memorandum of Points and Authorities in Support of Claimant's Application ("Claimant's Brief") with the to the Compensation Review Board ("CRB"). Claimant argues that the ALJ made errors of law and fact in making her decision and the CO is not supported by substantial evidence.

Employer opposed the appeal by filing Employer's Opposition to Claimant's Application for Review ("Employer's Brief"). In its opposition, Employer asserted the CO is supported by substantial evidence and law and should be affirmed.

ANALYSIS

Claimant argues the ALJ erred when concluding Employer rebutted the presumption of compensability and that Claimant failed to demonstrate by a preponderance of the evidence he was injured in the course of his employment. Claimant's Brief at 5.

Employer asserts, as was found by the ALJ, that it presented substantial and credible evidence that the incident did not occur, that Claimant was not hit by the bus and was not injured in the course of his employment.

¹ The Compensation Order incorrectly lists the hearing date as May 16, 2015.

As a preliminary matter, we note that the ALJ found Claimant's testimony lacked credibility because of its inconsistency with both the video evidence, as well as the testimony from Ms. Laster. Correspondingly, the ALJ concluded that Ms. Laster's testimony was credible.

With regard to establishing legal causation, claimant is entitled to a rebuttable presumption that an injury arose out of and in the course of his employment, upon production of credible evidence of an injury and a work-related event which has the potential of causing that injury. D.C. Code 32-1521. *See Whittaker v. DOES*, 668 A.2d 844, 845 (D.C. 1995). The ALJ must presume a causal relation between the present disability and the work-related injury, unless "the employer has rebutted the presumption by 'evidence specific and comprehensive enough to sever the potential connection' between the two." *Id.* at 847 (quoting *Parodi v. DOES*, 560 A.2d 524, 526 (D.C. 1989)); *see also Brown v. DOES*, 700 A.2d 787, 791 (D.C. 1997) (stating that burden shifts to employer to produce "substantial evidence" demonstrating that the disability did not arise out of and in the course of employment).

Neither party disputes the CO's conclusion that Claimant submitted sufficient evidence to invoke the presumption of compensability. In determining whether Claimant sustained an accidental injury that arose out of and in the course of his employment, the ALJ concluded Claimant, by virtue of his testimony that he was struck by the bus, met the minimal evidentiary requirements to establish, his injuries were work-related and therefore compensable under. D.C. Code § 32-1521(1).

Claimant argues that the ALJ erred when determining that Employer presented evidence to sufficiently rebut the presumption of compensability and offers that "none of the evidence submitted by the employer and insurer, whether by documentation or by testimony is substantial and credible enough to rebut the presumption of compensability." Claimant's Brief at 8.

Citing to *Ferreira v. DOES*, 531 A.2d 651, 655 (D.C. 1987), the ALJ acknowledged Employer's burden to produce evidence specific and comprehensive enough evidence sufficient for a reasonable mind to accept as adequate, to establish that Claimant's disability did not arise out and in the course of employment. The ALJ outlined Employer's dispute with the facts underlying the accident and referenced the video evidence of the incident. The ALJ summarized:

Employer disputes the underlying incident at work. In keeping with the Court of Appeals guidance in *Washington Post v. DOES (Reynolds)*, 852 A.2d 909 (D.C. 2004), Employer's evidence is sufficient to rebut the presumption because it presented credible evidence that the incident did not occur. In support of its position that Claimant was not hit by the bus and was not injured, Employer presented a video of the incident. EE 1 (2 DVD's). I find the video of the incident, particularly the behavior of the witnesses in the video, is sufficient to rebut the presumption.

CO at 6.

Claimant also argues that in determining that Employer rebutted Claimant's evidence, the ALJ failed to make findings with respect to the testimony of witnesses including the inconsistencies

of Ms. Laster's testimony, concluding that Ms. Laster's testimony was credible, and Claimant's, was not. Claimant asserts:

Ms. Laster stated under oath that she could not definitely say that the bus did not strike [Claimant]. The employer also offered of [sic] Officer Michael Jones the campus police officer who responded following the incident and Linda Raye, the manager of the Transportation Department. Neither Officer Jones, nor Ms. Raye were eyewitnesses to the incident, but only later obtained knowledge of the incident after the fact. None of the evidence submitted by the employer and insurer, whether by documentation or by testimony is substantial and credible enough to rebut the presumption of compensability.

Claimant's Brief at 8.

We disagree. Once established, the presumption of compensability operates only "in the absence of evidence to the contrary." D.C. Code § 32-1521. Further, once the presumption is triggered, the burden falls upon the employer to bring forth 'substantial evidence' showing that death or disability did not arise out of and in the course of employment." *Ferreira* at 655. This burden shift requires an employer to produce evidence "specific and comprehensive enough that a reasonable mind might accept it as adequate to contradict the presumed causal connection between the event at work and the employee's subsequent disability." *See, e.g., Safeway Stores, Inc. v. DOES*, 806 A.2d 1214, 1219-20 (D.C. 2002).

The ALJ concluded that the Employer successfully rebutted the evidence with its submission of the video of the bus incident, and determined that the video footage of Claimant as well as the behavior of the witnesses to the incident as seen on the video was sufficient to rebut the presumption. We agree with the CO's conclusions regarding this issue and find no error in the ALJ's rebuttal findings.

Claimant next argues that the ALJ erred in concluding that Claimant failed to demonstrate by a preponderance of the evidence that his injury was work-related.

With regard to an ALJ's discretion to make findings on the credibility of a claimant, the District of Columbia Court of Appeals ("DCCA") has held that in determining whether a claimant has met his or her burden, "a[n ALJ] must weigh and consider the evidence as well as make credibility determinations. In this regard, the [ALJ] may of course consider the reasonableness of the testimony and whether or not particular testimony has been contradicted or corroborated by other evidence." *McCamey v. DOES*, 947 A.2d 1191, 1214 (D.C. 2008). Credibility findings within the sound discretion of the ALJ and are "entitled to great deference." *See Ogden v. Bon Appetit Mang. Co.*, CRB No. 09-031 (D.C. 2009). 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 her weighing of the evidence to determine whether Claimant met his burden of proof, the ALJ explained:

I found that Claimant's testimony concerning the events on August 24, 2015 to [sic] lack credibility. Claimant's description of where he was standing is inconsistent with the video and the testimony of Ms. Laster. Claimant testified, and Claimant's attorney in his opening statement stated that, the evidence would show that Claimant and Mr. Dawes were standing on the curb [footnote omitted] when "the bus struck [his] lower left back." HT at 29 and 36. The video clearly demonstrates that, at all relevant periods to the event, Claimant was standing on the black top and later partially on the gutter, but not on the curb. EE 1.

CO at 6, 7

While we agree with the ALJ findings with regard to the physical location of Claimant at all times relevant to the bus incident, we take issue with the characterization of Claimant's counsels' opening remark, (stating the evidence would indeed show Claimant standing on the curb) as uncorroborated witness testimony. Notwithstanding this minor error, the ALJ's remaining analysis and the record evidence otherwise wholly supports the inconsistency. Indeed Claimant testified that he was "standing on the curb speaking . . ." when the bus allegedly struck him. Hearing Transcript at 36. Moreover, Ms. Laster's testimony and the video footage establish that contrary to his testimony, Claimant was indeed off of the curb at the time of the incident. This credibility finding and basis for the ALJ's credibility determination is sound, reasonable and based on substantial evidence.

In further weighing the evidence, the ALJ also took into consideration the reaction of witnesses who observed the incident (as demonstrated on the video footage), the credible testimony of Ms. Laster, as well as Claimant's medical records suggest an alternative non work-related cause for Claimant's symptoms,; notably, that Claimant's unrelated back injury was also undisclosed in Claimant's post-incident treatment records from Kaiser Permanente and Dr. Mininberg.

Claimant's argument as to the ALJ's weighing of the evidence fails as the CO clearly establishes a basis for the ALJ's credibility determination and with required specificity which is supported by substantial evidence. *See generally, Grant-Hopkins v. Alion Science and Technology*, CRB No. 14-027 (June 26, 2014). We do not find the ALJ's credibility determination or bases therefore to be inconsistent with the Act or the governing law. Claimant failed to prove by a preponderance of the evidence, that there was a work-related event which resulted in an injury, and the CO's conclusions are based on and supported by substantial evidence in the record. *Spartin v. DOES*, 584 A.2d 564 (D.C. App. 1990).

CONCLUSION AND ORDER

The conclusion that Claimant failed to prove, by a preponderance of the evidence, that there was a work-related event which resulted in an injury is **AFFIRMED**. The Compensation Order denying Claimant's claim for temporary total disability from August 25, 2015 through September 6, 2015 and for causally related medical expenses is **AFFIRMED**.

So ordered.