GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-032

DAVID P. MAJORS,

Claimant–Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and XCHANGING,

Self-Insured Employer and Third Party Administrator-Carrier-Petitioner.

Appeal from a Compensation Order by
The Honorable Anand K. Verma
AHD No. 10-139, OWC No. 657877

Donna J. Henderson, Esquire for the Petitioner
Manuel R. Geraldo, Esquire for the Respondent

Before HEATHER C. LESLIE,[1] MELISSA LIN JONES, and LAWRENCE D. TARR, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the January 31, 2012, Compensation Order on Remand[2] (COR2) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication[3] of the District of Columbia Department of Employment Services (DOES). In that

[1] Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

[2] *Majors v. WMATA*, CRB No. 10-160, AHD No. 10-139 (January 31, 2012).

[3] Formerly known as the Administrative Hearings Division.

COR2, the ALJ granted the Claimant's request for temporary total disability benefits. We VACATE, in part, and REMAND.

FACTS OF RECORD AND PROCEDURAL HISTORY

On February 17, 2009, the Claimant was repairing an escalator during the course of his employment. At a formal hearing, the Claimant alleged that during this repair work, he sustained plantar fasciitis. The Claimant also alleged that his injury was exacerbated on March 6, 2009 when he attempted to lift an escalator floor plate. The ALJ issued a Compensation Order (CO) awarding the Claimant temporary total disability benefits from March 14, 2009 to June 3, 2009, causally related medical expenses, and assessed penalties against the employer for failure to timely controvert the claim.

On July 28, 2011, the CRB issued a Decision and Remand Order[4] (DRO), vacating the CO. The CRB found the ALJ had improperly relied upon medical articles not introduced into evidence by the parties, had not ruled upon the Employer's objection to Claimant's exhibit 6, failed to consider Employer's exhibit 5, erred when assessing the nature and extent of the Claimant's disability from May 26, 2009 to June 2, 2009, and erred when placing the burden on the Employer to show that an accident did not occur.

In response, the ALJ issued a COR[5] on August 31, 2011. The ALJ stated that the CRB raised two principle issues, that of reliance on the medical journal articles and whether the CO's facts and conclusion of law were supported by the substantial evidence in the record. The ALJ again relied upon the medical articles utilized in the appealed CO, found that the Claimant's entitlement to temporary total disability benefits ended on May 26, 2009, and found the Employer failed to rebut the occurrence of an accidental injury.

The Employer timely appealed the COR. On January 26, 2012, the CRB issued a Decision and Remand Order[6] (DRO2), vacating the COR. The CRB found that contrary to the prior decision and order, the ALJ continued to rely upon medical articles not introduced into evidence by the parties, still had not ruled upon the Employer's objection to Claimant's exhibit 6, failed to consider Employer's exhibit 5, had not ruled upon the Employer's post hearing motion to supplement the exhibits, and failed to clarify what evidence the ALJ utilized when finding an accidental injury occurred.

On January 31, 2012, a COR2 was issued. In that Order, the ALJ admitted the Employer's exhibit 2[7] and the Claimant's exhibit 6. The ALJ also concluded that the "employer did not meet its burden of proving that the accidental injury did not occur." *Id*. The ALJ concluded that the parties would have 30 days to respond to the administratively noticed journal articles the ALJ relied upon. The ALJ then granted the Claimant's claim for relief.

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[4] *Majors v. WMATA*, CRB No. 10-160, AHD No. 10-139 (July 28, 2011).

[5] *Majors v. WMATA*, AHD No. 10-139, OWC No. 657877 (August 31, 2011).

[6] *Majors v. WMATA*, CRB No. 10-160, AHD No. 10-139 (January 26, 2012).

[7] Erroneously identified by the CRB in prior orders as Employer's Exhibit 5.

The Employer timely appealed with the Claimant opposing.

THE STANDARD OF REVIEW

The scope of review by the CRB 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. S*ee* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES,* 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id*. at 885.

DISCUSSION AND ANALYSIS

The Employer's first argument is that the ALJ "improperly refused to consider the prior inconsistent statement because it was unsworn." Employer's Argument at 2. We note in the COR2, the ALJ stated:

> Because the statement was not made under oath, its probative value was undermined and thus it was not relied upon in the resolution of the issues. Claimant, too, in raising the objection, has failed to proffer any evidence on how he was prejudiced by the admission into evidence of an otherwise relevant exhibit (EE2). Accordingly, absent any evidence of prejudice resulting to the parties objecting to the admission of exhibits into evidence, their admission into evidence at an administrative hearing was not error.

COR2 at 3.

We disagree with the Employer. The ALJ, after admitting the recorded statement, then weighed the statement and found it deficient. The ALJ did not "reject" the statement as the Employer states, but after consideration simply did not give the statement any significance when weighing the evidence. We find no error in this.

The Employer next raises the issue of whether or not the ALJ was in error in issuing the COR2 prior to allowing the parties to review and comment on the medical articles. A review of the COR2 reveals that the ALJ, stated in a footnote,

> The record in this case is reopened and shall remain open for 30 days from the date of issuance of this Order to allow both parties to submit their rebuttal of the administratively noticed documents on *plantar fasciitis*.

COR2 at Footnote 3.

The ALJ again issued a Compensation Order on Remand, granting the Claimant's claim for relief, *prior* to letting the parties review and respond to the articles the ALJ *sua sponte* introduced into evidence. This is in error. As reiterated in the January 26, 2012 decision and order,

> We restate the relevant holding of the July 28, 2011, DRO:
>
> > Neither of these articles was offered into evidence by either party. Although an ALJ may take official notice of documents outside the scope of the evidentiary record, both parties must be afforded an opportunity to rebut any fact officially noticed in the documents.[8]
> >
> > In this case, the ALJ used journal articles to take judicial notice of the cause of plantar fasciitis. Having introduced these articles into the Compensation Order on his own initiative, the ALJ failed to allow the parties to review the articles and to respond to the official notice taken of their contents.
> >
> > Furthermore, "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[9] A journal article is a source that reasonably can be questioned, especially on the issue of causal relationship in a particular case.
> >
> > The Compensation Order is based upon information not made part of the record. The ALJ's attempt to rehabilitate his error by stating "even in the absence of these studies, the opinion of the treating physician is preferred"[10] is unavailing inasmuch as it is not clear that given a truly fair review of the evidence without the taint of the journal articles the result reached is one based on an unaffected weighing of the evidence of record.
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> And, as stated in the DOR, "a journal article is a source that reasonably can be questioned, especially on the issue of causal relationship in a particular case." We once again cite to the District of Columbia Court of Appeals case of *Renard v.*

[8] *See Renard v. DOES*, 673 A.2d 1274 (D.C. 1996) (When notice of evidentiary matters outside the record is taken by the ALJ, due process requires the parties be afforded notice and the opportunity to contest the evidentiary matter.)

[9] *Christopher v. Aguigui*, 841 A.2d 310, 311-312 n.2 (D.C. 2003) quoting Fed. R. Evid. 201(b).

[10] *Majors*, *supra*, at p. 9.

> *DOES*, 673 A.2d 1274 (D.C. 1996) which describes the requirements of due process whenever an ALJ takes notice of evidence outside the record.
>
> Additionally, we cite D.C. Code § 2-509(c) which states,
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> > Where any decision of the Mayor or agency in a contested case rests on official notice of a material fact not appearing in the evidence in the record, any party to such case shall on timely request be afforded an opportunity to show the contrary.
>
> We again remand the case to the ALJ with the same instructions as before. If the ALJ chooses to rely on the articles in question, he must re-open the record to allow the parties an opportunity to review the articles and to respond.[11]

DRO2 at 4-5.

We are forced to vacate the order and remand the case back to the ALJ with instructions to follow the prior remand instructions. If the ALJ chooses to rely on the articles in question, the ALJ must re-open the record to allow the parties an opportunity to review the articles and to respond prior to issuing an order. If the ALJ chooses not to rely upon contested articles, he shall issue a decision taking into consideration the evidence of record without any reference to any medical journals or documents not taken into evidence. The ALJ is also cautioned to bear in mind the requirements outlined in *Renard*, *supra*, when taking judicial notice of a fact. Specifically, that a judicially noticed fact must be "generally known" and "capable of accurate and ready determination by sources whose accuracy cannot be reasonably questioned." *Id.*

The Employer next argues that the ALJ failed to rule upon its Motion to Supplement Exhibits post hearing pursuant to the decision and remand order of the CRB. We agree. As stated in the prior decision and order,

> Moreover, it appears that the Employer's motion to supplement the exhibits after the hearing was submitted to the ALJ before he issued the CO. If so, then the ALJ must rule upon the employer's motion.

DRO2 at 5.

A review of the COR2 reveals no mention or discussion of the Employer's post hearing motion. Upon remand, the ALJ shall address this motion and either grant or deny the Employer's request to supplement the record.

Finally, the Employer argues that the COR2 failed to hold the Claimant to his initial burden to prove through credible evidence the existence of a work related event, activity, or requirement which has the potential to cause or contribute to the disability. Employer's Argument at 14.

A review of the COR2 reveals that with regard to the issue of accidental injury, the ALJ stated,

[11] The ALJ does not have to reopen the record if he issues a decision without relying on the contested articles.

> With respect to other error, the undersigned notes that in meeting its burden to disprove the occurrence of an accidental injury, it presented two witnesses both of whom lacked personal knowledge of claimant's injury. The first witness, Cedric Watson learned of the injury through a report he received from claimant's supervisor with whom he discussed the details of the injury on March 17, 2009. Predicated on that evidence, it was concluded employer did not meet its burden of proving that the accidental injury did not occur.

COR2 at 4.

This is in error. We remind the ALJ of our prior decisions and orders regarding the issue of accidental injury. Specifically in our decision and order of January 26, 2012 we stated,

> On the cause of accidental injury, the ALJ found in the CO's findings of fact (which were adopted in their entirety in the current COR) that the Claimant suffered an injury to his left foot while at work on February 17, 2009. The ALJ stated "in other words, claimant suffered an injury in the course of his employment." CO at 3. No further discussion ensued regarding the accidental injury. The ALJ then proceeded to place the burden on the Employer to prove the accident did not occur.
>
> The CRB found this to be in error:
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> > Finally, at the formal hearing, in addition to raising the issue of causal relationship, WMATA contended Mr. Majors had not sustained an accidental injury arising out of and in the course of employment on February 17, 2009.[12] The requirement of an accidental injury is satisfied when something unexpectedly goes wrong with the human frame.[13] Moreover, the issues of accidental injury and injury arising out of and in the course of employment are inextricably intertwined; the 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."[14] In other words, in order to benefit from the presumption of compensability set forth at §32-1521 of the Act, the claimant initially must show credible evidence of a disability and the existence of a work-

[12] *Majors*, *supra*, at 2.

[13] *WMATA v. DOES*, 506 A.2d 1127 (D.C. 1986).

[14] *Booker v. George Hyman Construction Co.*, H&AS No. 85-5, OWC No. 049406 (Director's Decision August 2, 1988).

> related event, activity, or requirement which has the potential to cause or to contribute to the disability.[15]
>
> Once the presumption of compensability is invoked, it is the employer's burden to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."[16] Only upon a successful showing by the employer does the burden return to the claimant to prove by a preponderance of the evidence, without the benefit of the presumption of compensability, his ongoing injuries arose out of and in the course of employment.[17]
>
> In the Compensation Order, the ALJ states the legal standard as follows:
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> > Where, as here, the accidental injury is not stipulated, employer bears the burden of establishing that the alleged injury did not occur. … [The evidence] fails to refute the non-occurrence of the accidental injury, as alleged.
> >
> > Indeed, there is nothing in the entirety of evidence adduced at the hearing that negates the occurrence of the alleged accidental injury.[18]

This standard is an incorrect recitation of the law, and we cannot affirm a Compensation Order that "'reflects a misconception of the relevant law or a faulty application of the law.' *Washington Metro. Area Transit Auth. v. DOES*, 992 A.2d 1276, 1280 (D.C. 2010) (quoting *Georgetown Univ*., 971 A.2d at 915)."[19]

DRO at 5-6.

In the COR, the ALJ utilized the case cited by the CRB in the DRO and stated,

> Hence, once claimant, as here, proves something went wrong with his plantar fasciitis, the burden then shifts to employer to offer evidence in rebuttal that it did not occur.

COR at 3.

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[15] *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

[16] *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

[17] *See*, *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

[18] *Majors*, supra, p.4-5.

[19] *D.C. Department of Mental Health v. DOES*, 15 A.3d 692 (D.C. 2011).

> We are uncertain what evidence the ALJ is relying upon in showing that an injury occurred at work. Other then stating in the CO that the Claimant suffered an injury in the course of his employment on February 17, 2009, we are left to guess what "work related event, activity, or requirement which has the potential to cause or to contribute to the disability." Upon remand, the ALJ is to clarify what he is relying on when he indicates that an injury occurred on February 17, 2009.

DRO2 at 6-7.

Finally, the Employer seems to request this panel to not only vacate the COR2 and order the case to be "set for a new trial before a different ALJ." Employer's Argument at 2. A review of the record reveals no motion for a new trial or recusal has been submitted to the ALJ nor has a final order been issued. As such, the CRB does not have jurisdiction to rule upon such a request.

To outline the above and to avoid further appeals, the ALJ must address the following on remand:

> 1. The ALJ must either grant or deny the Employer's Motion to Supplement their exhibits post hearing. If the ALJ grants said motion, the ALJ must consider the evidence in coming to the ultimate conclusion of whether or not to award the Claimant's claim for relief.
>
> 2. With respect to the medical articles, if the ALJ continues to rely upon the articles, the ALJ must re-open the record to allow the parties an opportunity to review the articles and to respond to the official notice taken of their contents, prior to the issuance of a Compensation Order on Remand. Or, the ALJ can issue a Compensation Order on Remand based solely on the record before him which does *not* include the medical.
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> 3. Regarding the issue of accidental injury, the ALJ must first determine if the Claimant satisfied its initial burden of showing an accidental injury which arose out of and in the course of his employment occurred and explain what record evidence the ALJ is relying upon. If the Claimant satisfies his initial burden, then the ALJ must then analyze the Employer's evidence to determine if the Employer presented substantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event. If the ALJ finds that the Employer submitted evidence specific and comprehensive enough to sever the connection between the injury and job related event, the ALJ shall so explain this finding and what evidence he is relying upon. If all this occurs, then the presumption falls from the case and the Claimant must prove, by a preponderance of the evidence, his injuries arose out of and in the course of his employment.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the January 31, 2012 Compensation Order on Remand are not supported by substantial evidence in the record. It is **VACATED IN PART**. This matter is remanded for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

April 5, 2012
DATE