

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**

**VINCENT C. GRAY**  
**MAYOR**



**LISA M. MALLORY**  
**DIRECTOR**

**CRB No. 11-127**

**ALPHONSE MPIA,**

**Claimant–Petitioner,**

**v.**

**OMNI SHOREHAM HOTEL and ARCH INSURANCE GROUP,**

**Employer and Insurer–Respondent.**

Appeal from a Compensation Order of  
Administrative Law Judge Linda F. Jory  
AHD No. 11-198, OWC No. 676875

David J. Kapson, Esquire, for the Petitioner

Zachary L. Erwin, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,<sup>1</sup> HEATHER C. LESLIE, AND MELISSA LIN JONES, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

**DECISION AND ORDER**

**BACKGROUND**

Alphonse Mpia worked for the Omni Shoreham Hotel (Omni Shoreham) as an assistant executive steward, where he supervised banquet service employees. Mr. Mpia sustained a sprained left ankle on August 21, 2010. Mr. Mpia alleges that on December 17, 2010 he fell to the floor while power washing a machine in the dish room of Omni Shoreham’s hotel kitchen, and that he re-injured or aggravated his ankle injury. Omni Shoreham’s human services manager assisted Mr. Mpia into a taxi, which took him to Georgetown University Hospital’s emergency room, where he was treated and released. Mr. Mpia requested that Omni Shoreham accept his injury as a workers’ compensation injury, which it declined to do. A formal hearing was convened on September 14,

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<sup>1</sup> Judges Russell and Leslie were appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance Nos. 11-02 and 11-03 (June 23, 2011).

2011 before an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) to resolve the dispute as to whether Mr. Mpia had sustained an accidental injury arising out of and occurring in the course of his employment on December 17, 2010, and if so, whether as a result of that injury, he was disabled from his job for two periods, December 17, 2010 through December 20, 2010, and January 7, 2011 through January 22, 2011.

Following the formal hearing, the ALJ issued a Compensation Order (CO) on October 13, 2010. In the CO, the ALJ found that Mr. Mpia had adduced sufficient evidence to invoke the statutory presumption<sup>2</sup> that he had sustained the alleged work injury, citing the records from Georgetown's emergency room which reference an "acute ankle sprain" but which contain no mention of a fall that day, and the December 20, 2010 medical record from Dr. John P. McConnell, which states that Mr. Mpia injured his ankle when he sustained a "twist" injury to his left ankle when he slipped in the kitchen.

She then reviewed the evidence adduced by Omni Shoreham, which consisted of a video of Mr. Mpia on December 21, 2010, and the testimony of Omni Shoreham's human resources manager, Kelly Repasky to the effect that Mr. Mpia's supervisor reported to her that he did not see Mr. Mpia fall, but that he had heard a commotion, turned to see what it was about, and saw Mr. Mpia on the floor.

Following this review of the evidence, the ALJ determined that Omni Shoreham had not rebutted the presumption that the injury had occurred and that it arose out of and occurred in the course of Mr. Mpia's employment with Omni Shoreham.

The ALJ then proceeded to consider the nature and extent of the alleged disability, noting in the CO that claimants enjoy no presumptions in this area. She reviewed the evidence, and concluded that Mr. Mpia had failed to adduce sufficient evidence to support his claim that he was disabled for either of the two periods claimed.

Mr. Mpia timely appealed the CO, to which appeal Omni Shoreham filed a timely opposition. We affirm the CO.

#### STANDARD OF REVIEW

The scope of review by the Compensation Review Board (CRB) is generally 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. *See*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

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<sup>2</sup> D.C. Code § 32-1521 provides that "In any proceeding for enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter... ."

## DISCUSSION AND ANALYSIS

In this appeal, Mr. Mpia argues that the ALJ's denial of the claim for temporary total disability for the period December 17, 2010 to December 20, 2010 should be vacated because of what he views as the ALJ's "implied" finding that he had presented *no* evidence supporting the claim. He asserts that the ALJ's footnoted reference to *Golding-Alleyne v. DOES*, 980 A.2d 1209 (D.C. 2002) makes "unclear" what exactly the ALJ found, *i.e.*, whether she found on the one hand that Omni Shoreham had produced evidence outweighing his testimony and emergency room records, or on the other that he had not produced any evidence supporting his claim of disability.

We do not share Mr. Mpia's view that the ALJ is unclear.

The ALJ made an explicit finding that Mr. Mpia's testimony lacks credibility, a finding premised upon her having viewed a surveillance video taken December 21, 2010. The ALJ found that that video showed Mr. Mpia ambulating easily and without a limp or need to use crutches as he left his home and embarked on a trip to 64 New York Avenue, NE, the location of the Office of Workers' Compensation (OWC). The ALJ then found that upon his arrival, the video showed that Mr. Mpia's gait was labored and slow, with a marked limp. She also found that it showed Mr. Mpia retrieve a set of previously unused crutches (that is, unused by Mr. Mpia upon his departure from home) from the vehicle that he had driven to the OWC location and proceed to use them as he walked to the building. She also found that despite his employing the crutches, he did so in such a way so as to bear weight on the allegedly disabling-ly injured ankle.

The ALJ wrote that "a thorough review of the surveillance tape reveals a noticeable difference in claimant's gait as a whole and his obvious lack of difficulty walking without the crutches as he bears weight on the left ankle and even the weight he bears on his left ankle with the crutches, in the undersigned's opinion, [demonstrates] a level of deception." CO 4. She also wrote, "The film successfully challenges claimant's credibility", *id.*

In using those words, the ALJ found that Mr. Mpia was faking the degree to which his ankle was incapacitating.

We are aware that this part of the ALJ's discussion of this tape appears in the portion of the Analysis addressing whether Mr. Mpia had made a sufficient evidentiary showing to establish that he had sustained an injury at work on December 17, 2010, and that she ultimately concluded that with the aid of the presumption he had done so. However, the credibility finding could not be clearer, and it is not necessary that it be confined to the issue of whether Mr. Mpia had established that he had sustained an accidental injury at work. The fact that the ALJ found that such an injury had been adequately demonstrated does not change the fact that she obviously concluded that Mr. Mpia was attempting to appear to be more incapacitated than he actually was.

Further, the ALJ repeats reference to the video in assessing the nature and extent of the claimed disability. The damning video, which is part of Omni Shoreham's evidentiary presentation, coupled with the lack of medical *documentation* of any *incapacity* (as opposed to the medical records produced which are silent on the question) for the period from December 17, 2010 to December 20,

2010, led the ALJ to conclude that Mr. Mpia had failed to adduce a preponderance of the evidence supporting his claimed incapacity. We have no difficulty affirming that finding, as the evidence that the ALJ described supports it.

Similarly, for the period January 7, 2011 to January 22, 2011, the ALJ noted that there was no medical report from Mr. Mpia's physician, Dr. McConnell, "which explains why claimant should not be reporting to work after January 7, 2010, notwithstanding the fact that claimant was actually at work and working a light duty job on January 7, 2010 ... ." CO, page 5. The ALJ obviously felt that the medical documentation in the form of a disability slip obtained without Mr. Mpia being seen by or even speaking with Dr. McConnell, which does not address why Mr. Mpia could not continue to work in the light duty job that had been provided, was an insufficient improvement upon Mr. Mpia's quantum of evidence to change the determination that he had not demonstrated his incapacity from work by a preponderance of the evidence.<sup>3</sup>

Mr. Mpia expresses concern that the ALJ's reference to the District of Columbia Court of Appeals' decision in *Golding-Alleyne, supra*, renders the CO unclear or ambiguous. However, we see no such lack of clarity or ambiguity. The court wrote in that case that "We now hold that it is not absolutely necessary for the employer to present a medical expert of its own" (at 1214), and more to the point, in the portion cited by the ALJ:

In this context, as these cases teach, it is neither mandatory nor helpful to search for "substantial evidence," as that concept is normally understood -- "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [Citations omitted.] In some cases, rather, the weakness of the proponent's proof -- the lack of evidence -- may be enough to defeat her claim. Thus, our duty is to determine whether the ALJ's decision that petitioner failed to carry her burden of proof was "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." D.C. Code § 2-510 (a)(3)(A) (2001).

There was no such infirmity here. Presented with a claim that petitioner suffered from a permanent disability of the left leg, the ALJ obviously found the dearth of evidence of medical analysis and treatment significant, as do we. Petitioner's evidence certainly did not compel the ALJ to conclude that she had carried her burden of proof "to the exclusion of any other inference." *Douglas [v. Board of Trustees of the Maine State Retirement System]*, 669 A.2d [177 (1996)] at 179.

*Id.*, at 1216. The ALJ was referencing the fact that the lack of an independent medical evaluation (IME) stating that Mr. Mpia was not disabled during the periods claimed did not compel that his claim be granted. That is a salient and accurate point, and is in no way erroneous.

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<sup>3</sup> Mr. Mpia postulates in his Memorandum in support of this appeal that returning to work "in his regular capacity" led to a worsening of his ankle condition such that being taken off work completely on January 7, 2010 was needed. However, as Omni Shoreham points out in their opposing brief, Mr. Mpia testified that his return to work was in a limited, lighter capacity. HT 35.

Altogether, Mr. Mpia's arguments on appeal amount to little more than disagreement with the weight that the ALJ attached to the video and to Mr. Mpia's credibility and the effect of a lack of credible medical evidence supporting his claim of incapacity.

The CRB "may not consider the evidence de novo and make factual findings different from those of the [ALJ]." *Marriott International, supra*.

Moreover, the CRB is bound by an ALJ's findings of fact even though the CRB may have reached a contrary result based on an independent review of the record. If substantial evidence exists to support the ALJ's findings, the existence of substantial evidence to the contrary does not permit us to substitute our judgment for that of the ALJ. The CRB can reverse an ALJ's decision only when it is not supported by substantial evidence or is otherwise legally incorrect. *Id.* at 885-86.

#### CONCLUSION

The ALJ's findings that Mr. Mpia lacks credibility with regard to his level of claimed incapacity, that the record lacks medical documentary support for Mr. Mpia's alleged incapacity from his employment, and that such documentation as there is in the form of the January 7, 2011 disability slip is subject to doubt given the circumstances of its production and the lack of rationale for its conclusions, are supported by substantial evidence. The denial of the claim based upon those findings is in accordance with the law.

**ORDER**

The Compensation Order of October 13, 2011 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
Administrative Appeals Judge

\_\_\_\_ April 24, 2012 \_\_\_\_\_  
DATE