In the Matter of:	)	
	)	
LAVERN R. BENTT,	)	
	)	
Claimant,	)	OHA No. 00-130
	)	OWC No. 560664
v.	)	CRB No. 05-217
	)	
GEORGETOWN UNIVERSITY HOSPITAL,	)	
	)	
Employer/Carrier.	)	

Appearances:

SAMUEL J. DEBLASIS, II, ESQUIRE
For the Claimant

JEFFREY W. OCHSMAN, ESQUIRE
For the Employer

Before:

HENRY W. MCCOY
ADMINISTRATIVE LAW JUDGE

SECOND COMPENSATION ORDER ON REMAND

STATEMENT OF THE CASE

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §§32-1501 *et seq*., (hereinafter, the Act).

PROCEDURAL HISTORY

Initially, Lavern R. Bentt (hereinafter, claimant) commenced an action in tort against Georgetown University Hospital (hereinafter, employer) in the Superior Court of the District of Columbia alleging medical malpractice by her supervisor when he administered two nerve block injections to her left ankle at the work site. The Court stayed the negligence action pending a determination by this administrative agency as to whether claimant had sustained a compensable injury and whether the facts as alleged were subject to the exclusive remedy provisions of the

Act.[1]

After timely notice, a full evidentiary hearing was held on April 4, 2000 before Charles Devoe, Esquire, Hearing and Appeals Examiner.[2] The sole issue considered for resolution was whether, on or about October 4, 1994, claimant sustained an accidental injury which arose out of and in the course of her employment. Compensation Order at p. 2. Based on the record evidence, the Examiner concluded that the Claimant did not sustain an accidental injury arising out of and in the course of her employment on or about October 2, 1994.

Employer appealed to the Director of the Department of Employment Services (hereinafter, Director) arguing the Examiner's order was not supported by substantial evidence in that the findings were contrary to the credible evidence in the record. The Director affirmed the Examiner's order denying compensation. The Director found that substantial evidence supported the Examiner's finding that the Claimant's original ankle injury was not work-related and that the hospital's argument for application of the aggravation rule was not persuasive. Employer appealed.

On August 21, 2003, the District of Columbia Court of Appeals reversed and remanded this matter to the agency. The Court found error in that the agency failed to address whether the injections by the supervising physician brought about what constituted an accidental injury under the Act and whether the tendinitis was aggravated by the physical requirements of the job or by the injections. The Court accepted the Examiner's conclusion that the Claimant's initial ankle injury was not an accidental injury under the Act by stating that this finding was supported by the record. *Georgetown University v. D.C. Dept. of Employment Services*, 830 A.2d 865 (D.C. App. 2003). The Court reversed and remanded for further proceedings consistent with its opinion.

On February 18, 2005, the undersigned issued a Compensation Order on Remand wherein it was found that the injections administered by Claimant's supervisor did not constitute an accidental injury and that the non-work related tendinitis was not aggravated by the physical requirements of the job or by the injections. Employer appealed to the Compensation Order Review Board (the Board).

In a May 6, 2005 Decision and Order, the Board affirmed that part of the Compensation Order on Remand which found Claimant's tendonitis was not aggravated by the requirements of the job or by the injections administered by her supervisor. The conclusion that the injections administered by Claimant's supervisor did not constitute an accidental injury under the Act was reversed.

The instant matter was remanded with instructions to apply the positional-risk test pursuant to the Court of Appeals remand and to review the medical opinions in their entirety to determine if under the positional-risk test the injections administered by Claimant's supervisor and the complications that ensued have resulted in a work related injury under the Act. *Lavern Bentt v. Georgetown University Hospital*, CRB No. 05-217, OHA No. 00-130, OWC No. 540664

---

[1] See March 9, 2000 order of the Superior Court in *Lavern R. Bentt v. President and Directors of Georgetown College et al.*, Docket No. CA 97CA007786.

[2] Subsequent to the Formal Hearing, the title of the presiding official was re-classified from Hearing and Appeals Examiner to Administrative Law Judge.

(May 6, 2005). The Board also directed that the record should be re-opened upon remand to admit the complete text of the deposition of Dr. Charles A. Buzzanell. *Id*. at 6.[3]

Claimant appealed the Board's decision to the D.C. Court of Appeals on June 3, 2005. Employer filed a timely response and Motion to Dismiss on August 11, 2005. On September 20, 2005, the Court of Appeals issued an order granting the motion to dismiss as having been taken from a non-final order, but without prejudice to filing a petition for review after a final order has been issued by the Office of Hearings and Adjudication.

CLAIM FOR RELIEF

The Employer in this matter seeks a determination that the Claimant's Achilles tendinitis and any resulting complications were work-related and therefore exclusively compensable under the Act.

ISSUE

Whether the injections administered by the Claimant's supervisor and the complications that ensued resulted in a work-related injury under the Act.

FINDINGS OF FACT

The findings of fact contained in the Compensation Order of May 31, 2000 and the Compensation Order on Remand of February 18, 2005 are incorporated herein by reference, specifically the findings that Claimant first experienced left ankle discomfort following her attendance at a banquet on October 2, 1994 at which she wore tight shoes and that she received two local anesthetic nerve blocks to her left ankle administered by her supervisor on October 6, 1994 and October 7, 1994.

I make the following additional findings of fact:

I find Claimant's and Dr. Buzzanell's daily work relationship was essentially that of employee/supervisor. I find when Dr. Buzzanell administered the nerve blocks to Claimant's left ankle their relationship was that of doctor/patient. I find prior to administering the nerve blocks Dr. Buzzanell counseled Claimant on the various options, merits, and risks of the injections. I find Dr. Buzzanell counseled Claimant to seek initial relief by use of a local anesthetic with the option later of using long-acting steroid medicine injected around the tendon. I find this was the order of the two injections administered to Claimant by Dr. Buzzanell.

I find on returning to work on Monday, October 3, 1994, Claimant experienced pain and discomfort in her left ankle which she attributed to wearing tight shoes over the weekend. I find Claimant's co-workers, including her supervisor, Dr. Buzzanell, noticed that she was limping and offered to administer a nerve block to relieve the pain. I find during the work day on October 6, 1994 Claimant consented and Dr. Buzzanell administered the initial nerve block injection. The injection was administered in the Pain Management Clinic where both Claimant and Dr. Buzzanell worked. I find Dr. Buzzanell gave

[3] On April 30, 2007, Employer's counsel, in response to the Board's Decision and Order, filed a complete copy of Dr. Buzzanell's August 28, 1998 deposition. Accordingly and in compliance with the Board's directive, the undersigned, *sua sponte*, orders that the hearing record in the instant matter be reopen to accept into evidence the full transcript of Dr. Buzzanell's transcript. The transcript shall be designated as ER #10 and shall be admitted into the evidentiary record. Four pages of the deposition (pages 11-12 and 162-163) were initially introduced as Claimant's Exhibit #5.

Claimant a second injection the following day, October 7, 1994

I find when Claimant's left ankle pain persisted she started treating with Dr. Alan D. Aaron, an orthopedic surgeon, on October 18, 1994. Dr. Aaron diagnosed left Achilles tendinitis that was improving. I find Claimant had a follow-up visit with Dr. Aaron on November 11, 1994 complaining of pain and discomfort and an open wound. Dr. Aaron removed a thick skin slough over the wound and called in Dr. Christopher E. Attinger, a plastic surgeon, who surgically closed the wound. I find Dr. Aaron opined Claimant's condition was primarily due to localized injection with a skin slough.

I find Claimant's Achilles tendinitis was not initially caused by a work-related incident, that at the time she was initially examined by her treating physician the tendinitis was improving, and it was not aggravated by the physical requirements of the job. I find the treatment rendered by Dr. Buzzanell did not cause or aggravate her Achilles tendonitis but did cause the complication of skin slough that ensued, which required surgical correction. I find the complication of the skin slough, which resulted from the nerve block injections, constituted a new injury. I find the injury would not have happened but for the fact that conditions and obligations of Claimant's employment placed her in the position where she was injured.

DISCUSSION

To be deemed compensable under the Act, an injury must both arise out of, and occur in the course of, a claimant's employment. D.C. Official Code § 32-1201(12); *Clark v. D.C. Dept. of Employment Services*, 743 A.2d 722 (D.C. 2000); and *Grayson v. D.C. Dept. of Employment Services*, 516 A.2d 909 (D.C. 1986). D.C. Official Code § 32-1521(1) establishes a presumption in favor of compensability for employees injured on the job.[4] The presumption is designed to effectuate the humanitarian purposes of the statute" and "reflects a 'strong legislative policy favoring awards in arguable cases.'" *Ferreira v. D.C. Dept. of Employment Services*, 531 A.2d 651, 655 (D.C. 1987) (quoting *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 183; 407 F.2d 3037, 313 (1998). To invoke the presumption, a claimant must present some evidence of (1) a death or disability, and (2) a work-related event, activity, or requirement which has the potential to result in or contribute to the death or disability. *See id.* "The presumption then operates to establish a causal connection between the disability and the work-related event, activity, or requirement." *Id*.

Once the presumption is triggered, the burden shifts to the employer to produce "substantial evidence" that he disability did not arise out of and in the course of the employment. *See id.*; *Brown v. D.C. Dept. of Employment Services*, 700 A.2d 787, 791 (D.C. 1997). Absent such production, the claim will be presumed to fall within the scope of the Act. *Spartin v. D.C. Dept. of Employment Services*, 584 A.2d 564 (D.C. 1990).

In its remand of this matter, the Compensation Order Review Board (the "Board"), instructed the undersigned to apply the positional-risk test pursuant to the Court of Appeals remand and to review the medical opinions in their entirety to determine if under the positional-risk test the injections administered by Claimant's supervisor

[4] "In any proceeding for the 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...." D.C. Official Code § 32-1521(1).

and the complications that ensued resulted in a work related injury under the Act. *Bentt, supra* at 7. In evaluating whether an injury "arises out of" employment, the District of Columbia has adopted the positional-risk standard, which was articulated in *Grayson*, and which the undersigned has been instructed to apply to the facts herein.

The positional-risk standard amounts to a "but for test" whereby an injury arises out of the employment so long as 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. *Grayson, supra* at 911. The Court of Appeals further elaborated that positional-risk is a liberal standard which obviates any requirement of employer fault or of a causal relationship between the nature of the employment and the risk of injury. Furthermore, an employee need not be engaged in activity of benefit to the employer at the time of injury. *See Harrington v. Moss*, 407 A.2d 658, 662 (D.C. 1979).

Under the positional-risk test, an injury arises out of employment so long as it would not have happened but for the fact that conditions and obligations of the employment placed claimant in the position where she was injured. *Georgetown, supra* at 872. And, if the fact finder so finds, an employment relationship between said injury and her employment would exist without the necessity of the presumption. *Id.* at 867.

It is uncontested that Claimant initially felt discomfort in her left ankle as a result of wearing tight shoes to a non-work related function on October 2, 1994. Upon returning to work, Claimant to feel pain and discomfort. Claimant was at work, performing her usual duties of walking rounds and seeing patients, when she began experiencing discomfort in her left ankle sufficient to cause her to limp, which in turn was noticed by her co-workers, including Dr. Buzzanell, who to administer a nerve block to provide relief. Claimant initially declined, but later in the week accepted the offer. The first injection was administered on October 6, 1994, which provided momentary relief; and, followed on October 7, 1994 with a second injection.

Claimant left ankle pain persisted and on October 18, 1994 she came under the care of Dr. Aaron, who diagnosed Achilles tendinitis that was improving. He recommended a heeled shoe and a gentle stretching program. In a follow-up visit on November 11, 1994, Claimant complained of pain and discomfort over the area of her Achilles tendon and an open wound. He noted that Claimant had undergone an injection with 1% lidocaine with epinephrine and corticosteroid prior to her October 18th visit and she had noticed a full thickness skin slough, which he removed. He opined that this appeared to be primarily due to "localized injecture with a skin slough." (EE-10 and ER-1). On November 14, 1994, Dr. Christopher E. Attinger, a plastic surgeon, surgically closed the wound. Thus, as Claimant's tendonitis was improving, she was subjected to a separate and distinct event while at work, the injections to the area of her Achilles tendon.

In the March 8, 2000 independent medical evaluation (IME) report submitted by Employer, Dr. John B. Cohen opined:

> **To answer your specific questions, the claimant's work activities could easily have caused or aggravated her Achilles tendonitis. The treatment rendered by her supervising physician did not cause or aggravate her Achilles**

> **tendonitis, but obviously caused the complication that ensued.** (ER-8).

In the January 17, 2000 IME report of Dr. Richard H. Conant presented by Claimant, Dr. Conant opined:

> **Based on historical information and the physical examination referenced above, it is my opinion that [claimant's] medical condition involving her left Achilles tendon and the overlying soft tissues originated from initial irritation of the area by the back of a shoe on 10/2/94 and the subsequent complications of full thickness soft tissue slough following local injections of the area on 10/6/94 and 10/7/94. In my opinion, within reasonable medical probability, her condition did not arise from normal work activities.** (EE-3).

Claimant also presented the February 14, 2000 IME report Dr. Major P. Gladden, who opined:

> **It is my opinion, based on the history and the records, that the patient most likely had some retrocalcaneal bursitis associated with the wearing of the pumps at the banquet, which got progressively worse, and the subsequent involved the Achilles tendon....I fell that her primary problem initially was the retrocalcaneal bursitis, which was non-work related, most likely related to the wearing of the shoes and tendinitis was a subsequent complication and the complication resulted from the injection. By no means do I relate this as an on-the-job injury based upon the nature of tendinitis. This is a more of a chronic overuse-type syndrome as opposed to the routine activities that she would be normally doing at work and I feel again this is most likely related to the shoe wear and the inflammation related to the injections with the consequence of trying to relieve the discomfort resulting in the compromise to the tendon and subsequent therapy.** (EE-2).

The medical opinions as delineated above support the conclusion that Claimant's Achilles tendonitis was not work-related. However, the same medical opinions are sufficient to invoke the presumption of compensability by showing that a separate and distinct injury occurred as a result of the complications that ensued from the injections administered by Claimant's supervisor; and, that presumption is not rebutted by any evidence in the record.

It is uncontested that Claimant was at work, limping on her left ankle while performing her usual duties, when she finally consented to Dr. Buzzanell's offer to inject her ankle in order to relieve her discomfort. All of the IME reports agree that it was the injections to the Achilles tendon area that caused complications in the

nature of a full thickness of soft tissue slough that developed into an open wound that eventually had to be surgically closed. It is therefore found that the injections administered by Dr. Buzzanell caused a problem independent of the tendonitis and that problem, the complication of soft tissue slough, brought about an accidental injury under the Act.

Under the *Grayson* analysis, the inquiry thus becomes whether the injury would not have occurred *but for* the fact that conditions and obligations of Claimant's employment placed her in the position where she was injured. This standard requires a finding that the injury resulted from a risk incidental to the environment in which Claimant was placed by her employment. The facts presented herein support such a finding. Claimant was within the boundaries of time and space created by her employment at time she received the injections to her left Achilles tendon area resulting in an accidental injury and, therefore, such injury arose out of and in the course of her employment.[5] Herein, the offer of Dr. Buzzanell to give Claimant the injections arose directly from her limping and obvious discomfort as she performed her work.

CONCLUSIONS OF LAW

Based upon a review of the record evidence as a whole, I find and conclude that the injections administered by the Claimant's supervisor and the resulting complications were work-related and did constitute an accidental injury under the Act.

[5] The Board in effect decreed this result. In its Decision and Order, the Board stated: "This panel further concludes that the record contains sufficient evidence to establish that an injury occurred as a result of the complications that ensued from the injections administered by claimant's supervisor while claimant was at work on October 6 and 7, 1994. The panel is also in agreement that had the ALJ properly applied the positional risk standard as discussed in *Grayson v. Dist. Of Columbia Dep't of Employment Servs.*, 516 A.2d 909 (D.C. 1986), and as ordered by the Court of Appeals in the instant matter, the result would be that the injection administered by Dr. Buzzanell which led to the full thickness soft tissue slough would be classified as an injury pursuant to *Grayson, supra*." *Bentt, supra* at 5.

The Court of Appeals also stated it was "reluctant, however, to rule conclusively that he injections and the resulting aggravation or complication of Dr. Bentt's original ankle injury arose out of and in the course of her employment....Although the existing record could itself serve as an adequate basis for that conclusion, we think it is the better course to return the case to the agency so that a hearing examiner may address the causal significance of the injections - something he did not do originally - and make appropriate findings of fact and conclusions of law. (Citation omitted)." Georgetown, supra at 872-873.

ORDER

It is hereby **ORDERED** that any claim for relief under the Act is **GRANTED IN PART,** in that the injections and resulting complications constituted an accidental work-related injury under the Act**.**

HENRY W. MCCOY
ADMINISTRATIVE LAW JUDGE

November 21, 2007
Date