

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



DR. ROCHELLE L. WEBB
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 10-164

JOSE ACEVEDO,
Claimant–Petitioner,

v.

BROTHER’S CONCRETE CONSTRUCTION

AND

VALLEY FORGE INSURANCE COMPANY,

Employer and Insurer–Respondents.

Appeal from a Compensation Order on Remand of
Administrative Law Judge Gerald D. Roberson
AHD No. 293B, OWC No. 602206

Manuel R. Gerardo, Esq., for Claimant
Joseph C. Veith, III, Esq., for Employer and Insurer
Brian Steinbach, Esq., for Employer

Before LAWRENCE D. TARR, MELISSA LIN JONES, and HENRY W. MCCOY, *Administrative Appeals Judges.*

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Review Panel:

DECISION AND ORDER

This appeal challenges an August 27, 2010, Compensation Order on Remand by the Administrative Hearings Division (AHD), Office of Hearings and Adjudication, District of Columbia Department of Employment Services (DOES). In that Order, the Administrative Law Judge (ALJ) awarded the claimant temporary partial disability benefits from March 19, 2007, to September 11, 2007. We affirm.

BACKGROUND

The claimant, Jose Acevedo, sustained a compensable injury to his back on March 31, 2004, while working for the employer, Brothers Concrete Construction Corporation. On January 9, 2007, the claimant returned to a light duty position with the employer that paid \$3.60 less per hour. The claimant was fired on March 19, 2007.

On April 10, 2008, an ALJ held an evidentiary hearing at which the claimant requested the following indemnity benefits:

Temporary total disability benefits from December 4, 2006, to January 9, 2007.

Temporary partial disability benefits from January 9, 2007, to September 11, 2007,

Temporary total disability benefits beginning on March 20, 2007.

In his May 23, 2008, Compensation Order, the ALJ awarded the claimant temporary total disability benefits from December 4, 2006, to January 8, 2007, and temporary partial disability benefits from January 9, 2007, to March 19, 2007. The ALJ did not award any benefits after March 19, 2007.

The ALJ held the claimant was not entitled to benefits after March 19, 2007, because the claimant voluntarily limited his income when he was fired for cause on March 19, 2007. The ALJ further found that the claimant's termination from employment was not a retaliatory discharge. *Acevedo v. Brother's Concrete Construction*, AHD No. 05-293B, OWC 602206 (May 23, 2008).

The CRB affirmed this decision but remanded the case to the ALJ to consider two matters that were raised by the claimant but not decided by the ALJ: the claimant's request for an MRI and for authorization to have lumbar spine surgery. *Acevedo v. Brother's Concrete Construction*, CRB No. 08-182 (April 14, 2009).

In his decision on remand, the ALJ found the claimant was entitled to the MRI but not to surgery. *Acevedo v. Brother's Concrete Construction*, AHD No. 05-293B, OWC 602206 (April 29, 2009). This decision was affirmed by the CRB. *Acevedo v. Brother's Concrete Construction*, CRB No. 09-077 (June 23, 2009).

The claimant appealed to the District of Columbia Court of Appeals (DCCA). The DCCA affirmed in part and reversed in part. The DCCA affirmed the determinations that the claimant was only partially disabled and that his discharge was not retaliatory.

The Court, relying on its 2001 *Upchurch* decision, reversed the decision to end benefits on March 19, 2007. The Court held:

However, the ALJ's May 23, 2008, order reflects that its reason for denying petitioner temporary partial benefits after March 19, 200[7], despite the physicians' agreement that petitioner remained *partially* disabled, was that petitioner *voluntarily* limited his work income by failing to accept such employment. We have held that the "[D.C. Workers' Compensation] Act does not provide that the subsequent termination of an employee, whether related or unrelated to a work injury, is a defense for an employer who denies an obligation to pay disability compensation." *Upchurch v. District of Columbia Dep't of Employment Servs.*, 783 A. 2s 623,627 (D.C. 2001). Thus, the petitioner's wage loss of three dollars and sixty cents (\$3.60) was a result of the petitioner's work injury and, hence, is unrelated to his subsequent termination."

The Court concluded:

Consequently, we are obligated to remand this case to the District of Columbia Department of Employment Servs. for the sole purpose of determining the period of time from March 19, 200[7] onward for which petitioner is entitled to TPD benefits and to award those benefits in the amount of three dollars and sixty cents (\$3.60) per hour.

Acevedo v. DOES and Brothers Concrete Construction, Inc., intervenor, No 09-AA-806 (June 8, 2010). (Unpublished memorandum opinion and judgment).

The CRB, in turn, remanded the case to the ALJ. *Acevedo v. Brother's Concrete Construction*, CRB No. 09-077R (August 17, 2010).

In his August 27, 2010, Compensation Order on Remand, the ALJ noted that the only claim for temporary partial disability benefits was the claimant's request for temporary partial benefits from January 9, 2007, to September 11, 2007. The ALJ found the claimant only was able to do light duty work, a decision that was consistent with the opinions of the claimant's treating physician, Dr. Marc Scheer, and the employer's IME physician, Dr. James Gardiner and with the work hardening program report.

Since the ALJ previously awarded the claimant temporary total benefits from January 9, 2007, to March 19, 2007, the ALJ entered an award for additional temporary partial disability benefits from March 19, 2007, to September 11, 2007. *Acevedo v. Brother's Concrete Construction*, AHD No. 05-293B, OWC 602206 (August 27, 2010).

The clamant timely appealed the ALJ's Compensation Order on Remand. On review, the claimant asserts the ALJ erred by ending the award on September 11, 2007.

The employer argues in opposition that the claim should be limited to what the claimant requested in the Joint Pre-Hearing Statement and at the formal hearing--temporary partial benefits from March 19, 2007, to September 11, 2007. The employer asserts that to permit any different claim than what was requested violates due process and is barred by latches.

DISCUSSION

On Review, the claimant argues that the ALJ erred in ending the award for temporary partial disability benefits on September 11, 2007, because this claim was included within his claim for temporary total disability benefits. Without citing any legal authority, the claimant argues, "A claim for TPD after September 11, 2007, is comprised within the TTD claim." Claimant's Memorandum of Points and Authorities at p. 3.

We disagree. Not only are these benefits established by different statutes, D.C. Official Code §§ 32-1508 (a) (2) and 32-1505 (5), but the evidence needed to establish total disability is significantly different from the evidence needed to establish partial disability. The benefits are

not sufficiently similar and a claim for one is not included in a claim for the other. See *Teklu v. Jurys Doyle Hotel*, CRB No. 08-016, AHD No. 05-241 (January 23, 2008).

We find that the ALJ correctly ended temporary partial disability benefits on September 11, 2007.

The only claim asserted by the claimant at the formal hearing (and which he stated in the Joint Pre-Hearing Statement) was a claim that ended on September 11, 2007. Due process considerations required the ALJ to award only what was requested and what was litigated. As the CRB held in *Teklu*:

Pursuant to the Scheduling Order issued in proceedings before AHD, the parties are required to jointly execute and file in advance of the formal hearing a joint pre-hearing statement and stipulation identifying, *inter alia*, the issues to be presented and the claim for relief that is sought. Absent formal amendment to that documentation, Employer had every reason in the instant case to expect that the ALJ would rule on the claim for relief as presented, and adjudicate only those issues identified by the parties in their stipulation and joint pre-hearing statement. In light of this well-established procedure, we find Employer assertion of prejudice well-founded. Accordingly, we must vacate the Compensation Order's determination that the *nature* of Claimant's disability was permanent, and remand the case to AHD for further proceedings consistent with this opinion, including affording to Employer the opportunity to present evidence and argument on the issue of permanency. The due process protection recognized by the court in *Transportation Leasing* [*Transportation Leasing v. DOES*, 690 A.2d 487 (D.C. 1997)] stands as a bar not merely to the grant of relief that has not been requested, but as a bar to reaching and deciding the underlying issues giving rise to that relief where, as in the instant case, the lack of notice and opportunity to present evidence and argument addressing such issues results in prejudice to the opposing party.

Id. at 8.

Therefore, we find that the ALJ did not err by deciding that any award for temporary partial benefits must end on September 11, 2007.

It should be noted that the ALJ only considered the claim for temporary total disability benefits through September 11, 2007. Therefore, the ALJ's decision, and this review opinion affirming that decision, is issued without prejudice to the claimant's ability to file a new claim for other benefits.

CONCLUSION AND ORDER

The August 27, 2010, Compensation Order on Remand is supported by substantial evidence and is in accordance with the applicable law.

It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

LAWRENCE D. TARR
Administrative Appeals Judge

March 7, 2011
DATE