

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-106

**JOHN HODGE,
Claimant-Petitioner,**

v.

**WINGS ENTERPRISES, INC., and
GALLAGHER BASSETT SERVICES, INC.,
Employer and Third-Party Administrator-Respondents.**

Appeal from a May 28, 2015 Compensation Order on Remand
by Administrative Law Judge Joan E. Knight
AHD No. 13-364, OWC No. 695532

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 OCT 26 PM 1 56

Decided October 26, 2015

Tony D. Villeral for Employer
Michael J. Kitzman for Claimant

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, who is left hand dominant, was working as an iron worker/rodman for Employer when he began to experience pain and tingling in his left hand in November of 2010.

Claimant sought treatment with Howard University Hospital Emergency Room on November 21, 2010 for left hand complaints. Claimant subsequently was sent to Concentra by the Employer for pain in the left upper arm and forearm. Claimant was diagnosed with a left wrist sprain, received conservative care, and was taken off of work for a period of time.

Claimant returned to full duty work after the injury. On October 11, 2011, Employer terminated Claimant from his position for cause.

On September 28, 2012, Claimant began treatment with Dr. Joel Fechter. After performing a physical examination and taking a history of the injury, Dr. Fechter diagnosed the Claimant with

carpal tunnel syndrome and recommended an EMG for confirmation of this diagnosis. Employer did not authorize the requested EMG.

Employer sent Claimant for independent medical evaluations (IME) with Dr. Louis Levitt and Dr. Richard Barth. Claimant first saw Dr. Barth on August 28, 2013. Dr. Barth took a history of Claimant's injury and treatment to date, and performed a physical examination. Dr. Barth opined Claimant suffered from left wrist and hand pain of unclear etiology that was not work related. Dr. Barth did not feel that Claimant suffered from carpal tunnel syndrome and that he could go back to work fully duty. Dr. Barth further opined that Claimant reached maximum medical improvement from his work injury and required no further treatment.

Claimant saw Dr. Levitt on August 25, 2014. Similar to Dr. Barth, Dr. Levitt took a history of Claimant's injury and treatment to date, and performed a physical examination. Dr. Levitt found Claimant had a normal examination and no "active musculoskeletal process that requires evaluation or treatment." Dr. Levitt opined Claimant could return to work full duty and had recovered from any injury that he experienced in 2010.

Employer sent Claimant's medical records for utilization review (UR) which generated an independent review report on September 4, 2014. After reviewing the medical records, the UR determined the requests for an EMG and further treatment were neither reasonable nor necessary.

A full evidentiary hearing was held on September 9, 2014. At that hearing, Claimant sought temporary total disability benefits from October 11, 2011 to the present and continuing, authorization for medical treatment, and payment of causally related medical benefits. The issues presented were whether Claimant's left hand and wrist condition is medically causally related to his employment, the reasonableness and necessity of the diagnostic testing recommended by Dr. Fechter, the nature and extent of Claimant's disability, and whether Claimant voluntarily limited his income. A Compensation Order (CO) was issued on November 20, 2014 which granted Claimant's claim for relief.

Employer appealed. In a Decision and Remand Order (DRO) dated April 20, 2015, the Compensation Review Board (CRB) affirmed the CO's conclusion that Claimant's left hand and wrist condition is medically causally related to the work injury. However, the CRB vacated and remanded the case for further findings of facts and analysis regarding whether Claimant had voluntarily limited his income, pursuant to *Upchurch v. DOES*, 783 A.2d 623, 627 (D.C. 2001) (*Upchurch*) and *Robinson v. DOES*, 824 A.2d 962 (D.C. 2003) (*Robinson*).

A Compensation Order on Remand (COR) was issued on May 28, 2015. In the COR, the ALJ determined that Claimant's wage loss was caused by non-work related reasons and that Claimant had voluntarily limited his income. Claimant's request for disability benefits was denied.

Claimant timely appealed. Claimant argues the COR's finding that Claimant is an incredible witness regarding his termination is in error. Furthermore, Claimant argues the substantial evidence in the case does not support a finding that Claimant voluntarily limited his income.

Employer opposes, arguing the COR is supported by the substantial evidence in the record and in accordance with the law.

STANDARD OF REVIEW

The scope of review by the 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.

ANALYSIS

Claimant first argues the COR's contention that Claimant's testimony was incredible is not supported by the substantial evidence in the record, especially in light of Claimant's un-rebutted testimony. We disagree.

As the ALJ noted in the findings of fact,

Upon further review of the record addressing the issue of voluntary limitation of income Claimant is not found to be a credible witness as it relates to his reasons for his termination from employment and his testimony is unreliable. This credibility finding is based upon Claimant's testimony in response to a series of leading questions on direct examination. Claimant's testimony on cross-examination was at times evasive and inconsistent with the evidence in the record.

COR at 2.

The ALJ later discussed whether, pursuant to *Upchurch* and *Robinson*, *supra*, Claimant voluntarily limited his income. The ALJ stated,

Employer argued Claimant was terminated for cause due to his failure to abide by Employer's workplace rules. Employer, relying on *Robinson*, asserts that any wage loss suffered by Claimant after October 11, 2011, was not due to his work injury but for non-injury related factors. On cross-examination Employer elicited from Claimant that he was terminated for excessive tardiness following warnings, which was in violation of workplace rules. Employer also elicited from Claimant that he had been previously warned for repeatedly using his cell phone while on the clock. Employer argued that Claimant's conduct of tardiness and absences were the reason [*sic*] for his termination.

Claimant testified that following his work injury, he returned to work for Employer as an iron worker/rodman but due to his left wrist injury, it did not allow him to return to work at the same level that he performed as an ironworker/rodman prior to the work injury and experienced residual wrist pain. The record reflects on February 16, 2011, Dr. Elmo released Claimant to modified

duty with restrictions limiting the use of his left hand. However, Claimant had been given a full duty release on February 22, 2011, and was under no work restrictions. Claimant also testified on cross examination that he resumed full-duty two weeks after his release to return to work. He acknowledged and testified he was terminated by Employer for attendance problems. When specifically asked on direct examination what the reason for his termination was, Claimant responded, "for being tardy" and "transportation problems" i.e., problems finding a parking spot for his truck. When asked on direct was he ever late for reasons other than parking, Claimant responded in the affirmative, but could not remember or recall the reason(s). When asked specifically if he was late for problems with his hands, Claimant responded in the affirmative. When prodded further on direct and asked why he would be late because of his hands, Claimant responded, "because I was in pain and I couldn't perform the duties at work". Furthermore, on cross-examination, Claimant testified he was tardy because he couldn't perform his duties and doctor's appointments, check-ups and "things like that". When asked on cross-examination if he received any medical treatment from his last visit with Concentra (February 22, 2011), Claimant responded, "No". The testimony from Claimant that he was terminated from his employment for tardiness due to left wrist problems is not reliable

COR at 4-5. (Footnotes omitted).

Thus, the ALJ assessed Claimant's credibility after observing his appearance, testimony as well as responses to direct and cross examination. The ALJ, after going through a series of questions asked on direct and noting how Claimant's responses changed after questions from counsel, found Claimant to be unreliable. Claimant posits that the ALJ must compare the testimony to the rest of the evidence in the record. We conclude that the ALJ did implicitly take into account the rest of the record, having made findings that Claimant had returned to work without restrictions prior to his termination. The ALJ's evaluation of Claimant's testimony, its rationality and consistency, as well as how it hangs with the rest of the evidence in the record is supported by the evidence in the record and in accordance with the law. *See McAlister v. Flippo Constr. Co.*, CRB No. 08-045, AHD No. 03-314 (March 25, 2008).

Claimant next argues that the COR finding that Claimant's present wage loss is not the result of his injury is not supported by the evidence of record. Claimant argues that Employer presented no evidence and instead relied solely on Claimant's testimony as the basis for his termination. Moreover, Claimant argues even if the basis for termination was sufficient, Claimant is still entitled to wage loss benefits as Employer presented no evidence that work was available. We reject these arguments.

The ALJ noted,

The record established that following his work injury, Claimant returned to work and was terminated from his employment for attendance problems. I find, based on Claimant's testimony that his inability to report to work on time was due to non-injury related transportation and parking problems. In *Upchurch* and

Robinson, where the work injury, or an impairment stemming from the work injury, played no part in the discharge, and support a finding of voluntary limitation of income, then under the Act, the resulting wage loss is not related to the work injury. I further find that Employer has demonstrated that Claimant's wage loss was caused by factors other than his injury and therefore, Claimant voluntarily limited his income. Therefore, I find, based on the record, that Claimant's wage loss subsequent to October 11, 2011, is not related to his work related injury of November 21, 2010.

COR at 5.

Claimant testified on direct that Claimant was fired for "transportation problems." Hearing transcript at 30. Claimant also testified that he was working full duty two weeks after returning to work in February 2011 and was able to perform his duties. Hearing transcript at 28, 36.

As the Court noted in *Robinson*,

In *Upchurch, supra*, this court addressed a similar contention by an employer that the worker had been "terminated . . . for failing to keep his superior apprised of his work status and failing to follow the procedures of the department." 783 A.2d at 625. The court first explained the relevant legal framework:

Disability is an economic and not a medical concept, and any injury that does not result in loss of wage-earning capacity cannot be the foundation for a finding of disability. The statutory presumption of compensability once there has been an on-the-job injury[, D.C. Code § 32-1521 (2001),] may be rebutted if an employer proves by substantial evidence that the disability did not arise out of and in the course of employment. Thus, where rebuttal evidence is presented, the claimant ultimately has the burden to show by a preponderance of the evidence that his or her disability, in an economic sense, was caused by the work injury.

Robinson, supra at 964.

As the ALJ stated, Claimant's wage loss after his termination for cause on October 11, 2011 was unrelated to his work injury. The denial of wage loss benefits after this date is supported by the substantial evidence in the record and in accordance with the law.

CONCLUSION AND ORDER

The May 28, 2015 Compensation Order on Remand is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

So ordered.