

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-038

**JONATHAN GUZMAN,
Claimant-Respondent,**

v.

**MANGANARO MID-ATLANTIC LLC and
OLD REPUBLIC INSURANCE Co.,
Employer-Petitioner.**

Appeal from a February 17, 2016 Compensation Order
by Administrative Law Judge Mark W. Bertram
AHD No. 15-417, OWC No. 710598

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 AUG 8 PM 1 26

(Decided August 8, 2016)

Benjamin E. Douglas for Claimant
Anthony J. Zaccagnini and Tony D. Villeral for Employer¹

Before LINDA F. JORY, HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Employer as a laborer. His duties included caulking and flashing outside using a ladder and scaffolding. Claimant was required to carry a bucket while working on the ladder to heights of more than 10 floors. On November 4, 2013, Claimant was assisting brick layers move a large stone which fell onto Claimant's right foot. Claimant came under the care of Dr. Daniel Cuttica who performed surgery on Claimant's right foot on January 16, 2014. A T-plate and screws were inserted in the foot during the surgery. Due to pain, Claimant underwent a second surgery on January 13, 2015, to remove the right foot hardware previously placed in his foot.

¹ Tony D. Villeral represented Employer at the formal hearing.

Dr. Cuttica authorized Claimant to return to full duty on April 10, 2015. Claimant testified that he attempted without success to contact his employer after being released to full duty. Employer did not contact Claimant with regard to returning to work after Claimant was released to full duty, nor upon learning of Claimant's work restrictions subsequently imposed by Dr. Cuttica.

On June 29, 2015, Claimant underwent an Independent Medical Examination (IME) requested by Claimant's Counsel. The IME was conducted by Dr. Jeffrey H. Phillips. Dr. Phillips opines in his IME report that Claimant can work but should only work on ground level and never be required to climb ladders. On July 16, 2015, Claimant filed an Application for Formal Hearing (AFH) with the Administrative Hearings Division (AHD) requesting temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits.

On October 19, 2015, Dr. Cuttica was deposed. On this date, Dr. Cuttica opined that Claimant would be able to climb a ladder but that performing activities on the ladder that would require balance would "be worrisome for him".

On December 23, 2015, Claimant underwent an IME requested by Employer. Dr. Hinkes performed the IME and authored a report. The IME report refers to a work hardening program which recommended Claimant could return to work on November 12, 2014 as a brick mason helper. Dr. Hinkes opines Claimant may return to work in accordance with the recommendation of the work hardening program.

Following the formal hearing, the Administrative Law Judge (ALJ) issued a Compensation Order (CO) on February 17, 2016 in which it was determined that Claimant was temporarily and totally disabled from June 2, 2015 to the present and continuing and that he was entitled to penalties from Employer pursuant to D.C. Code § 32-1515 (e) and § 32-1528(b).

Employer appealed the CO to the Compensation Review Board (CRB) by filing Employer's Application for Review and memorandum of points and authorities in support thereof (Employer's Brief).

Claimant filed a Memorandum of Points and Authorities in Opposition to Employer's Application for Review (Claimant's Brief).

ANALYSIS

Employer asserts that the ALJ's findings of fact are arbitrary and do not adequately reflect the record. Specifically Employer asserts:

The ALJ fails to impartially recite the facts based on the record as a whole. The ALJ sites [sic] the Claimant's testimony stating, "Claimant attempted without success to contact his employer after being released to full duty. HT 61:15-20" The ALJ then goes on to thoroughly state that the Employer did not contact the Claimant regarding his full duty release, or provide work restrictions. The ALJ fails to acknowledge the Claimant's unverifiable attempts to contact the Employer were via telephone and Claimant only allegedly called a maximum of 2 to 3

times. The ALJ fails to acknowledge the Claimant admitted to receiving the answering machine when he alleged called the Employer and admitted that he never left a message. Due to the ALJ overly relying on the fact the Employer did not offer the Claimant full duty work throughout the CO; [sic] the facts surrounding the Claimant's failure to return to work should be incorporated and properly analyzed.

The ALJ fails to acknowledge the Claimant's missed IME appointment scheduled for November 13, 2015; [sic] whereby the Claimant admitted to having notice but did not appear for the IME HT 11.

The ALJ states "Employer did not show Claimant could return to work during the brief period he was released to full duty". CO, p.3. This finding is not a fact and does not take into consideration the Claimant's full duty release from his treating physician. The ALJ cites the facts in favor of the Claimant creating a distorted and prejudicial record. The Employer requests the Order be remanded for an impartial recitation of the facts.

Employer's Brief at 4, 5.

Although we agree with Employer that the ALJ "overly relied" on the fact that Employer did not offer Claimant full duty work and did not mention Claimant's failure to attend an IME, we are not prepared to state that the ALJ distorted the evidence as Employer suggests.

In support of its argument that the ALJ's determination that Claimant had met his burden of establishing entitlement to TTD is not supported by substantial evidence, Employer argues that:

Dr. Cuttica's questionable work restrictions were not imposed until 6 months after he had last seen the Claimant. In fact, Dr. Cuttica's last report dated April 9, 2015 indicates the Claimant rated his pain a 4 out of 10 and there had been no post-operative complications. ER 3. P. 6. He noted the Claimant's gait is unremarkable and released him to work full duty. *Id* at 7. Without seeing the Claimant for 6 months he testified in a response to whether he would make climbing a ladder conditional depending on how severe the Claimant's symptoms are, Dr. Cuttica testified, "...I mean if his pain was that severe where he would be favoring his foot and he'd be climbing a ladder, then – then yes, I would worry that he could have another injury." CE 1, p.27. The records do not support the Claimant had an antalgic gait resulting in the alleged balance issues, which is the basis for Dr. Cuttica's questionable work restrictions given on October 19, 2015. The Claimant never made a legitimate attempt to return to work to see how symptomatic he would be and he was last seen by Dr. Cuttica on April 9, 2015 where he was released to return to work full duty. As a result, the Claimant's request for temporary total disability from June 2, 2015 to the present and continuing should be denied.

While it quite possible that this Panel could have reviewed the evidence and decided this issue in an alternative manner, the issue before us is not whether there is some evidence that supports a contrary finding. Rather the CRB reviews the Compensation Order on Remand to determine if there is substantial evidence to support the ALJ's conclusion determination that Claimant established by a preponderance of the evidence entitlement to disability benefits. The CRB and this Panel are constrained to uphold a conclusion that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion. We find no error by the ALJ in weighing the evidence with regard to the nature and extent of Claimant's disability. The TTD award is accordingly affirmed.

Employer's third argument is the ALJ's conclusion that the Employer unreasonably delayed payment of compensation is an abuse of discretion, not in accordance with the law and is not supported by substantial evidence.

Employer asserts that the ALJ did not properly apply the test enunciated in *Bivens v. Chemed/Roto Rooter Plumbing Services*, CRB No. 05-215 (April 29, 2005) and failed to properly analyze the Employer's evidence in reaching the conclusion that Employer failed to show a good faith basis for not paying benefits. Employer asserts:

Specifically, the ALJ fails to acknowledge the clear and unambiguous fact that the Claimant was released to return to work full duty by the treating physicians on April 19, 2015. The Employer paid temporary total disability benefits until June 1, 2015 well after the Claimant's release and while the Claimant did not have any work restrictions. In awarding bad faith penalties the ALJ fails to acknowledge the alleged unverifiable attempts by the Claimant to call the Employer and focuses primarily on the issue that the Employer did not call the Claimant to return to work after his full duty release.

Employer's Brief at 8.

With regard to the Penalty issues the ALJ stated:

During the formal hearing in this matter the fact that Claimant was not receiving compensation was addressed. On November 18, 2015, I issued an Order to Show Cause why penalties should not be assessed for failure to pay compensation in accordance with the Act.

In response to the Order to Show Cause, Employer claimed that Claimant was released to full duty on May 6, 2015. Employer then argues that no payment was due and an independent medical evaluation was scheduled. Further, Employer argued that during Dr. Cuttica's deposition, Dr. Cuttica imposed new work restrictions. While Employer's argument may be somewhat factually correct, the Employer did not follow the law and controvert the claim as required in order to avoid paying compensation without the possibility of penalty. Further, Employer never, for the period at issue, offered to return Claimant to full duty or offered suitable alternative employment. Employer did not pursue voluntary limitation of

income as a defense. Employer knew of claimant's injury and claim for TTD benefits. Therefore, compensation was due to Claimant when owed. To date, Employer has not paid compensation owed Claimant.

CO at 6.

Specifically with regard to a penalty pursuant to § 32-1515 (e), the ALJ concluded:

Claimant is disabled within the meaning of the Act. I find Employer failed to promptly pay compensation owed to Claimant due to Claimant's wage loss. I find Claimant is entitled to a penalty under §32-1515 (e). Employer offered no credible evidence addressing why it should be excused for this penalty.

Id.

With respect to a penalty pursuant to § 32-1528(b), the ALJ properly cited to *Asylum Co. v. DOES* 10A.3d 619(D.C. 2010) and restated the three requirements needed to establish a prima facie showing of bad faith:

As noted above, Claimant established he was entitled to temporary and total disability benefits for the period of June 2, 2015 to [sic] present and continuing. Employer discontinued payment of compensation without ever offering Claimant a return to his pre-injury job nor provided or offered suitable alternative employment. Further, Employer knew of Claimant's work new restrictions as of October 19, 2015. Employer never offered Claimant work within his restrictions. Employer did not controvert Claimant's claim. Claimant's argument in its Post Hearing Brief references a Functional Capacity Evaluation (FCE) that allegedly showed Claimant could return to work as a brick mason. As noted above, there is no FCE in evidence.

To date, Employer has not paid compensation to Claimant for the period at issue in this case. Claimant has established a prima facie showing of bad faith. Employer argued evidence not in the record. Employer failed to factually and legally show a good faith basis for not paying Claimant's benefits when owed.

I find Claimant is entitled to a penalty under § 32-1528 (b)

CO at 6.

We agree with Employer that the CO imposition of a burden to contact Claimant about returning to work following his release to full duty without restriction on April 10, 2015 on the Employer constitutes error. We further note that in a rather unusual set of circumstances the treating physician, Dr. Cuttica, who reported that Claimant was able to return to full duty on April 10, 2015, subsequently was apprised that Claimant's daily job duties could involve ladder climbing with equipment and performing activities while on ladders and sometimes at unprotected heights and he opined that doing so would be "worrisome". CE 1 at 27-29.

Nevertheless, we cannot overlook the fact that Dr. Cuttica did in fact release Claimant to return to work on April 10, 2015. At that point in time, Claimant had the burden to return to work which he conceded he did not do. Employer eventually stopped paying TTD benefits. However, Employer was obligated, pursuant to the regulations promulgated to administer the Act, send a "Notice of Final Payment" in lieu of filing a Notice of Controversion, which the record does not indicate Employer did. There is no provision for a penalty to be assessed against Employer for its failure to issue the Notice of Final Payment in June 2015 when Employer stopped payment based on the full duty release.

While we do agree that, albeit after the fact, Claimant may be entitled to TTD benefits for the entire period based on Dr. Cuttica's stance at his deposition, this is a determination that would have to be made by the ALJ if Employer did not voluntarily re-instate Claimant's TTD benefits, as it is clear that the hearing was requested before Dr. Cuttica's deposition was taken. We determine the ALJ's conclusion, Employer has not acted in bad faith is not supported by substantial evidence nor in accordance with the law as it was reasonable for the Employer to await the results of the November 17, 2015 formal hearing.

Because the CO's award of both penalties pursuant to D.C. Code § 32-1515 and § 32-1528 were based on an incorrect application of the Act, we vacate the awards of both penalties.

CONCLUSION AND ORDER

The Compensation Order's finding that Claimant has established by a preponderance of evidence that he is entitled to temporary total disability benefits is supported by substantial evidence and is **AFFIRMED**. The Compensation Order's awards of penalties pursuant to D.C. Code § 32-1515 and § 32-1528 are not in accordance with the law and not supported by substantial evidence and are hereby **VACATED**.

So ordered.