

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB No. 08-144

ROLAND BURROWS,

Claimant-Respondent,

v.

M. C. DEAN AND ZURICH AMERICAN INSURANCE COMPANY,

Employer/Carrier-Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Belva D. Newsome
AHD No. 08-019, OWC No. 609703

Barbara Thompson, Esquire,¹ for the Petitioner

Benjamin T. Boscolo, Esquire, for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL and LESLIE MEEK,² *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Review Panel:

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 250, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

¹ While Jamie L. DeSisto, Esquire, represented Petitioner at the formal hearing, Ms. Thompson filed Petitioner's Application for Review and Memorandum in support thereof.

² Administrative Law Judge Meek is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Issuance No. 09-01 (October 10, 2008) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005). Judge Meek, although appointed to the panel, did not participate in this decision.

OVERVIEW

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on March 18, 2008, the Administrative Law Judge (ALJ) granted Respondent-Claimant's (Respondent's) claim for temporary total disability from December 20, 2006 to the date of the formal hearing and continuing thereafter³ and causally related medical care. Petitioner filed an Application for Review (AFR) on April 17, 2008, seeking review of that Compensation Order.

As grounds for this appeal, Petitioner-Employer (Petitioner) asserts that the ALJ erred (1) in "summarily dismissing" employer's argument that Respondent did not suffer a wage loss "as a result of the [work] injury" that would "otherwise entitle him to disability [benefits]"; (2) failed to make a finding as to whether Petitioner had rebutted the presumption of compensability; (3) by finding Respondent had met his burden of showing that his wage loss was caused by the work injury, and (4) by finding that Respondent had adduced substantial evidence to support the award for temporary total disability.⁴ Petitioner relies upon and cites *Robinson v. District of Columbia Department of Employment Services and Flippo Construction Co., Intervenor*, 824 A.2d 962 (D.C. App. 2003) in support of these arguments.

Respondent opposes this appeal, and argues that termination from employment following a return to work in a modified position does not sever the causal relationship between the work injury and the wage loss sustained following the termination, and cites *Upchurch v. District of Columbia Department of Employment Services and The Washington Post, Intervenor*, 783 A.2d 623 (D.C. App. 2001) in support of his position.

Because the ALJ did not make sufficient findings of fact concerning the circumstances surrounding Respondent's termination from employment, and did not reach conclusions of law concerning whether based upon those facts, Petitioner's defense based upon a claim that the causal relationship between the stipulated work injury and the wage loss from and after Respondent's termination from employment had been severed, the Compensation Order is not supported by substantial evidence

³ The claim for relief included that it was "subject to a credit for unemployment compensation paid in 2007 and for a period of employment in the fall of 2007". Compensation Order, page 2, "Claim for Relief". The Compensation Order is otherwise silent regarding the referenced unemployment compensation. The re-employment earnings are referred to in the "nature and Extent" portion of the "Discussion", where the ALJ states that "During the period from September 14, 2007 until November 9, 2007, Claimant worked a total of 180 hours out of a possible 280 hours (EE 8). Claimant testified that he could not do the work because he did not work within his restrictions and lifted packages up to 150 to 200 pounds. (HT, p. 74, 105 – 112). Additionally, Claimant lifted packages above his head, and did not rest every ten minutes after two hours. *Id.*". Compensation Order, page 7 – 8. There are no findings concerning what wages Respondent was paid in this attempt at re-employment. Neither party has raised any issue in this appeal relating to the level of those earnings and what effect, if any, they might have had upon the extent of disability during that time frame.

⁴ One issue contested at the formal hearing was whether the current debilitating condition to Respondent's left shoulder is medically causally related to the stipulated work injury of March 7, 2005. The ALJ found that it was. Petitioner does not contest this aspect of the Compensation Order. See, "Memorandum of Points and Authorities in Support of Employer/Carrier's Application for Review", page 1, "The Employer/Carrier do not take issue with that part of the Compensation Order regarding medical causation of the left shoulder".

and is not in accordance with the law. Accordingly we reverse the award of temporary total disability benefits and remand the matter to AHD for further consideration.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is 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 Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, as noted above, Petitioner describes the issues raised in this appeal as whether the ALJ erred (1) in "summarily dismissing" employer's argument that Respondent did not suffer a wage loss "as a result of the [work] injury" that would "otherwise entitle him to disability [benefits]"; (2) failed to make a finding as to whether Petitioner had rebutted the presumption of compensability; (3) by finding Respondent had met his burden of showing that his wage loss was caused by the work injury, and (4) by finding that Respondent had adduced substantial evidence to support the award for temporary total disability.

Each of these issues revolves around Respondent's termination from his modified duty position. In essence, Petitioner asserts that it raised the defense that Petitioner offered and provided suitable modified employment to Respondent, within his physical capacity, at no loss of wages, which employment was subsequently terminated for cause, when Respondent failed a mandatory workplace drug test. That termination, Petitioner argued to the ALJ, constituted a severance of the link between the work injury and the wage loss suffered as a result of the termination. In support of its position that the termination of Respondent, for cause, which is unrelated to effects of the work injury, severs the causal link, Petitioner cites *Robinson, supra*.

Respondent argues that termination from employment following a return to work in a modified position does not sever the causal relationship between the work injury and the wage loss sustained following the termination, and cites *Upchurch, supra*, in support of his position. Respondent argues that *Robinson*, is inapplicable here, because in Respondent's view, *Robinson* is limited to cases involving "personal choices" by a claimant amounting to a "voluntary limitation of income", as opposed to Petitioner's termination of Respondent's employment in this case, which Respondent argues is a "unilateral act" by Petitioner, which under *Upchurch* does not permit Petitioner to avoid payment of ongoing disability benefits.

Review of the Compensation Order yields very little regarding the facts surrounding the termination, including the reasons therefor. The “Findings of Fact” are completely silent on the subject, and the only references to the termination are found in the preliminary portion of the “Discussion” section, preceding subtitled subsections “A. Medical Causal Relationship” and “B. Nature and Extent of Disability”. The ALJ wrote:

As a preliminary matter, Employer argues that termination of Claimant from his light duty position on December 17, 2006, severs the causal relationship between the injury and the wage loss. In *Upchurch* [supra], the court stated “[t]his court can find no authority, from any jurisdiction or legal treatise, which would support the proposition that termination severs the causal link between injury and wage loss. To the contrary, according one of the leading authorities on workers’ compensation law, the ‘misconduct of the employee, whether negligent or willful, unless it takes the form of a deviation from the course of employment, or unless it is of a kind specifically made a defense in the jurisdictions containing such a defense in their statutes.’ *Id.*, at 627, citing 2 ARTHUR LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 32.00 (2001).

The court went on to state, “[s]pecifically, the Act does not provide that the subsequent termination of the employee, whether related or unrelated to the work injury, is a defense for an employer who denies an obligation to pay disability compensation. Rather, the Act creates a presumption that an employee’s injury is compensable upon a showing by substantial evidence of a disability and a work-related event or condition which had the potential to cause such a disability.” *Id.*

Compensation Order, page 4. The ALJ appears to have concluded that regardless of the circumstances surrounding the termination, there are no circumstances in which such a termination could possibly affect the outcome of the claim, under the specific language from *Upchurch*, including the reliance by the court upon the cited Larson text.

However, as Petitioner points out, subsequent to *Upchurch*, the District of Columbia Court of Appeals (DCCA) issued another decision, *Robinson*, supra. The factual scenario and analysis in *Robinson* is given by the court, and we repeat it here:

Petitioner [claimant] was injured on January 24, 2000, while at work for the employer-intervenor (Flippo). After a short absence he was given suitable light-duty work at full wages. On March 22, 2000, however, Flippo discharged him for violation of its employee attendance rules. Petitioner then sought workers’ compensation for the period March 20, 2000, to October 9, 2000, when he began new employment. An ... [ALJ] denied the claim on the ground that during the period for which Petitioner sought compensation, he suffered no wage loss as a result of the injury but instead had “voluntarily limited his income by not abiding by [Flippo’s] rules, which forced [Flippo] to terminate him.” The Director of ... [DOES] affirmed this ruling on appeal.

...

The ALJ found that, although petitioner had been injured on the job, “any wage loss [he incurred] after March 20, 2000 is not due to his work injury” because “suitable light duty employment within his restrictions” – and at his full wages—“was available and offered” to him by Flippo.” Rather, petitioner was terminated by Flippo because of his failure to report to work on February 14, March 15, and March 21, 2000, despite written and oral warnings following the first two non-appearances. Petitioner does not take issue with the ALJ’s finding that Flippo had made suitable light duty work available to him at full pay after his injury and up to the time he was discharged.

...

In this case, the Director applied the *Upchurch* framework correctly, and his conclusion that Flippo had rebutted the presumption of compensability and petitioner had failed to show the necessary causal connection between the injury and wage loss is supported by substantial evidence.

...

That conclusion is in keeping with the principle stated in 4 LARSON’S WORKERS’ COMPENSATION, § 84.04 [1], at 84-14 (2002) that “if the record shows no more than that the employee, having resumed regular employment after the injury, was fired for misconduct, with the impairment playing no role in the discharge, it will not support a finding of compensable disability.”

Robinson, supra, at 963 – 965. Notably, the court added a footnote at the end the above quoted passage, which reads as follows: “By ‘regular employment’, we assume LARSON would mean suitable light-duty employment as well.” *Id.*, at 965, footnote 4.

If one simply substitutes “failed a mandatory drug test” for the references to non-attendance in *Robinson*, one would have facts functionally identical to those on the record before us, or at least as Petitioner alleged them to be at the formal hearing.

Respondent understandably relies upon *Upchurch*, as did the ALJ. Yet, while the *Upchurch* ruling raises almost as many questions in this area as it answers⁵, the more recent and fundamentally

⁵ Had *Robinson* been decided prior to *Upchurch*, the *Upchurch* court’s search for authority to support the proposition that “termination severs the causal link between injury and wage loss” would presumably have not been futile, since that is precisely what *Robinson* does, by affirming the Director’s finding that the presumption of such causal relationship was rebutted by the termination for cause unrelated to the effects of the work injury. Curiously, the *Upchurch* court’s discussion immediately following its discussion of said futility deals with Prof. Larson’s treatment of a fundamentally unrelated issue in workers’ compensation law, that being the effect (or more precisely, the lack of effect) of “misconduct” on the initial question of compensability of a claim. Neither this case, nor *Robinson*, nor *Upchurch*, presents that issue, and why the court chose to discuss it in *Upchurch* is not apparent. Regardless, the question of whether “misconduct” or other “deviations” from employment remove an injury from the ambit of the compensation statute when considering whether an injury is compensable, has nothing whatever to do with whether termination from employment for misconduct severs the causal relationship between the wages no longer being earned, and the injury.

clearer *Robinson* answers the question that this case presents, at least potentially, depending upon the facts surrounding the termination. That question is whether termination from a light duty or modified, suitable alternative position, for reasons unrelated to the effects of the work injury, severs the causal relationship between the work injury and the wage loss resulting from that termination. The answer is that it does.

The ALJ's ruling assumes the contrary, and is therefore not in accordance with the law. Further, we must disagree with Respondent's point that the *Robinson* decision interposes some "personal choice" issues into the equation as some type of special test within the "voluntary limitation of income" realm of the Act. First, the court in *Robinson* did not use the "voluntary limitation" theory as the basis of its ruling. Rather, the language involving voluntary limitation of income was the court's description of the terminology or framework employed by the ALJ in the Compensation Order which was the subject of that appeal. Second, and more fundamentally, distinctions between a "personal choice" to engage in excessive absenteeism (the basis of Mr. Robinson's termination) and a "personal choice" to violate an established workplace drug policy (the alleged basis for the termination here) are difficult if not impossible to make, and in any event are not found in the Act.

In order to conform to the requirements of the District of Columbia Administrative Procedures Act (DCAPA), D.C. Code § 2-501 *et seq.* (2006), for each administrative decision in a contested case, (1) the agency's decision must state findings of fact on each material, contested factual issue, (2) those findings must be based on substantial evidence, and (3) the conclusions of law must follow rationally from the findings. *Perkins v. District of Columbia Department of Employment Services*, 482 A.2d 401, 402 (D.C. 1984); D.C. Code § 2-509. Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate body is not permitted to make its own finding on the issue; it must remand for the proper factual finding. See *Jimenez v. District of Columbia Department of Employment Services*, 701 A.2d 837, 838-840 (D.C. 1997). As the Court of Appeals explained in *King v. District of Columbia Department of Employment Services*, 742 A.2d 460, 465 (D.C. 1999), basic findings of fact on all material issues are required, for "[o]nly then can this court determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law." See also *Sturgis v. District of Columbia Department of Employment Services*, 629 A.2d 547 (D.C. 1993). The CRB is no less constrained in its review of compensation orders issued by AHD. See *WMATA v. District of Columbia Department of Employment Services (Juni Browne, Intervenor)*, 926 A.2d 140 (D.C. 2007). *Accord, Hines v. Washington Metropolitan Area Transit Authority*, CRB No. 07-004, AHD No. 98-263D (December 22, 2006). Thus, where an ALJ fails to make express findings on all contested issues of material fact, the CRB can no more "fill the gap" by making its own findings from the record than can the Court of Appeals upon review of a final agency decision, but must remand the case to permit the ALJ to make the necessary findings. See *Mack v. District of Columbia Department of Employment Services*, 651 A.2d 804, 806 (D.C. 1994).

The *Upchurch* court's blanket statement that "termination of petitioner as a basis for denying benefits [...] would not withstand judicial scrutiny as it would find no support in the District of Columbia Workers' Compensation Act" cites as its support a general reference to the entire Act, and no specific part or sub-part thereof, making difficult the task of determining which part of the Act the court was referring to.

The record potentially supports Petitioner's theory of the case, but the Compensation Order makes insufficient findings for us to deem the matter as settled factually. It is evident that the ALJ found that Respondent had been terminated, and the Compensation Order is at least suggestive that the ALJ would have or might have found that the reason for that termination is the failed drug test, and that until that termination occurred Respondent was employed in a suitable light duty position at no wage loss, as discussed in *Robinson*. We can not, however, make such factual determinations ourselves, given that fact finding is uniquely within the province of the ALJ.

However, the failure of the ALJ to make sufficient factual findings upon this question renders the Compensation Order insufficiently supported by substantial evidence, and requires reversal and a remand for further findings of fact and conclusions of law regarding this matter. Specifically, the ALJ must determine whether Petitioner did offer and make available to Respondent suitable alternative employment commensurate with Respondent's physical and other vocational capacities. If so, the ALJ must determine whether that alternative employment would have remained available to Respondent throughout the time period for which the benefits are claimed, whether it would have resulted in Respondent earning less, the same, or more than his pre-injury average weekly wage, and whether the termination from that alternative employment was or was not result of the effects of the work injury.⁶

Upon making these findings of fact, the ALJ is to make such conclusions of law as are appropriate, in light of the law as established by the court in *Robinson* as well as in *Upchurch*, and in accordance with this Decision and Remand Order.

Finally, we note that Respondent's argument that "public policy" ought to preclude denying benefits where the subsequent termination from light duty modified employment is "without cause" is inapt. There is no suggestion in this case that Petitioner's termination of Respondent was "without cause".

CONCLUSION

The Compensation Order of March 18, 2008 is not supported by substantial evidence in the record and is not in accordance with the law.

⁶ Of course, it is not necessary for the ALJ to decide whether the termination was ultimately justified, in the sense that a determination as to whether or not Respondent did or did not use drugs that Petitioner bans in its workplace is not needed. Although Respondent implies in its opposition filings herein that the drug test results were inaccurate, there is no claim in this case that the termination was retaliatory under D.C. Code § 32-1542, and this agency is not the proper forum for determining the accuracy or validity of such workplace drug testing policies and procedures.

ORDER

The Compensation Order of March 18, 2008 is reversed, and the matter is remanded to AHD for further findings of fact and conclusions of law in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

January 28, 2009

DATE