

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA MARÍA MALLORY  
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 13-034**

**MARLAN V. TOLLIVER,  
Claimant-Petitioner/Cross-Respondent,**

**v.**

**WILLIAM C. SMITH CO., INC. and COMPANION PROPERTY & CASUALTY,  
Employer/Insurer-Respondent/Cross-Petitioner.**

Appeal from a February 22, 2013 Compensation Order By  
Administrative Law Judge Leslie A. Meek  
AHD No. 08-430B, OWC No. 649188

Matthew Pepper, Esquire for the Petitioner/Cross-Respondent  
Cheryl D. Hale, Esquire for the Respondent/Cross-Petitioner

Before MELISSA LIN JONES, HENRY W. MCCOY, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

On February 12, 2008, Mr. Marlan V. Tolliver worked for William C. Smith Co., Inc. as a building engineer. On that date, he stepped on a carpet tack and injured his left foot.

Mr. Tolliver suffers from pre-existing diabetes, and as a result of compensating for his left foot injury, he began experiencing problems with his right foot. William C. Smith Co., Inc. denied the compensability of Mr. Tolliver's right foot condition, and the parties proceeded to a formal hearing on the issues of medical causal relationship between Mr. Tolliver's right foot condition and his work-related accident as well as the nature and extent of Mr. Tolliver's disability, if any.

On February 22, 2013, an administrative law judge ("ALJ") ruled that Mr. Tolliver had invoked the presumption of compensability and that William C. Smith Co., Inc. had not rebutted the presumption of compensability. As a result, Mr. Tolliver's right foot injury is compensable;

however, the ALJ also ruled that Mr. Tolliver had not proven any entitlement to temporary total disability benefits. Both parties appealed the February 22, 2013 Compensation Order.

On appeal as petitioner and cross-respondent, Mr. Tolliver asserts he is entitled to temporary total disability benefits because he has not reached maximum medical improvement, he is unable to perform his pre-injury employment, and he has not been offered suitable, alternative employment. Mr. Tolliver does not appeal the ruling that his right foot injury is causally related to his work-related accident because William C. Smith Co., Inc. failed to rebut the presumption of compensability through Dr. Willie E. Thompson's independent medical examination report or Dr. Brian Phillip Bach's testimony.

As respondent and cross-petitioner, William C. Smith & Co., Inc. contends a medical causal relationship between Mr. Tolliver's right foot condition and his work-related accident is not supported by the evidence because Mr. Tolliver failed to make some initial demonstration of an injury and a work-related event that has the potential of resulting in or contributing to the right foot condition that arose years after his work-related accident. Even if Mr. Tolliver did present sufficient evidence to invoke the presumption of compensability, William C. Smith & Co., Inc. argues Dr. Bach's deposition and medical records are sufficient to sever the connection between the right foot injury and the compensable work accident. Finally, William C. Smith & Co., Inc. argues Mr. Tolliver did not prove entitlement to wage loss benefits.

#### ISSUES ON APPEAL

1. Did Mr. Tolliver present sufficient evidence to invoke the presumption of compensability?
2. Did William C. Smith Co., Inc. present sufficient evidence to rebut the presumption of compensability?
3. Does the February 22, 2013 Compensation Order adequately analyze Mr. Tolliver's entitlement to temporary total disability benefits?
4. Is the February 22, 2013 Compensation Order supported by substantial evidence in the record and in accordance with applicable law?

#### ANALYSIS<sup>1</sup>

Pursuant to §32-1521(1) of the Act, a claimant may be entitled to a presumption of compensability

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<sup>1</sup> The scope of review by the Compensation Review Board ("CRB") is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

(“Presumption”);<sup>2</sup> “once an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act.”<sup>3</sup> William C. Smith & Co., Inc. argues Mr. Tolliver did not present evidence sufficient to invoke the presumption of compensability:

Claimant presented little evidence of medical causal relationship. The ALJ notes in the Order several times that Claimant’s medial [*sic*] expert, Dr. Bach, fails to relate the right foot condition to Claimant’s work injury under the overcompensation theory that Claimant argued (Compensation Order at page 2, 3, 4). Therefore, the ALJ relied solely on the argument of Claimant’s counsel, namely that the diabetic ulcer on Claimant’s right foot was caused by Claimant overcompensating on that foot while his left foot was in the healing process, to conclude that Claimant made is [*sic*] initial demonstration in order to shift the burden to the Employer.<sup>[4]</sup>

Contrary to William C. Smith & Co., Inc.’s argument, the ALJ relied on evidence not argument to invoke the Presumption:

Dr. Bach’s testimony was taken via deposition on June 29, 2012 and the doctor failed to relate the causation of Claimant’s right foot condition to his February 12, 2008 work injury. During that deposition the following exchange took place:

Q. Okay. In the field of podiatric medicine, can a person develop a medical condition from over compensation or shifting all of your weight from one side of the body to the other side of the body?

A. The only condition that would be is at the side that you’re putting all the pressure on gets more irritated.

Q. Okay. Can, or strike that. Could Mr. Tolliver have irritated his right foot either through the socks that he wears or the shoes that he wore and bore more weight because of the left foot?

A. He could.

Q. Can that irritation or those conditions cause scratching, scraping, those sorts of things?

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<sup>2</sup> Section 32-1521(1) of the Act states, “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.”

<sup>3</sup> *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

<sup>4</sup> Memorandum of Points and Authorities in Support of Employer/Carrier’s Application for Review, unnumbered pp. 3-4.

A. That would be the irritation.

Q. All right. And that irritation lead to the infection process such as what Mr. Tolliver presented to you in Southern Maryland Hospital?

A. If-because he's neuropathic and he doesn't feel it if it rubs and scrapes. And if he gets an opened wound it'll get infected.

Q. Is that an opinion that you can hold within a reasonable degree of medical probability?

A. We can say that is a possibility. Yep.

Q. Are there other possibilities?

A. Yeah. I can't tell you which one is correct; I can just tell you those are possibilities.

(CE 1, pp. 24-25).<sup>[5]</sup>

Combined with Mr. Tolliver's credible testimony, the ALJ properly ruled

Claimant has presented evidence of an injury and a work-place event that has the *potential* of causing Claimant's current condition. The workplace injury is Claimant's left foot injury. Evidence that the work place injury has the potential of causing Claimant's right foot injury was presented in CE 1. Dr. Bach testified in his deposition, it was *possible* that Claimant could have irritated his right foot by bearing more weight on it due to the condition of his left foot. (CE 1, p. 24).

The presumption in the instant matter has been triggered.<sup>[6]</sup>

The threshold for invoking the Presumption is some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.<sup>7</sup> Dr. Bach's testimony satisfies the first prong, and Mr. Tolliver's testimony satisfies the second prong. Moreover, Mr. Tolliver's left foot injury was accepted as compensable, and the Presumption still applies when a claimant files for additional benefits due to new symptoms allegedly stemming from the work-related injury.<sup>8</sup>

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<sup>5</sup> *Tolliver v. William C. Smith Co., Inc.*, AHD No. 08-430B, OWC No. 649188 (February 22, 2013), pp. 3-4.

<sup>6</sup> *Id.* at p. 5.

<sup>7</sup> *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

<sup>8</sup> *Short v. DOES*, 723 A.2d 845, 850 (D.C. 1998), citing *Whittaker v. DOES*, 668 A.2d 844, 846-847.

Once the Presumption was invoked, it was William C. Smith Co., Inc.'s burden to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."<sup>9</sup> To rebut the Presumption, William C. Smith Co., Inc. relied upon Dr. Bach's testimony:

Q: And would ischemic changes be related to Mr. Tolliver's diabetes?

A: They can be related to a lot of things.

Q: Okay.

A: Diabetes is just one of them. On the right foot, it could be. On the left foot, it could be also related to the infection process that's there.

Q: Okay. But again, to your recollection, Mr. Tolliver, that you observed, never had a problem with his right foot until you saw him in the early fall of 2001, is that –

A: As I recall, there wasn't anything foot-wise that we were real concerned about.

Q: Okay. When Mr. Peffer was questioning you about the possible causes of his right foot problems, he stated that the irritation of his right foot, which could've been due to being more weight-bearing on his right foot for a period of time was only a possible cause of this infection he now has; is that correct?

A: That's one of the possible causes.

Q: What other possible causes could there be?

A: It could be diabetes, peripheral vascular disease, neuropathy, setting you up for it all.

Q: Okay. So he could've been – if he had no problems with this left foot at all, this still could've happened to his right foot; is that what you're saying?

A: It's possible that it just happened.

Q: Okay.

A: And it's also possible that he had more pressure on it because he had an irritation and it broke. And then, because of all the other problems, the diabetes, the smoking, it broke down and it got infected.

Q: Right.

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<sup>9</sup> *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

A: So which one is correct?

Q: Right. It is also possible he could have cut his right foot?

A: It's possible.

Q: And you don't have any opinion with any degree of medical certainty as to which factor caused his current condition of his right foot; is that correct?

A: There's [sic] so many causes that are out there. I just can tell you what I saw when I got there.

Ms. Hale: Okay. That's all I have.

By Mr. Peffer:

Q: Doctor, just following that up, do you have an opinion within a reasonable degree of medical certainty as to whether or not the increased weight bearing could've contributed to the condition for which you saw Mr. Tolliver in the hospital, Southern Maryland Hospital?

A: That's a possibility.<sup>[10]</sup>

Dr. Bach's opinion outlines other possible causes for Mr. Tolliver's right foot injury, but it does not sever the potential connection between the on-the-job accident and Mr. Tolliver's overcompensating which Dr. Bach opined could have caused Mr. Tolliver's right foot injury. A vague and nebulous opinion that many things can cause an injury is not sufficiently specific and comprehensive enough to sever the potential connection and rebut the Presumption.<sup>11</sup> Consequently, as a matter of law, Dr. Bach's opinion is not specific and comprehensive enough to rebut the Presumption, and the ALJ's ruling that "Employer presented no evidence to rebut the presumption that Claimant's claim for workers' compensation benefits comes within the provision of the Act"<sup>12</sup> is supported by substantial evidence and is in accordance with the law.

Regarding the nature and extent of Mr. Tolliver's disability, he argues his present condition renders him unable to perform the duties of his pre-injury employment, and as a result, he is entitled to temporary total disability benefits. Specifically, Mr. Tolliver asserts Dr. Bach never released him to pre-injury employment because of his left foot injury:

#### Opening Statement on Behalf of Claimant

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<sup>10</sup> Claimant's Exhibit 1, pp. 42-44.

<sup>11</sup> *Holder v. Washington Metropolitan Area Transit Authority*, Dir. Dkt. 99-90, H&AS No. 99-342, OWC No. 507781 (November 14, 2000).

<sup>12</sup> *Tolliver, supra*, at p. 5.

Mr. Pepper: Your Honor, as the joint pre-hearing statement indicates, the two issues for adjudication here is [*sic*] the medical causal relationship of the right foot, as well as the nature and extent of Mr. Tolliver's disability, if any, and I'd like to start by telling you a little bit about what you're going to hear from Mr. Tolliver, as a person, and then tell you, Your Honor, what Mr. Tolliver believes, when you look at the evidence, that really the sole issue is, that you're actually going to have to decide, because Mr. Tolliver believes that he has been and continues to be temporarily totally disabled, because of his left foot, and he'll be relying upon the evidence of Dr. Bach, as well as his testimony.

Judge Meek: One second.

Mr. Pepper: Yes, Your Honor.

Judge Meek: I thought you told me you were seeking TTD for the right foot.

Mr. Pepper: No, we're seeking temporary –

Judge Meek: It's the left foot?

Mr. Pepper: -- and total disability benefits, Your Honor.

Judge Meek: Okay, hold on.

Mr. Pepper: And we're also seeking medical care and treatment for the right foot.

Judge Meek: Got you, I'm sorry.

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Mr. Pepper: Dr. Bach, his treating physician, has never released him to his pre-injury employment as a maintenance engineer, which is a fancy title.<sup>[13]</sup>

Although the ALJ addressed Mr. Tolliver's work capacity as a result of his right foot condition, the narrow findings of fact do not lead to the broad conclusion. The ALJ determined

Claimant's evidence fails to show, the current medical condition of his right foot prevents him from working. Dr. Bach's medical reports do not direct Claimant to remain off from work. At hearing, Claimant testified he was no longer able to work after April 21, 2008 but does not attribute this inability to work to his foot ailments. (TR p. 46). At hearing Claimant was asked, ". . . do you recall Dr. Bach ever releasing you to return to work?" Claimant answered, "no." The problem with this verbal exchange is that there was no foundation laid to

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<sup>13</sup> Hearing Transcript pp. 18-20.

establish the fact that Dr. Bach ever directed Claimant to remain off from work due to his foot ailments.<sup>[14]</sup>

The start of this analysis focuses on Mr. Tolliver's right foot injury and is accurate; however, the conclusion that Dr. Bach never directed Mr. Tolliver to remain off from work due to his bilateral foot ailments is not accurate. At his deposition, the following exchange took place between Dr. Bach and Mr. Pepper:

Q: And when I review your medical records in your file and the ones that I have, have you to date released Mr. Tolliver back to his pre-injury employment as it relates to his left foot?

A: No.<sup>[15]</sup>

We do not hold that this is the only reference in the record to Mr. Tolliver's work capacity, but it is evidence in the record which must be addressed when reaching a conclusion regarding Mr. Tolliver's entitlement to temporary total disability benefits. For this reason, we must remand this matter.

#### CONCLUSION AND ORDER

The presumption of compensability properly was invoked, and William C. Smith Co., Inc. failed to present evidence to rebut it. Thus, the ruling that Mr. Tolliver's right foot injury is medically causally related to his work-related accident is **AFFIRMED**; however, the Compensation Order fails to adequately analyze Mr. Tolliver's entitlement to temporary total disability benefits in that the conclusion that Dr. Bach never directed Mr. Tolliver to remain off of work due to his foot ailments is not accurate. Consequently, the portion of the February 22, 2013 Compensation Order denying Mr. Tolliver temporary total disability benefits is not supported by substantial evidence in the record, is not in accordance with applicable law, and is **VACATED**. This matter is remanded for further consideration of the nature and extent of Mr. Tolliver's disability.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES  
*Administrative Appeals Judge*

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May 17, 2013  
DATE

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<sup>14</sup> *Tolliver, supra*, pp. 5-6.

<sup>15</sup> Claimant's Exhibit 1, p. 17.