GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-106

EBONY ACTY,

Claimant–Petitioner,

v.

WASHINGTON HOME AND HOSPICE AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer and Insurer–Respondent.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2012 APR 19 AM 9 00

Appeal from a Compensation Order of
Administrative Law Judge Gerald D. Roberson
AHD No. 11-402, OWC No. 656979

Michael J. Kitzman, Esquire, for the Petitioner

Christopher R. Costabile, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[1] LAWRENCE D. TARR, AND MELISSA LIN JONES, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board.

MELISSA LIN JONES, *concurring in part and dissenting in part.*

DECISION AND REMAND ORDER

BACKGROUND

Ebony Acty (Petitioner) was employed by Washington Home & Hospice (Respondent) as a Certified Nursing Assistant (CNA). On June 7, 2008, prior to becoming employed by Respondent, Petitioner had sustained a back injury while also working as a CNA. After becoming employed by Respondent, she injured her low back on January 29, 2009 while assisting transfer of a patient to the bed. She claimed and received temporary total disability benefits for a period of time not specified in the record before us, which were terminated at some point, also unspecified.

[1] Judge Russell was appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance Nos. 11-02 (June 23, 2011).

Petitioner was deemed by her treating physician to be unable to lift more than twenty pounds, which limitation would prevent her from performing her pre-injury job. While Petitioner was receiving temporary total disability benefits, Respondent offered Petitioner a different position which in the offering document is called "Modified/Transitional Work", and which was stated in that document to commence July 27, 2009 and terminate August 28, 2009. Petitioner declined to take the position, stating in her written response that it would conflict with her class schedule.

Sometime thereafter Respondent terminated Petitioner's temporary total disability benefits.

The dispute over her entitlement to said benefits was presented to an Administrative Law Judge (ALJ) in the hearings section of this Agency as provided for under Act. A formal hearing was convened to resolve the dispute on August 31, 2011, and on September 20, 2011, the ALJ issued a Compensation Order (CO) in which he denied Petitioner's claim for temporary total disability from March 18, 2010 through the date of the formal hearing and continuing thereafter. Petitioner filed a timely appeal of the CO with the Compensation Review Board, (CRB) to which Respondent filed an opposition.

ISSUES PRESENTED

1. Did the ALJ impermissibly deny the claim when the parties had stipulated to medical causal relationship?
2. Was the denial of the claim on the grounds that Petitioner had resigned her employment supported by substantial evidence?

DISCUSSION

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, 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 (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. "Substantial evidence" is such relevant evidence as a reasonable mind might accept to support a conclusion. *Canlas v. DOES*, 723 A.2d 1210 (1999).

CAUSAL RELATIONSHIP

Petitioner argues that the ALJ's finding that she failed to adduce evidence of a disability from the injury under consideration was improper, because the parties had stipulated to "causal relationship".

The problem in this case arose because neither the parties nor the ALJ were explicitly clear in entering into the stipulations regarding causal relationship. There are two distinct aspects to "causal

relationship", one being "legal causation", the other being "medical causation". As the CRB has stated before:

> For clarity's sake, we remind those concerned that, as a general rule, questions of "arising out of and occurring in the course of" employment deal with legal causation, i.e., the question of whether a particular incident which caused (or is alleged to have caused) an injury occurred under circumstances making the injury a compensable event under the Act. "Medical causal relationship", on the other hand, presents the question of whether a given condition for which medical or disability benefits are sought is related to the work injury. It is of course possible that a claimant could sustain an injury that is work related, but that the specific conditions for which he seeks benefits are not, as a medical matter, related to the injury that was sustained. In other words, in this case, having found that an injury occurred on November 10, 2003, and that that injury arose out of and occurred in the course of Petitioner's employment, "legal causation" has been established, leaving the question of whether the complained of conditions (that is, the conditions for which Petitioner seeks benefits) are medically causally related to that November 10, 2003 injury.

Nettleford v. Cambridge Management, et al., CRB No. 06-055 (August 1, 2006). The distinction between medical and legal causation has been noted in this jurisdiction for a long time. See, *Dailey v. 3M*, H&AS No. 85-259 (Decision of the Director May 19, 1988); *Avans v. Potomac Job Corps, et al.*, Dir. Dkt. 88-35 (May 30, 1995).

Although we recognize that the ALJ was correct when he stated that Petitioner's evidence assigned the disability to a different date of injury, and thus logically speaking there was no medical evidence presented which assigned any disability to the instant injury, review of the hearing transcript (HT) makes clear that neither party identified medical causal relationship as an issue prior to the formal hearing. Here is the discussion of stipulations and issues as is contained in HT:

> JUDGE ROBERSON: Thank you. Good morning. Prior to opening the record, I received a joint pre-hearing statement from the parties which contained the stipulations, issues, and claim for relief. It is my understanding that the parties have entered into the following stipulations.
>
> There was an employer/employee relationship, there's jurisdiction pursuant to Section 32-1503 of the Act, the Claimant sustained an accidental injury or [sic] January 29th, 2009 which is causally related to her employment, Claimant provided timely notice [sic] an injury, timely filed a claim, and we have an average weekly wage of $480.00. *As I mentioned before, the only outstanding issue for today's adjudication is nature and extent.*

HT 5 – 6 (emphasis added). Neither party disagreed with the ALJ's description of the dispute as being centered upon the issue of nature and extent of disability. Given that the claim for relief was solely for temporary total disability from March 18, 2010 to the date of the formal hearing and continuing, the only issue presented to the ALJ was whether Petitioner was disabled from

employment (meaning either her pre-injury employment or any available alternative employment).[2] There was no dispute identified prior to the commencement of the formal hearing about whether, if Petitioner had some physical/medical incapacity from work, it was the result of the stipulated work injury.

That issue appears to have arisen later when, during the course of the hearing, Petitioner's counsel objected to Respondent's cross examination concerning the fact that the medical report from Petitioner's treating physician attributes Petitioner's disability to the earlier date of injury, June 7, 2008. Although the ALJ overruled the objection, the following colloquy is instructive:

> Q [by Respondent's Counsel Christopher Costabile to Petitioner] But there's no reference in the January 2011 report to this accident?
>
> MR. KITZMAN [Petitioner's counsel]: Your Honor, objection.
>
> JUDGE ROBERSON: I mean—
>
> MR. KITZMAN: The medical causal relationship was stipulated to, Your Honor.
>
> MR. COSTABILE: Well, medical causal relationship was stipulated as to the fact that she had a back injury in 2009 but not that every back injury she ever might have had was related to the current disability. Especially when it doesn't appear that she, that her doctors may not have been aware of the prior accident.

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[2] One of Respondent's defenses to this claim was that Petitioner's claim is now barred due to her having "resigned" from employment by declining to accept an offer of temporary modified employment in order to continue her studies. As will be discussed later, this defense is a defense of voluntary limitation of income, a subset of nature and extent of disability. Respondent conceded that Petitioner "has limitation on her ability to do work but no total disability." HT 11. We note parenthetically that Respondent's formulation of its position suggests a misapprehension what constitutes "total disability" under the Act, in that "total disability" claims must be assessed within the framework established in *Logan v. DOES*, 805 A.2d 237 (2002). When considering the issue of nature and extent of disability within the context of a claim for wage loss benefits, the District of Columbia Court (DCCA) has laid out a burden shifting analysis that must be followed.

Under *Logan*, a *prima facie* case of total disability is made when a claimant presents evidence that he or she can not perform the duties of the job held at the time of the injury, shifting to the employer the obligation to refute that evidence, either by showing that the claimant can in fact perform the pre-injury job, that it offered suitable modified employment to the claimant which the claimant refused to accept, or that there exist jobs in the relevant labor market, considering the claimant's age, education, experience and physical capacity, for which the claimant could compete and for which if he applied he would likely obtain. Such a showing by the employer shifts the burden back to the claimant to overcome the employer's evidence by, for example, attacking the suitability of the proffered modified employment, the suitability of the identified alternate jobs, or by showing that the supposedly available other jobs are not actually available. This last showing could be by presenting labor market evidence contradicting that of the employer, or showing a diligent yet unsuccessful job search. See, *Id.*, at 243.

Because the ALJ denied the claim on other grounds, he never reached the stage where *Logan* analysis would be required. Respondent also argued that Petitioner's entitlement to further temporary total disability benefits is extinguished by having received scheduled benefits for her legs. While this claim also involves an alleged back injury in addition to the legs, we express no view as to the merits of Respondent's argument. On remand, the ALJ will be in a position to consider these issues that heretofore have not been addressed.

JUDGE ROBERSON: But, I mean, what's your claim today though. Are you claiming that her current status is not causally related to the January 29th, 2009 accident?

[MR. COSTABILE]: I'm claiming that her, well, first our argument is legal argument that because she declined light-duty work in 2009 she's not entitled to temporary total disability benefits. But aside from that – given that she's only, that she's got restrictions. But aside from that it appears from the evidence that the Claimant has introduced that, at least, as of January of 2011, the restrictions that that doctor is talking about do not support a claim that the 2009 accident caused the disability.
The only history in that report is of a 2008 accident. So I'm just saying, I'm pointing out that the evidence that's been put before Your Honor, combined with the explanation from the Claimant that she did have a June 2008 accident supports that, at least, supports the argument that—

JUDGE ROBERSON: Okay. All right. I'll overrule it just on the basis of—

MR. Costabile: Okay.

JUDGE ROBERSON: -- the medical history but we're not going to review the, any terms of medical causation.

HT 26 – 28.

From this somewhat confusing colloquy it seems that the ALJ recognized that Respondent was attempting to inject medical causation into the case, and that while the ALJ would permit cross examination about the history Petitioner gave to the treating physician for *some* purpose, he would not consider it in connection with medical causal relationship. Injecting medical causal relationship into the case for the first time during cross examination of Petitioner, absent unreasonable and unforeseeable surprise, is violative of her procedural rights. If on remand the ALJ cares to permit Respondent to file a motion to re-open the record to litigate medical causal relationship based upon some good cause for not having raised it prior thereto, the ALJ is free to consider such request. However, the ALJ's initial inclination not to permit the matter to be injected at such a late stage was correct.

Our dissenting colleague states: "In other words, Ms. Acty, in fact, was injured at work on January 29, 2009; however, the parties disputed the nature and extent of the disability resulting from that injury"---implying that this case presented two issues for determination: (1) the nature and extent of the disability (2) resulting from [the stipulated] injury.

The record does not support this characterization. The parties specifically stated that there only was one issue: the nature and extent of the claimant's disability. Not only does the hearing transcript make clear that this is a one-issue case, the stipulation form identifies medical causal relationship as being among the matters to which the parties stipulated.

Moreover, the dissent misstates our decision by saying "The majority equates a stipulation to an accidental injury arising out of and in the course of employment with a stipulation to the compensability of a claim."

The employer stipulated to the medical causal relationship of the claimant's injuries to the accident with this employer. By stipulating to "medical causal relationship" in a case where the contest was whether a claimant is voluntarily declining to perform a proffered position, the dispute centers on the proffered employment, including its availability and its suitability, not whether its unavailability or unsuitability is the result of (also known as "medically caused by") the work injury.

Petitioner's Refusal of Temporary Modified Employment

The ALJ denied the claim on the alternative ground that Petitioner had declined to accept a modified job, and that in so declining she effectively resigned. Thus, he reasoned, relying upon *Powers v. DOES*, 566 A.2d 1068 (1989), Petitioner was not entitled to receive any further disability compensation. We disagree.

It appears to be undisputed that on or about July 27, 2009, Petitioner was offered a modified position which she refused, and that her reasons for the refusal were that the position conflicted with school attendance in coursework to obtain a certificate as a Medical Assistant. *See*, EE 1. She testified that her classes continued on a quarter-by-quarter basis and concluded the following June, and in response to Respondent's question on cross-examination that "So, you wouldn't have been available for any kind of work during the hours that you were going to school until after 2010; is that right?" she answered "Right". HT 24 – 25.

However, Respondent's offer of modified employment was characterized as "Modified/Transitional work on [to begin] 7-27-09 ending 8-28-09". EE 1. Respondent called no witness to explain this document, or to illuminate any other aspects of Respondent's policies or practices concerning this job or its practices generally, so it must be assumed that the offer of employment was temporary, lasting only until August 28, 2009.

It may be that Respondent has a program in which these temporary offers of modified employment are extended for as long as a claimant has limited capacity for work, or it may be that they expire at the end of their term regardless of whether a claimant has improved sufficiently to return to the pre-injury job, or it may be that they are handled in some other fashion. However, on this record, the only evidence of the availability of continued employment within Petitioner's capacity is EE 1, which in clear and certain terms characterizes the offer as temporary, ending on August 28, 2009.

These facts distinguish this case from *Powers*, wherein the claimant resigned from a permanent modified position in order to take a new, higher paying job elsewhere. When he later quit that job because his work injury made that job uncomfortable as well, he sought re-instatement of temporary total disability benefits on the theory that he still remained unable to perform the pre-injury job. The Court held that under those circumstances, the causal link between the work injury and the wage loss was extinguished. The critical difference between this case and *Powers* is that in *Powers* the claimant resigned from a permanent position, whereas in this case Petitioner was not offered a

permanent position. On this record, the only thing that she declined was temporary employment from July 27, 2009 through August 28, 2009.

Thus, while it is apparent that Petitioner voluntarily limited her income for that period, thereby subjecting her wage loss replacement rate to the reduction (in this case to zero) as set forth in D.C. Code § 32-1508 (5), there is simply no evidence that Petitioner resigned from the pre-injury position from which she was allegedly disabled at the time the temporary position was offered. Further, the period during which Petitioner voluntarily limited her income is not encompassed by the claim for relief. In any event, the determination that Petitioner resigned from her position is unsupported by substantial evidence.

CONCLUSION

The denial of the claim for temporary total disability on the basis that Petitioner failed to present evidence that the instant work injury caused her present disability is not in accordance with the law, in light of the stipulations of the parties and the issues that were identified by the parties as being the matters in dispute.

The finding that Petitioner resigned from her employment thereby terminating entitlement to continuing temporary total disability benefits is not supported by substantial evidence and is not in accordance with the law.

ORDER

The denial of the claim for temporary total disability is vacated and the matter is remanded for further consideration regarding the nature and extent of Petitioner's disability, including any issues that were presented but were not considered due to the denial of the claim on the grounds specified in the CO, with the ALJ retaining the discretion to permit a re-opening of the record as discussed in the aforegoing Decision and Remand Order.

JEFFREY P. RUSSELL
ADMINISTRATIVE APPEALS JUDGE

April 19, 2012
Date

MELISSA LIN JONES, Administrative Appeals Judge, *concurring in part and dissenting in part*:

Certainly, I agree with the majority that "neither the parties nor the ALJ were explicitly clear in entering into the stipulations." Washington Home & Hospice contends that although it stipulated to an accidental injury arising out of and in the course of employment, it did not stipulate that Ms. Acty has any disability as a result of that accidental injury. Ms. Acty contends that by stipulating to causality, Washington Home & Hospice agreed that her physical limitations and restrictions are the result of her January 2009 work-related injury. By a reading of the Compensation Order, the issue of nature and extent arguably could relate to the nature and extent of Ms. Acty's disability attributable to the injury she sustained on Washington Home & Hospice's risk or to Ms. Acty's refusal to return to work on light duty. Consequently, at best, when entering into the stipulation the parties lacked a meeting of the minds; however, even accepting the stipulation as valid, I do not agree with the portion of the majority opinion labeled "Causal Relationship."

At the formal hearing, the parties stipulated "the Claimant sustained an accidental injury or [*sic*] January 29th, 2009 which is causally related to her employment."[3] In other words, Ms. Acty, in fact, was injured at work on January 29, 2009; however, the parties disputed the nature and extent of the disability resulting from that injury.

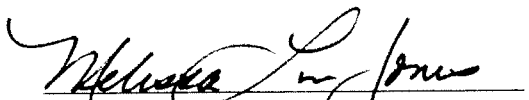
Inherent in an assessment of the nature and extent of a claimant's disability (if any) is that the disability is causally related to the work-related accident and resulting injury. An employer is responsible only for wage loss benefits because a disability is the result of an on-the-job injury that arises out of and in the course of that employment.

[3] Hearing Transcript, p.6.

The majority equates a stipulation to an accidental injury arising out of and in the course of employment with a stipulation to the compensability of a claim. If that were so, by agreeing that an injury took place, an employer would concede the claimant's entitlement to benefits.

It was Ms. Acty's burden to establish both the nature of her disability (whether the disability is temporary or permanent) and the extent of her disability (whether the disability is partial or total). Inherent in that determination is a possible finding that the disability she suffered as a result of the January 2009 injury is nonexistent because it is related to something else.

I concur with the portion of the majority opinion regarding Ms. Acty's refusal of temporary modified employment; however, I cannot agree with the portion of the majority opinion labeled "Causal Relationship."



MELISSA LIN JONES
ADMINISTRATIVE APPEALS JUDGE

APRIL 19, 2012
DATE

APPEAL RIGHTS

Any party aggrieved by this Decision and Order may petition the District of Columbia Court of Appeals for its review. D.C. Court of Appeals Rule 15 (a) requires that the Petition for Review be filed within thirty (30) calendar days of the mailing date shown on the Certificate of Service.

The Court of Appeals is located at 430 E Street, N.W. Washington, D.C. 20001. The Court is open from 8:30 a.m. to 5:00 p.m., Monday through Friday, except legal holidays.

In addition to filing a Petition for Review with the Court of Appeals, you must send a copy of the Petition and any motions, briefs, or other documents that you submit to the court, to the opposing party in this case, and also to:

Todd S. Kim, Solicitor General
Office of the Attorney General
441 4th Street, NW,
Washington, DC 20001

and

Compensation Review Board
Labor Standards Bureau
Department of Employment Services
4058 Minnesota Avenue, NE, Suite 4005
Washington, DC 20019

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CRB NO. 11-106

CERTIFICATE OF SERVICE

I certify that on April 19, 2012 the attached Decision and Order was deposited in the U.S. mail, postage pre-paid, or hand delivered as noted, addressed as follows:

Michael J. Kitzman, Esq. CHASENBOSCOLO INJURY LAWYERS 7852 Walker Drive Suite 300 Greenbelt, MD 20770	Certified Mail; Return Receipt Requested No. 7005 0000 9465 6993
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Clerk, Compensation Review Board