

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

**MURIEL BOWSER**  
MAYOR



**ODIE DONALD II**  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 16-154**

**BRUCE TULLOCH,**  
Claimant-Petitioner,

v.

**SODEXHO, INC., and**  
**GALLAGHER BASSETT SERVICES,**  
Employer/Third-Party Administrator Respondent.

Appeal of an October 18, 2016 Compensation Order on Remand  
by Administrative Law Joan E. Knight.  
AHD No. 12-541, OWC No. 669344

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2017 MAR 9 PM 2 02

(Decided March 9, 2017)

Matthew Pepper for Claimant  
Julie D. Murray for Employer

Before GENNET PURCELL, HEATHER C. LESLIE and LINDA F. JORY, *Administrative Appeals Judges.*

GENNET PURCELL for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Bruce Tulloch ("Claimant") worked for Sodexho ("Employer") as an executive general manager of the Sports division.

The following background is from a Decision and Order issued on April 8, 2015, by the Compensation Review Board ("CRB"):

Claimant had a prior lumbar injury unrelated to his employment and has a complicated medical history associated with a lumbar fusion, pulmonary embolism and Paget Schroeder Syndrome. Claimant worked for Employer as an executive general manager of Employer's sports division. On April 3, 2010, Claimant was working and supervising an event at RFK Stadium. While lifting and moving cases on that date, Claimant injured his back for which he sought

treatment from Michael Hasz, MD, an orthopedic spine surgeon who was Claimant's treating surgeon for previous back problems. Dr. Hasz performed an L2/L3, L4/L4 fusion in January 2006. On April 12, 2010, Dr. Hasz examined claimant and diagnosed an exacerbated disc herniation at L4/L5 and L5/S1 and recommended additional studies and epidural injections.

Claimant was able to return to his work duties with modifications. To prepare for epidural injections, Claimant was taken off of Coumadin, a blood thinner, which Claimant had been taking since 2006. Claimant developed a number of complications including kidney stones, blood clots and kidney infection. An MRI of the brain in March 2011 revealed Claimant had a stroke secondary to atherosclerosis. An emergency carotid endarterectomy was performed. Dr. Hasz performed a follow-up MRI on November 1, 2012, which showed the L4/L5 disc herniation, nerve root compression and degenerative disc disease.

The epidural injections treatment was never performed due to the numerous complicating medical issues. Claimant continues to have back and radicular leg pain from the work injury. Claimant currently suffers from right-sided numbness and is wheelchair bound.

A full evidentiary hearing occurred on January 29, 2013. Claimant sought an award of temporary total disability benefits from December 17, 2010 through the present and continuing, as well as authorization for medical treatment and payment of all causally related medical expenses.

An administrative law judge (ALJ) issued a Compensation Order (CO) on October 29, 2014. The ALJ concluded the stroke Claimant suffered following the work injury are not causally related to the April 3, 2010 work injury. The ALJ further found Claimant has been temporarily and totally disabled due to the untreated lumbar injury, since December 17, 2010 and granted Claimant's claim in part.

*Tulloch v. Sodexho*, CRB No. 14-137 (April 8, 2015).

Employer appealed the Compensation Order ("CO") to the CRB and on April 8, 2015, the CRB issued a Decision and Order affirming the CO. *Tulloch v. Sodexho*, CRB No. 14-137 (April 8, 2015). Employer then appealed the CRB's decision and order to the District of Columbia Court of Appeals ("DCCA"). On July 29, 2016, the DCCA affirmed in part and remanded in part, the CRB's Decision and Order holding that Claimant was disabled, and unable to return to work due to his back related injury. With regard to its remand, the DCCA noted that the record was unclear why the ALJ concluded that the Claimant was entitled to benefits commencing as of December 17, 2010. The DCCA also questioned whether Claimant was entitled to receive benefits if he suffered from two injuries, one work-related, and one not work-related and whether Employer preserved this issue for review on appeal. Accordingly, the matter was remanded to the CRB for clarification on these specific issues. *Sodexho, Inc. et. al., v. DOES*, No. 15-AA-491 Mem. Op. & J. (D.C. July 29, 2016).

The following background is from the September 19, 2016 Order on Remand issued by the CRB to Administrative Hearings Division (“AHD”):

The DCCA remanded this case for two reasons. The DCCA instructed the CRB to remand this case back to the administrative law judge (“ALJ”) to make additional findings on the issue of the appropriate date for the commencement of Claimant’s benefits. The DCCA also instructed the CRB to address whether Employer preserved the legal issue of whether it is appropriate for a claimant who has suffered two disabling injuries, one work related and one not, to receive disability benefits, and if that issue was preserved, may such claimant receive disability benefits.

*Tulloch v. Sodexho*, CRB No. 14-137(R) (September 19, 2016).t 1.

On October 28, 2016, AHD issued a Compensation Order on Remand (“COR”) concluding that the appropriate date of commencement of Claimant’s temporary total disability (“TTD”) benefits was December 17, 2012. *Tulloch v. Sodexho*, AHD No. 12-541 (October 28, 2016).

Claimant timely appealed the COR to the CRB by filing Claimant’s Application for Review (“Claimant’s Brief”). In his appeal Claimant asserts that in finding that the commencement date of his benefits was December 17, 2012, the ALJ failed to consider record evidence of Claimant’s back pain prior to that date, and as such, the COR is not based on substantial evidence in the record and must be reversed. Claimant also asserts that he is entitled to TTD benefits for his compensable injury notwithstanding his unrelated disabling condition.

Employer opposed the appeal by filing Employer’s Opposition to Claimant’s Application for Review (“Employer’s Brief”). In its opposition, Employer asserts the COR’s conclusions are supported by substantial evidence in the record, is in accordance with prevailing law and should be affirmed. Employer also argues it has preserved for review on appeal, the question of Claimant’s entitlement to TTD benefits given his multiple disabilities. Employer’s Brief at 10.

#### ANALYSIS

Claimant first argues that the COR did not fully review or discuss Dr. Hasz’s December 17, 2012 medical report which indicates that his disability related to the compensable work injury began in November of 2010, when he suffered a painful flare-up of his back.

Specifically Claimant asserts:

The Compensation Order on Remand, upon deciding that Mr. Tulloch’s disability began on December 17, 2012, did not address the totality of Dr. Hasz’ medical report. While Dr. Hasz did note on that date Mr. Tulloch could not work, the medical report likewise discussed that in November of 2010 he suffered a “flare up of back pain” that required both an emergency room visit and a heavy opioid pain medication, Dilaudid in order to treat. This element of Dr. Hasz’ medical report indicates that Mr. Tulloch’s disability began in November of 2010, and was

unaddressed by the Compensation Order on Remand. *See Darden*, 911 A.2d at 416. There is no evidence in the record that Mr. Tulloch could work with this back pain and his need for opioid pain medication to control it in November of 2010, and thus the failure of the ALJ to address this part of the evidence when other portions of the same document were relied upon is error mandating reversal. *See Smith*, 77 A.2d at 994. Therefore, Mr. Tulloch established a prima facie case of temporary total disability commencing November 24, 2010 to the present and continuing due to his radiating back pain, and there is no evidence to the contrary in the record. *See Logan*, 805 A.2d at 242.

Claimant's Brief at 9.

Employer argues in opposition:

The Administrative Law Judge's conclusion that the Claimant is only entitled to temporary total disability benefits from December 17, 2012, to the present and continuing is supported by the substantial evidence. It is well-settled that there is no presumption of compensability with regard to the nature and extent of disability and that the Claimant has the burden of proving by a preponderance of the evidence entitlement to on-going temporary total disability benefits. *See Logan v. Dept. of Employment Services*, 805 A.2d 237 (2002); *Joyner v. Dept. of Employment Services*, 502 A.2d 1028 (1986). As the Administrative Law Judge noted, there is no evidence to show that the Claimant was wholly unable to work as a result of his back condition until the December 17, 2012, medical report from Dr. Hasz. Up until that time, the Claimant's inability to work and his treatment was focused on his subsequent, intervening stroke. The December 17, 2012, report is the point where Dr. Hasz first addressed the Claimant's inability to work as it related to the back condition. There is no medical evidence prior to that date to substantiate a claim for temporary total disability benefits. As a result, the Administrative Law Judge properly considered this to be the appropriate start date for temporary total disability benefits.

Employer's Brief at 10-11.

We agree with Employer's argument.

Claimant's argument ignores the fact that the burden to produce evidence establishing entitlement to disability benefits rests solely with Claimant. *See Logan*, 805 A.2d at 237. Further, pursuant to the D.C. Workers' Compensation Act, D.C. Code §§32-1501 *et. seq.*, ("Act") there is no presumption regarding the nature and extent of a claimant's disability. *Landesberg v. DOES*, 794 A.2d 607 (D.C. 2002). A claimant has the affirmative duty to present substantial credible evidence to support at a preponderance level, the benefits sought. A claimant must establish, the nature and extent of a claimed disability, whether it is temporary or permanent, and the extent thereof, whether the disability is partial or total. *Dunston v. DOES*, 509 A.2d 109, 111 (D.C. 1986). The Act defines "disability" as "physical . . . incapacity because of injury which results in the loss of wages." D.C. Code § 32-1501(8). This requires transformation of the

commonplace concept of “disability” from one laden with issues of medical expertise and differently-abled physical capacity to one centered on economics and wage earning. *Id.* We accordingly reject Claimant’s argument on this issue.

Our review of the record evidence supports the COR’s findings that Dr. Hasz first addressed the Claimant’s inability to work as it related to his compensable work injury, the back condition. The ALJ concluded:

Claimant contends the date of his disability from his work injury was December 17, 2010, the date he was released from the hospital after suffering multiple strokes. A reevaluation of the record and the preponderance of the evidence establishes otherwise.

Claimant presented and relied upon the medical opinion of treating orthopedic Dr. Hasz to support his claim for disability compensation. A further review of the treatment records reveal following his release from the hospital on December 17, 2010, Claimant underwent an extensive period of recuperation and recovery of the complications from multiple strokes. Therefore, Claimant has not shown by a preponderance of the evidence he was temporary [sic] and totally disabled on December 17, 2010 as a result of his April 2010 work injury.

Turning to the treating records, Claimant returned to Dr. Hasz on December 17, 2012 and was evaluated for complaints of flare ups of radiating back pain. The record indicates Dr. Hasz’s review of a lumbar MRI taken on November 12, 2012 revealed a L4-L5 disc protrusion with high intensity zone suggestive of an annular tear L5-S1 grade 1 spondylolisthesis. Claimant continues to have flare-ups of back and radicular leg pain secondary to his work injury that have also rendered him disabled and unable to resume his pre-injury duties.

On December 17, 2012, Dr. Hasz opined Claimant is disabled and unable to return to work. Dr. Hasz opined not only is Claimant disabled from work due to his strokes, Dr. Hasz also opined Claimant has significant flare-ups of his back and leg pain, which would preclude any type of activities, if he was to do this [work]. Thus, it is determined Claimant is deemed to be temporary totaled [sic] disabled from working as a direct result of his April 3, 2010 back injury as of December 17, 2012, the date Dr. Hasz issued his medical opinion.

COR at 5.

As the ALJ concluded, there is no medical evidence to support the finding that Claimant was unable to work as a result of his back condition prior to the December 17, 2012, medical report from Dr. Hasz; likewise, Claimant points us to none. Indeed, Claimant was still working as of the December 17, 2010 date of his ‘flare up.’ Further, the record reflects that there was no limitation on his ability to work prior to the onset of his unrelated health emergencies. The medical evidence supports that any missed time off of work or inability to work was a result of

Claimant's medical treatment focused on, and related to, the intervening strokes, seizures and other complications not his compensable back-related pain.

The COR states the ALJ's findings of fact based upon the substantial evidence in the record, and renders a conclusion that flows rationally from those findings. Claimant's argument that the COR declined to discuss the circumstances surrounding Claimant's back pain in November 24, 2010, and the effects of Claimant's back pain "that sent [Claimant] to the emergency room on that day were upon [Claimant's] ability to work" is ostensibly a request for this panel to reweigh the evidence which is a task we cannot undertake. We find no error in the ALJ's conclusion that Claimant's eligibility for TTD benefits began on December 17, 2012. The ALJ's conclusion on this matter is affirmed.

In its remand to the CRB the DCCA instructed:

We also remand this case for the CRB to address whether [Employer] has preserved the legal issue of whether it is appropriate for a claimant who has suffered two disabling injuries, one work related and one not, to nonetheless receive disability benefits, and only if the CRB concludes that [Employer] has adequately preserved the issue do we ask the CRB to consider the question.

*Sodexo, Inc. et. al., v. DOES*, NO 15-AA-491 Mem. Op. & J. at 7. (D.C. July 29, 2016).

On this issue Claimant asserts Employer did not raise the question of whether or not Claimant was entitled to benefits due to an unrelated condition when there was a compensable worker's compensation condition also at issue. Claimant asserts further that this issue was also not referenced in Employer's closing argument.

Our review of Employer's closing arguments however reveals the following:

...And since it's our position that the blood clots and the stroke aren't related, it would also be our position that no temporary total disability benefits are due and owing given the fact that the back is the only accepted body part per Dr. Johnson's IME report. He doesn't need any more treatment and that's not what's impairing his ability to work.

Formal Hearing Transcript at 151-152.

While the record evidence does not support Employer counsel's conclusion that Claimant is no longer in need of treatment for his back injury—having never received any—we nevertheless determine that Employer did preserve for review on appeal, the issue of Claimant's entitlement to TTD benefits overall, given his multiple injuries, one of which is compensable, the others which are not. As such, the DCCA has remanded this issue back to this panel for a determination as to whether it was appropriate for the Claimant to receive TTD benefits when he has multiple disabilities, one which is compensable, the others, not.

Employer asserts that the Act does not contemplate that TTD benefits should be awarded where a claimant has a work injury, is capable of working in some capacity despite that injury, but then suffers a debilitating intervening event where he is rendered permanently and totally disabled as a result of that intervening event. Employer's Brief at 15.

The purpose of workers' compensation laws, which is to provide financial and medical benefits to employees injured in work-related accidents, is humanitarian in nature. *Grayson v. DOES*, 516 A.2d 909, 912 (D.C. 1986). To that end, workers' compensation statutes should be liberally construed to achieve their humanitarian purpose. It has been a long-applied legal rule in the context of the Act that doubts and ambiguities, both legal and factual, are to be resolved in the employee's favor due to the humanitarian nature and liberal construct afforded under the Act. *See Jiminez v. DOES*, 701 A.2d 837, 840-41 (D.C. 1997), *see also Vieira v. DOES*, 721 A.2d 579, 584 (D.C. 1998). Employers must "accept with their employees the frailties that predispose them to bodily hurt." *Id.* (citing *J.V. Vozzolo, Inc. v. Britton*, 126 U.S. App. D.C. 259, 262-63, 377 F.2d 144, 147-48 (1967)). *But see American Bakeries Co. v. Hatzell*, 771 S.W.2d 333 (Ky. 1989) (Compensation denied for treatment of preexisting heart condition, where the only expert testimony was that the angina was not work related.).

In the case *sub judice*, Claimant suffered from preexisting health issues prior to the date of his compensable back injury. Further, it is the law of the case that Claimant's health issues which occurred *after* the date of his back injury did not flow, and were distinctly independent, from his compensable back injury. Accordingly, due to Claimant's preexisting health issues, the recurrence of his unrelated health issues (including Claimant's subsequent stroke and paralysis after the date of the back injury) have not been determined compensable under the Act. As it pertains to Claimant's TTD benefits however, Claimant's significant, unrelated health issues and paralysis does not negate the compensability of his unresolved back injury, treatment for which Claimant has not received and due to the progression of his preexisting health issues, currently remains unable to receive.

Claimant's entitlement to TTD benefits, both as a matter of law and fact, has not ended. The Act provides clear support for the continuation of Claimant's TTD benefits as it relates to his compensable disability and does not provide a basis for termination at this time.

#### CONCLUSION AND ORDER

The October 28, 2016 Compensation Order on Remand is AFFIRMED.

*So ordered.*