

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. 08-225

David E. Young,

Claimant-Respondent,

v.

J & J Maintenance, Inc. and The Hartford,

Employer/Carrier-Petitioner.

Appeal from a Compensation Order of  
Administrative Law Judge Amelia G. Govan  
AHD No. 08-253, OWC No. 618904

Lisa A. Zelenak, Esquire, for the Petitioner

Jessica G. Bhagan, Esquire, for the Respondent

Before: HENRY W. MCCOY, MELISSA LIN KLEMENS, and LAWRENCE D. TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Panel;  
MELISSA LIN KLEMENS, *Administrative Appeals Judge, dissenting in part*:

**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 § 230, et seq., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005). The CRB replaces the Department of Employment Services Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code § 31-1501 *et seq.*

## OVERVIEW

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD), Office of Hearings and Adjudication, D.C. Department of Employment Services, issued August 29, 2008. In that Compensation Order, the Administrative Law Judge (ALJ) granted Claimant-Respondent's (Respondent) claim for temporary total disability from April 6, 2006 to December 11, 2007, with interest and ongoing medical benefits. The Employer-Petitioner (Petitioner) filed an Application for Review on September 24, 2008 seeking review of that Compensation Order. On October 2, 2008, Respondent filed an opposition to the application for review.

Respondent was working for Petitioner as a master plumber when he slipped and fell on August 3, 2005, striking his head and sustaining a closed head injury. After initial treatment at the Walter Reed Army Hospital emergency room, Respondent came under the care of his primary care physician, Dr. Mohammed A. Mannan. Dr. Mannan subsequently referred Respondent to Dr. Peter Bernad, a neurologist, who started treating Respondent on September 8, 2005 and continues to treat him at present.

At Respondent's insistence, Dr. Bernad released him to return to work on March 9, 2006. While Dr. Bernad explained in his deposition that he expected Respondent to return in a gradual, light duty capacity, no such restriction was stated in his release. In an April 6, 2006 follow-up, Dr. Bernad noted that Respondent had returned to work but was still symptomatic, primarily severe pain at the back of his head. On May 23, 2006, Dr. Mannan released Respondent to return to work on May 28, 2006, with no restrictions stated, and also released him from his professional care.<sup>1</sup>

Respondent returned to work in April 2006 after being released to do so by Dr. Bernad, but was unable to perform his usual pre-injury work duties. Respondent worked for approximately two weeks. At that time, he, along with others, was laid off due to a downsizing by Petitioner. After seeing Dr. Bernad on April 6, 2009, Respondent lost his insurance coverage and was not able to see the doctor again until June 14, 2007.

As grounds for this appeal, Petitioner argues the ALJ erred in finding Respondent met his burden to show entitlement to temporary total disability benefits as that finding was not supported by substantial evidence and thus not in accordance with the law. Petitioner further contends the ALJ erred by denying Petitioner a credit for unemployment benefits received by Respondent.

After a review of the record, because the Panel concludes the ALJ's determination that Respondent is entitled to an award of temporary total disability is supported by substantial evidence in the record and is in accordance with the law, it is affirmed. Because the denial of Petitioner's request for a credit for Respondent's receipt of unemployment benefits is not in accordance with the law, this issue is remanded.

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<sup>1</sup> On May 10, 2006, Dr. Mannan initially released Respondent to return to work on Monday, May 15, 2006. However, on that date, Dr. Mannan noted in a May 16, 2006 letter that Respondent had been readmitted to Washington Adventist Hospital. The letter did not state a reason for the readmittance.

## 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, Petitioner initially argues that the substantial credible evidence in the record does not support the finding by the ALJ that Respondent met his burden that any wage loss sustained during the contested period resulted from a disabling work injury. It is the contention of Petitioner that Respondent was released to return to work by both of his treating physicians, that he did return to work, and that subsequently he, along with others, was laid off. Petitioner specifically argues that no medical evidence was presented that Respondent's being laid off was in any way due to his disability causing an inability to perform his work duties.

Respondent counters that his attempt to return to work failed. He testified that, due to his head injury, he was unable to remember how to repair plumbing fixtures and could not carry heavy equipment. Within two weeks, Respondent was laid off and has not worked since that time.

After Respondent sustained his closed head injury on August 3, 2005, his claim was accepted and Petitioner began voluntary payments of temporary total disability benefits. Respondent's treating physicians, first Dr. Bernad on March 9, 2006 and then Dr. Mannan on May 23, 2006, released him to return to work, without any stated restrictions. In his letter of release, Dr. Bernad stated that he was doing so at Respondent's insistence. Respondent, who testified to increased anxiety over the need to return to work due to his benefits being terminated, returned to work in and around April 2006.

The ALJ found that when Respondent returned to work he could no longer do his regular pre-injury job; he was unable to remember how to repair pipes and plumbing fixtures; and he could not perform the physical activities of carrying heavy pipes, squatting, or using his tools. Compensation Order at 3. The ALJ then found when Respondent's supervisors became aware of the difficulties he was having, he was laid off. *Id.*

As Petitioner correctly stated that established case law provides that a claimant is entitled to compensation benefits after being laid-off if his wage loss was due to a disability that occurred before being laid-off. *Davis v. Georgetown University*, OHA No. 84-534, OWC No. 37947 (July 22, 1987). Moreover, if a claimant remains unable to work after a lay-off due to an injury which occurred prior to the lay-off, he is entitled to receive temporary total benefits. See *Wise v. District Management Corporation*, OHA No. 83-42 (September 28, 1984), as modified by *Morris v. DMI, Inc.*, Dir. Dkt. 87-49, OHA No. 86-566, OWC No. 58418.

In the instant case, Petitioner asserts Respondent was laid off as part of a company-wide lay off; that any wage loss incurred was not due to his work injury; and therefore, he is not entitled to temporary total disability benefits. Petitioner points to the medical evidence in the record that Respondent was released to return to work by both of his treating physicians and that no medical evidence was submitted for the period April 2006 to June 2007 and thus no documentation exists to show that his wage loss was due to any disability. After a thorough review of the record, this Panel must disagree.

Respondent testified that he decided to go back to work after seeing an independent medical evaluator<sup>2</sup> who he said called Petitioner and said he was capable of returning to work and he then received a call from Petitioner asking why he had not returned. Hearing Transcript (HT) at 39. Respondent further testified that he became “frightened” and went to Dr. Bernad and told him he had to go back to work; that Dr. Bernad said he could not go back; but that he insisted because Petitioner had cut off his benefits. HT at 39-40.

The medical reports from Dr. Bernad before and after he released Respondent to return to work and when he resumed seeing him well over a year later show no change in Respondent’s condition. On March 9, 2006, the date he acceded to Respondent’s insistence and released him to return to work, Dr. Bernad found Respondent to have tenderness in the back of his head and neck with “exquisite tenderness around the greater occipital nerve.”

Dr. Bernad’s findings were similar on April 6, 2006, when he gave Respondent nerve block injections for his occipital neuralgia, and noted that while Respondent had returned to work, he still remained symptomatic. It is also worthy of noting that in his deposition, Dr. Bernad, in releasing Respondent to return to work, had expected him to gradually work his way back to full duty. Deposition of Peter Bernad at 34-35. The April 6, 2006 examination was also significant for a new finding of Respondent having developed a fear of falling again after returning to work. On June 14, 2007, Dr. Bernad made a virtually similar assessment and findings of Respondent’s physical complaints with a resumption of nerve blocks and trigger point injections.

As for his return to work, Respondent testified to the physical and mental difficulties he experienced in his inability to perform the regular tasks required of a lead plumber. He testified to confiding in his co-workers, who noticed these deficiencies and urged him to tell his

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<sup>2</sup> This is a reference, also made in the hearing record, to an independent medical evaluation performed by Dr. Louis Levitt at Petitioner’s request wherein Respondent allegedly was released to return to work. Dr. Levitt’s report was not introduced into the record and thus will not be determinative in this appeal.

supervisor which he claims he did. It was Respondent's testimony that he was told he could not continue working "unless you're 100 percent okay." HT at 45. It was then a week later that Respondent was laid off, along with other employees of Petitioner.

There is no evidence in the record as to the reason Respondent and some of his co-workers were laid off. However, there is substantial evidence in the record, with no evidence to the contrary, that Respondent was not able to perform his usual employment duties at the time he was laid off.

Based upon Respondent's testimony, the ALJ found that he could no longer perform his usual work duties, that he was unable to remember how to repair pipes and fixtures, and could perform the physical requirements of the job. Respondent testified that he only felt compelled to return to work, and urged Dr. Bernad to release him to return, after Petitioner received an independent medical evaluation stating he could return to work, Employer told him to report for duty, and terminated his benefits.

The medical reports in evidence establish there has never been any change in Respondent's disabling condition, especially during the period for which benefits are being requested. Throughout his treatment of Respondent, Dr. Bernad's reports have been consistent in chronicling the symptoms found, to point of stating after Respondent had returned to work that he remained symptomatic. Respondent testified to experiencing these ongoing symptoms before he returned work and during the brief period of his return, which is corroborated by the medical records in evidence. The evidence is such that a supervisor had informed Respondent that due to his inability to perform his job he could not continue to work. Thus, there is substantial evidence in the record to support the ALJ's determination that Respondent is entitled to the period of temporary total disability benefits.

Finally, Petitioner argues the ALJ erred in denying a credit for unemployment benefits. In the hearing below, Respondent testified in the affirmative that he filed for and received unemployment benefits after he was laid off but could not recall exactly when he received them. HT 68-69. At this time, Petitioner raised the issue of receiving a credit for these payments against any disability benefits to be paid. In the CO, the ALJ summarily disposed of the issue in footnote 1 by stating that as unemployment benefits received were not advance payments of compensation, Petitioner was not entitled to any credit.

The CRB spoke definitely on this issue in the matter of *Beckwith v. Providence Hospital*, CRB No. 07-138, AHD No. 06-139, OWC No. 615744 (September 7, 2007) and affirmed in *Gibson v. Aramark Corporation*, CRB No. 08-007, AHD No. 07-293, OWC No. 635657. In *Beckwith*, the CRB acknowledged that while unemployment benefits are not advance payments of compensation within the meaning of D.C. Official Code § 32-1515(j), the Director has held, and the CRB has affirmed, that an employer is nevertheless entitled to a credit for an employee's receipt of unemployment benefits. *Id.* citing *Stanford v. Cary International, Inc.*, Dir. Dkt. No. 99-68, OHA No. 99-144, OWC No. 533475 (April 30, 2002), and *Flanagan v. Auger Enterprises*, Dir. Dkt. No. 94-65, H&AS No. 92-714, OWC No. 198453 (May 11, 1995). The CRB then clarified the employer was entitled to the credit, not because unemployment benefits qualify as advance payments of compensation but to prevent an employee from receiving a

double recovery of monies from an employer. *Watts v. Guardian Service Group*, CRB No. 07-55, AHD No. 05-053 (May 18, 2007).

The CRB in *Beckwith* concluded by holding:

“Thus, not only is an employer’s entitlement to a credit for an employee’s receipt of unemployment benefits during the disability period well settled in this jurisdiction as a result of prior Agency holdings, such a credit supports the policy against a double recovery and the impropriety of duplicative benefits, while ensuring that an injured employee does not receive more money under wage-loss legislation while not working than that employee earned before he or she was injured.”

*Beckwith* at 4.

It is thus well established in this jurisdiction that an employer is entitled to a credit for unemployment benefits received by an injured employee at the same time the employee received workers’ compensation benefits. *Standford, supra*.

In the instant matter, while Respondent testified to the receipt of unemployment benefits, the ALJ made no findings on the issue before summarily denying Petitioner’s request. Given this omission, this matter must be remanded to the ALJ to make the appropriate findings of fact and conclusions and to enter an award consistent with established precedent.

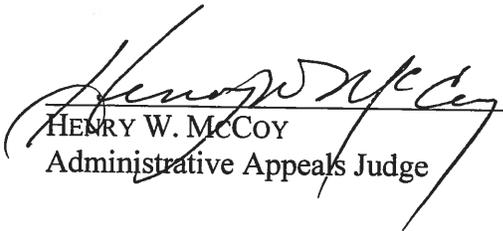
#### CONCLUSION

That part of the Compensation Order of August 29, 2008 awarding temporary total disability benefits is supported by substantial evidence in the record and is in accordance with the law. The part denying a credit for the receipt of unemployment benefits is not in accordance with the law.

**ORDER**

The Compensation Order of August 29, 2008 is hereby AFFIRMED IN PART AND REMANDED IN PART. The award of temporary total disability for the period requested is affirmed. The denial of any entitlement to a credit for the receipt of unemployment benefits is remanded. On remand, the ALJ may conduct such further proceedings as may be deemed necessary in order to make appropriate findings of fact and conclusions of law on this issue.

FOR THE COMPENSATION REVIEW BOARD:

  
HENRY W. MCCOY  
Administrative Appeals Judge

January 29, 2010  
\_\_\_\_\_  
DATE

MELISSA LIN KLEMENS, *Administrative Appeals Judge, dissenting:*

The Act provides no express authority for the undersigned to grant Employer a credit or offset against workers' compensation indemnity benefits for "unemployment disability" benefits received by a claimant. §32-1515(j) of the Act allows an employer to recover "advanced payments of compensation" made by the employer and specifically states:

If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due. All payments prior to an award, to an employee who is injured in the course and scope of his employment, shall be considered advance payments of compensation. Id. (emphasis added.)

This provision cannot be read to include payments made for unemployment benefits. Simply put, unemployment benefits are not an advance payment of compensation by Employer.

Furthermore, such a reading of the Act grants to Employer a reduction of its workers' compensation benefits liability because of payments made to Claimant from funds through a separate and distinct benefits program. Unemployment benefits are treated as income and, therefore, are subject to federal and state income tax. Workers' compensation indemnity benefits are not similarly taxable. Thus, to grant Employer a credit or offset for unemployment benefits against workers' compensation benefits awarded pursuant to the Act allows Employer to benefit

at Claimant's expense as, presumably, Claimant retains the income tax liability for the unemployment benefits although the income has been transferred to Employer through the credit or offset. This result is not in keeping with the beneficent and humanitarian purposes of the Act.

It is undisputed that Respondent received unemployment benefits. These payments, however, as a matter of fact and of law are not "advance payments of compensation" for which Employer is entitled to be reimbursed under §32-1515(j) of the Act and are unrelated to benefits attributable to Claimant's work-related injury. I, therefore, respectfully dissent from the portion of this Decision and Order awarding Petitioner a credit for unemployment benefits.

  
MELISSA LIN KLEMENS  
Administrative Appeals Judge