

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-145

DAVID J. JOHNSON,  
Claimant-Petitioner,

v.

HD SUPPLY COMPANY and  
GALLAGHER BASSETT SERVICES, INC.  
Employer/Third-Party Administrator-Respondents.

Appeal from an August 12, 2015 Compensation Order  
by Administrative Law Judge Douglas A. Seymour  
AHD No. 15-211, OWC No. 723681

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 FEB 4 AM 11 20

(Decided February 4, 2016)

David J. Kapson for Claimant  
Michael L. Daily for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND REMAND ORDER**

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant injured his neck and right shoulder on September 29, 2014 when lifting bags of ice melt. Claimant sought treatment, and ultimately was placed on restrictions by Concentra. Claimant returned to work in a light duty status, to a job paying less than his pre-injury earnings.

On December 4, 2014, Claimant was terminated for reasons unrelated to his work injury. On May 21, 2015, Claimant obtained employment elsewhere, within his restrictions, also earning less than his pre-injury wage.

Claimant came under the care and treatment of Dr. Joel Fecther. Dr. Fecther diagnosed Claimant with a cervical sprain and a right shoulder sprain/strain. Dr. Fecther opined Claimant's condition

was medically causally related to the work accident of September 29, 2014. Dr. Fecther continued Claimant's light duty restrictions.

Employer sent Claimant for an independent medical evaluation (IME) with Dr. Louis Levitt on March 24, 2015. Dr. Levitt took a history of the injury, treatment to date, and performed a physical examination. Dr. Levitt opined Claimant's current neck and right shoulder condition are medically causally related to the work-injury and recommended arthroscopic inspection of the right shoulder. Dr. Levitt agreed Claimant could only work light duty, with restrictions on lifting and not utilizing the right arm above the shoulder level.

A dispute arose over Claimant's entitlement to temporary partial disability. A full evidentiary hearing occurred on June 30, 2015. Claimant sought an award of temporary partial disability from September 29, 2014 to the present and continuing, payment of causally related medical expenses, and interest on accrued benefits. The issues to be adjudicated were whether Claimant's neck condition is causally related to his work-injury, whether Claimant voluntarily limited his income, and whether Claimant refused to undergo recommended medical treatment. The parties were allowed to submit post hearing proposed calculations of Claimant's temporary partial disability. Claimant submitted proposed calculations while Employer did not submit any calculations. In a Compensation Order (CO) dated August 12, 2015, the administrative law judge ("ALJ") concluded:

I conclude that Claimant has proven, by a preponderance of the evidence, that his neck condition is causally related to his work injury of September 29, 2014. I further conclude that the medical treatment rendered to claimant's neck is the responsibility of Employer, including the cervical epidural blocks recommended by Dr. Ammerman.

I conclude that Claimant is entitled to temporary partial disability benefits from November 24, 2014 to December 3, 2014, based on a weekly wage loss of \$92.37. I further conclude that Claimant's wage loss, subsequent to December 4, 2014, is not related to his work injury of September 29, 2014. Thus, I conclude that Claimant is not entitled to temporary partial disability benefits from December 4, 2014 to the present and continuing. Finally, I conclude that the issue of refusal to undergo recommended medical treatment, absent the introduction into evidence of the mandatory UR, is not ripe for adjudication.

CO at 8.

The ALJ ordered:

It is **ORDERED** that Claimant's claim for relief be, and hereby is, **GRANTED** in part, and **DENIED** in part. Employer is ordered to pay Claimant temporary partial disability benefits from November 24, 2014 to December 3, 2014, based on a weekly wage loss of \$92.37. Claimant's request for temporary partial disability benefits beginning December 4, 2014, to the present and continuing, is hereby **DENIED**. Employer is **ORDERED** to pay interest on accrued benefits. Employer is also **ORDERED** to pay for all medical treatment rendered to claimant's neck, including the cervical epidural blocks recommended by Dr. Ammerman.

*Id.* at 8. (Bold in original.)

Claimant appealed only that portion of the CO that denied Claimant's temporary partial disability from December 4, 2014 to the present and continuing. Claimant argues the ALJ's determination that Claimant has not demonstrated entitlement to temporary partial disability after December 4, 2014 is not supported by the substantial evidence in the record.

Employer opposes Claimant's appeal, arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

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

Both parties acknowledge that Claimant remains under light duty restrictions, as reflected in the CO. CO at 6. Both parties also acknowledge that prior to his termination, Claimant was working under these light duty restrictions. Claimant also argues and the ALJ found Claimant suffered a wage loss while on light duty in the amount of \$92.37 per week, entitling him to temporary partial disability benefits. CO at 7. There is also no contest that Claimant found light duty work subsequent to his termination that was within his restrictions, paying less.

Consistent with the above summary, the ALJ found:

Claimant, a 60 year old delivery driver, injured his right shoulder on September 29, 2014 while lifting bags of ice melt. Claimant first treated at Bowie Health Center, and was then referred by Employer to Concentra. Claimant was given a 20 pound lifting restriction, and a no lifting above his shoulder restriction, by Concentra. Claimant returned to work for Employer in the warehouse for a couple of days. Employer furnished Claimant a helper when he returned to work making deliveries. The helper did the lifting, and Claimant pushed the cart and brought in the items. Claimant worked less hours due in part because of the helper, and due in part to his physical therapy appointments. Claimant was terminated for cause by Employer on December 4, 2014. Claimant received one check from the workers compensation insurance company for \$459.51 after his termination. HT 26-39, 52, 53, EE 2.

CO at 3.

Relying on *Robinson v. DOES*, 824 A.2d 962 (D.C. 2003) and *Figueroa v. Ulliman Schutte Construction*, CRB 14-149 (May 5, 2015), the ALJ denied Claimant's claim for relief, concluding that Claimant's termination for cause was the reason for his wage loss and not his work-related

---

<sup>1</sup> The scope of review by the CRB 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 (D.C. 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.

injury. Thus, the ALJ awarded temporary partial disability up to the date of termination, but denied disability thereafter. Employer argues this is in accordance with *Robinson* and should be affirmed. Claimant argues the ALJ's reliance on *Robinson* was in error as Claimant was suffering a wage loss before his termination. We agree with Claimant.

In addressing the effect of a termination and entitlement to disability benefits, the District of Columbia Court of Appeals (DCCA) has held the "[D.C. Workers' Compensation] Act does not provide that the subsequent termination of an employee, whether related or unrelated to a work injury, is a defense for an employer who denies an obligation to pay disability compensation." *Upchurch v. DOES*, 783 A.2D 623, 627 (D.C. 2001). Two years after *Upchurch*, in *Robinson*, the DCCA had another opportunity to address what effect a termination for cause has on a claimant's right to disability benefits. Citing *Robinson*, in *Burrows v. M.C. Dean*, CRB No. 08-144, (January 28, 2009) (*Burrows*) the CRB noted:

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. (Emphasis added.)

*Burrows, supra* at 4-5.

We note that *Robinson* and *Figueroa*, the cases relied upon by the ALJ, dealt with claimants who returned to work under light duty restrictions but were making *full wages*, and not suffering a wage loss. Such is not the case here where Claimant was working light duty but suffering an ongoing wage loss.

We are mindful that D.C. Code §32-1805(5) states, in part:

In case of temporary partial disability...If the employee voluntarily limits his income or fails to accept employment commensurate with his abilities, then his wages after the employee had the disability shall be deemed to be the amount he would earn if he did not voluntarily limit his income or did accept employment commensurate with his abilities.

Thus, as the Claimant was working at a wage loss before his termination, his entitlement continues even after his termination for cause.

In *Acevedo v. Brother's Concrete Construction*, CRB No. 10-164 (March 7, 2011), the CRB affirmed the ALJ's award of temporary partial disability benefits to an injured worker who was working light duty, with a wage loss, when terminated for cause, after the case was remanded by the DCCA. The award for temporary partial disability was initially denied and appealed to the DCCA. The DCCA determined Claimant was entitled to temporary total disability benefits. The CRB noted:

The Court, relying on its 2001 *Upchurch* decision, reversed the decision to end benefits on March 19, 2007. The Court held:

However, the ALJ's May 23, 2008, order reflects that its reason for

denying petitioner temporary partial benefits after March 19, 200[7], despite the physicians' agreement that petitioner remained *partially* disabled, was that petitioner *voluntarily* limited his work income by failing to accept such employment. We have held that the "[D.C. Workers' Compensation] Act does not provide that the subsequent termination of an employee, whether related or unrelated to a work injury, is a defense for an employer who denies an obligation to pay disability compensation." *Upchurch v. District of Columbia Dep't of Employment Servs.*, 783 A.2d 623,627 (D.C. 2001). Thus, the petitioner's wage loss of three dollars and sixty cents (\$ 3.60) was a result of the petitioner's work injury and, hence, is unrelated to his subsequent termination.

The Court concluded:

Consequently, we are obligated to remand this case to the District of Columbia Department of Employment Servs. for the sole purpose of determining the period of time from March 19, 200[7] onward for which petitioner is entitled to TPD benefits and to award those benefits in the amount of three dollars and sixty cents (\$ 3.60) per hour.

*Acevedo v. DOES and Brothers Concrete Construction, Inc., intervenor*, No 09-AA-806 (June 8, 2010). (Unpublished memorandum opinion and judgment).

In line with D.C. Code §32-1805(5) and the reasoning in *Acevedo*, Claimant is still entitled to temporary wage loss benefits after his termination for cause. We must remand the case with instructions to award Claimant temporary partial disability benefits from December 4, 2014 to the present and continuing.

#### CONCLUSION AND ORDER

The August 12, 2015 Compensation Order's denial of temporary partial disability benefits from December 4, 2014 to the present and continuing is not supported by the substantial evidence in the record or in accordance with the law and is VACATED. Upon remand, the ALJ is directed to award Claimant temporary partial disability benefits from December 4, 2014 to the present and continuing.

*So ordered.*