

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-169

JOSEPH HOFF

Claimant-Petitioner,

v.

EMCOR GOVERNMENT SERVICES AND SPECIALTY RISK SERVICES,

Employer and Carrier-Respondents.

Appeal from a Compensation Order by
The Honorable David L. Boddie
AHD No. 11-156A, OWC No. 676413

Michael Kitman, Esquire for the Petitioner
David O. Godwin, Esquire for the Respondent

Before HEATHER C. LESLIE,¹ HENRY MCCOY and MELISSA LIN JONES, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board,

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the September 21, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for temporary total disability benefits, but did award the payment of casually related medical expenses.

¹Judge Heather C. Leslie is appointed by the Director of DOES as an interim Compensation Review Board member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

FACTS OF RECORD AND PROCEDURAL HISTORY

On November 9, 2010, the Claimant suffered an injury to his right shoulder when he was struck by a motor vehicle. The Claimant sought medical care at Calvert Memorial Hospital where he was instructed to stay off of work for two days and follow up with an orthopedic physician. After some delay, the Claimant came under the care and treatment of Dr. Bryan Herron. Dr. Herron diagnosed the Claimant with a tear to the rotator cuff, which was subsequently confirmed after undergoing an MRI. Dr. Herron recommended surgery to repair the tear.

The Employer sent the Claimant for an independent medical evaluation (IME) with Dr. Louis Levitt on May 24, 2011. Dr. Levitt took a history of the Claimant's accident, medical treatment, and performed a physical examination. Dr. Levitt opined the Claimant did injure his right shoulder in the November 9, 2010 work accident and agreed with Dr. Herron's opinion that the Claimant required surgery. The Claimant underwent the recommended surgery in August 2011. The Claimant was paid temporary total disability from August 30, 2011 to December 26, 2011.

Prior to surgery, between November 9, 2010 and June 15, 2011, the Claimant missed 14 days of work, allegedly due to shoulder problems related to his work accident. The Claimant kept a log of missed days attributable to his shoulder injury.

A Formal Hearing was held on March 8, 2012. The Claimant sought an award of temporary total disability for the 14 days of work intermittently missed between November 10, 2010 through June 15, 2011, payment of related medical expenses, and interest. The Employer sought a credit for overpayment of compensation benefits. The issues raised were the nature and extent of the Claimant's disability, if any, and the Claimant's average weekly wage. A Compensation Order was issued on September 21, 2012 which denied the Claimant's request for temporary total disability but granted the request for causally related medical expenses to be paid by the Employer. Notably, the ALJ denied the temporary total disability benefits for 11 days of temporary total disability as no medical documentation was submitted to support those days and denied the two days immediately after the injury as these days, while consecutive, did not satisfy the requirements of D.C. Code § 32-1505(a). As the requested temporary total disability benefits were denied, the ALJ concluded the issue of average weekly wage was moot.

The Claimant timely appealed the CO on October 19, 2012. The Claimant argues on appeal that the CO erred in its interpretation of D.C. Code § 32-1505(a), erred in not awarding temporary total disability and erred in not making any findings of fact or conclusion of law on the Claimant's average weekly wage. The Employer argues the CO is supported by the substantial evidence in the record and is accordance with the law and should be affirmed.²

THE STANDARD OF REVIEW

The scope of review by the CRB 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*

² The Employer did not appeal the award of causally related medical expenses. Nor does the Employer appeal the apparent lack of findings or discussion on any overpayment the Employer may, or may not, be due. Thus, we will not address these issues on appeal.

District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

DISCUSSION AND ANALYSIS

The Claimant first argues the ALJ erred when concluding "any disability prior to three consecutive days of disability were not compensable." Claimant's argument unnumbered at 6.

D.C. Code § 32-1505 regarding the commencement of compensation provides:

(a) No compensation shall be allowed for the first 3 days of the disability, except the benefits provided for in § 32-1507 (regarding the provision of medical services); provided, that in case the injury results in disability of more than 14 days the compensation shall be allowed from the date of the disability."

The ALJ, after reciting the statute, states,

This provision has further been interpreted as requiring that the initial three day period to invoke payment of compensation should be consecutive days. *Mexicano v. DOES*, 806 A.2d 198 (D.C. 2002). I therefore find that the evidence in the record reflecting that the Claimant did not miss three consecutive days from work due to his work injury prior to his August 30, 2011 surgery, his claim for temporary total compensation benefits for intermittent dates between November 10, 2010 and June 15, 2011 is denied.

CO at 8.

We disagree with the ALJ's summary of the District of Columbia Court of Appeals decision in *Mexicano* as well as the Employer's argument that the decision "implicitly holds that the initial three days of disability must be consecutive to be compensable." Employer's argument unnumbered at 8-9. A reading of *Mexicano* reveals the decision was centered on whether or not the Employer had rebutted the presumption of compensability. Only briefly is 32-1505 mentioned when the Court summarizes the ALJ's finding of only two days of disability which was disallowed under the statute.

Nothing in the above statute mentions that any days off as a result of a disability have to be consecutive and we can find no case law that stands for this proposition. We are mindful that "When the language of a statute is plain and unambiguous, the plain meaning of that language is binding. See *Hudson Trail Outfitters v. D.C. Department of Employment Services*, 801 A.2d 987, 990 (D.C. 2002). We assume that if the legislature meant for the time period enunciated in D.C. Code § 32-1505 to be consecutive, it would have been inserted into the statute. As the word consecutive does not appear in the statute, the clear meaning is that the first 3 days of

disability are disallowed until more than 14 days have been missed. These days do not have to be consecutive. Upon remand, the ALJ is to award the Claimant temporary total disability for the 3 days the ALJ found the Claimant to have missed as a result of his work related injury, the two days immediately after the accident and the day the Claimant attended the IME.

As for the remaining 11 intermittent days sought, the ALJ denied the Claimant temporary total disability as,

None correspond with an indication that the Claimant was seen for treatment on or near any of those dates. Recognizing that the Claimant in seeking to recover wage loss benefits for these dates that he would present them in the best light in his interest, I find no support in the record for his testimony that the dates missed from work were for reasons related to his work injury and therefore I am not persuaded that they were.

CO at 6.

We are mindful of our decision in *Fuentes v. Willard Intercontinental Hotel*, CRB No. 11-149, AHD No. 11-235 (May 9, 2012) which stated

There is no requirement under the Act or in the case law that mandates that a medical condition be the subject of a written medical restriction before it can be the basis for a wage loss-based award of benefits. Such written restrictions may make adjudication of disputed claims easier, and the lack of such a restriction certainly can, in some instances, be a legitimate basis for denying a claim. However where, as here, the ALJ finds as facts that the work injury is causing a claimant to be unable to work to the same degree that was being worked prior to the injury, and that the claimant is earning less post-injury because of that inability, the claimant is entitled to a partial disability award based upon that ongoing wage loss, until such time as the claimant becomes eligible for an award under the schedule.

In *Fuentes*, the Claimant after undergoing surgery was unable to perform his duties at a second job due to his work related injury. The ALJ had found the Claimant to be a credible witness in describing the effect of his injury on his ability to work his second job, but denied the Claimant temporary partial disability as the Claimant's treating physician released him back to work without restrictions, thus leaving the ALJ no choice but to deny the claim as no "medical justification" had been presented. *Fuentes*, supra at 3. The CRB vacated the denial of benefits and remanded the case to the ALJ with instructions to award the Claimant the temporary partial disability sought. Thus, in limited circumstances, where the injury is significant and the Claimant credible, the ALJ may award disability benefits absent medical documentation.

Turning to the case at hand, it is clear the Claimant's condition is significant enough to warrant surgery. Prior to surgery, the Claimant took intermittent days off for his shoulder pain. Unlike *Fuentes*, however, we are uncertain whether or not the ALJ found the Claimant to be credible. The ALJ does note an inconsistency in the Claimant's testimony when he stated that he did not have any problems or treatment with his right shoulder prior to November 2010 then later

amended his testimony to reflect that he did in fact receive such treatment several years prior to the work injury. CO at 7, footnote 6. We are uncertain if the ALJ ultimately found the Claimant credible, having amended and corrected his testimony to reflect he received treatment for a bilateral shoulder condition in 2003, or whether this inconsistency rendered the Claimant's testimony incredible. Upon remand, the ALJ is to make a specific credibility finding as well as take into consideration the CRB's decision in *Fuentes*, quoted above. If the ALJ finds the Claimant's testimony credible, the lack of medical documentation for the dates claimed does not preclude an award of disability benefits. If the ALJ finds the Claimant incredible, the lack of a medical justification can be a legitimate basis to deny the remaining 11 days of temporary total disability benefits.

As we are sending the case back to the ALJ for, at a minimum, an award of three days of temporary total disability, the ALJ is to determine the average weekly wage of the Claimant, a contested issue raised properly before him.

CONCLUSION AND ORDER

The September 21, 2012 Compensation Order is VACATED, in part, and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

January 14, 2013

DATE