

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-149

**JUAN FIGUEROA,
Claimant-Respondent,**

v.

**ULLIMAN SCHUTTE CONSTRUCTION,
and ESIS,
Employer and Third-Party Administrator-Petitioners.**

Appeal from a November 18, 2014 Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. 14-379, OWC No. 701669

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
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Carlos A. Espinosa for the Claimant
Anthony J. Zaccagnini for the Employer

Before HEATHER C. LESLIE, MELISSA LIN JONES, 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

The Claimant was working as laborer when on February 19, 2013 Claimant injured his back, left shoulder, left elbow, right knee, and right leg when he slipped and fell.

Claimant sought medical treatment with the assistance of Employer’s Safety Director, Brian Danik. Claimant first was treated by a workers’ compensation clinic, before coming under the care of Dr. Christopher Raffo. Claimant’s injuries required a partial lateral menisectomy of the right knee and left shoulder rotator cuff repair and debridement of the superior labrum. Claimant was released to sedentary work on November 13, 2013. Dr. Raffo opined the sedentary work restrictions were permanent. Dr. David Johnson, Employer’s independent medical evaluator, opined Claimant was permanently restricted to lifting over 20 pounds occasionally and 10 pounds frequently.

Upon his release to sedentary work, Mr. Danik testified that he informed Claimant he was to return to work on November 18, 2013 in a training position at the same wages. Hearing

transcript at 55-56. On that day, due to a power outage, Claimant was unable to work at the plant where the job was located. Claimant did not report to the plant thereafter. On November 22, 2013, Mr. Danik hand delivered a letter to Claimant stating if Claimant failed to show up to work, he would be terminated. Claimant was terminated by Employer on November 25, 2013.

A full evidentiary hearing was held on October 22, 2014. At that hearing, Claimant sought an award of temporary total disability from November 14, 2013 to the present and continuing and payment of all causally related medical expenses. The issues presented for adjudication were the nature and extent of Claimant's disability, whether Claimant voluntarily limited his income, and whether Employer discharged Claimant in retaliation for filing his workers' compensation claim. A Compensation Order (CO) was issued on November 18, 2014 which granted Claimant's claim for relief, in part, awarding Claimant temporary total disability from November 14, 2013 to the present and continuing, but suspended Claimant's benefits from November 18, 2013 to November 25, 2013. The CO further found did not Employer had not retaliatorily discharged Claimant from employment.

Employer appealed. Employer argues the ALJ erred because Claimant was discharged for reasons unrelated to the workplace accident and awarding benefits after November 25, 2013 was in error.

Claimant opposes Employer's appeal, arguing the CO is supported by the substantial evidence in the record and is in accordance with the law. Claimant did not appeal the finding that Employer had not retaliated against Claimant when terminating his employment.

STANDARD OF REVIEW

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.

ANALYSIS

Employer argues the ALJ erred in awarding disability benefits to the Claimant as he was terminated for reasons unrelated to his employment. Employer argues the ALJ incorrectly relied upon *Upchurch v. DOES*, 783 A.2d 623, 627 (D.C. 2001) (*Upchurch*). Employer relies upon the District of Columbia Court of Appeal (DCCA) subsequent decision *Robinson v. DOES*, 824 A.2d 962 (D.C. 2003) (*Robinson*) in support of its argument that the ALJ misstated the law when relying upon *Upchurch*.

A review of the CO reveals the following discussion:

The undersigned is mindful that a lot of testimony was elicited about the power outage that occurred either on November 18, 2013 or November 25, 2013. Claimant asserts the outage occurred on November 25, 2013 and employer asserts that the power outage occurred on November 18, 2013. Having reviewed the entire record, it is determined that it is odd that employer's letter does not mention that it occurred in its letter which states "You did not show up for this light duty assignment this entire week". Claimant also does not explain why he did not return to work on November 18th through the 22nd other than his insistence that Mr. Danik told him there was no light duty available, if in fact he did return on the 25th as he alleges. HT at 27, 37, and 38. Nevertheless, the date of the outage is irrelevant as employer terminated claimant on the 25th of November, and employer's sole reason for terminating claimant on November 25, 2013 was claimant's refusal to return to work when he was released by Dr. Raffo.

In sum, it is concluded that employer has met its burden of establishing the availability of a suitable position within claimant's physical capability and claimant's refusal is a voluntary limitation income. As claimant's testimony, that Mr. Danik told him there was no light duty available, has been sufficiently contradicted by Mr. Danik, claimant's benefits for the week preceding his termination shall be suspended based on a voluntary limitation of income. Employer's decision to terminate claimant while he is unable to return to his pre-injury position negates the availability of suitable employment, such as it is, and claimant is entitled to have his temporary total disability benefits reinstated as of the date of his termination until such time as suitable employment is again available. *See Upchurch v. District of Columbia Department of Employment Services*, 783 A.2d 623 (DC2001)(employees do not lose their rights to disability benefits under workers' compensation statutes when their employment is terminated, even for wrongdoing).

CO at 4-5.

The ALJ appears to have concluded that regardless of the circumstances surrounding the termination, under *Upchurch* no possible scenario could affect the outcome of this claim.

Two years after *Upchurch*, in *Robinson*, the DCCA had another opportunity to address the affect a termination for cause has on a Claimant's right to disability benefits. The CRB noted in *Burrows v. M.C. Dean*:

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.

CRB No. 08-144, AHD No. 08-019 (January 28, 2009).

The facts in *Robinson* are similar to the facts in the case before the CRB. Claimant was offered sedentary employment within his restrictions at the same rate of pay. Claimant failed to show up for work after November 18, 2013 and was subsequently terminated on November 25, 2013. Thereafter, his wage loss was caused by factors other than his injury.

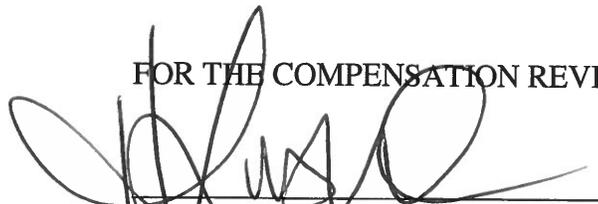
Claimant, in opposition, argues that the facts in *Robinson* are dissimilar as the claimant in that case was able to return to light duty employment for a period of time, was given three warnings from his Employer and received a suspension prior to termination. However, as Claimant concedes, he was given a warning letter prior to termination and still did not show up for work. Regardless of the number of warnings, the basic premise remains the same – Claimant was offered a suitable position within his restrictions at the same rate of pay and failed to show up after November 18, 2013 at this sedentary position, even after a warning advising him of the consequences. As the ALJ stated, “claimant’s refusal is a voluntary limitation of income.” CO at 4. Any wage loss thereafter is not related to his injury but to other factors.

As we are without power to make any amendments to Compensation Orders, we must remand the matter to the ALJ for entry of an award terminating Claimant’s temporary total disability benefits from November 25, 2013 to the present and continuing, consistent with the testimony and evidence presented in light of the DCCA’s analysis in *Robinson*. *Washington Metropolitan Area Transit Authority v. DOES (Juni Browne, Intervenor)*, 926 A.2d 140 (D.C. 2007).

CONCLUSION AND ORDER

The November 18, 2014 Compensation Order is not in accordance with the law. It is VACATED and REMANDED for entry of an order denying Claimant temporary total disability benefits from November 25, 2013 to the present and continuing.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE
Administrative Appeals Judge

May 5, 2015

DATE