

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-018**

**MARLAN V. TOLLIVER,  
Claimant-Petitioner/Cross-Respondent,**

v.

**WILLIAM C. SMITH Co., INC. and  
COMPANION PROPERTY & CASUALTY,  
Employer/Insurer-Respondent/Cross-Petitioner.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 MAY 8 AM 10 34

Appeal from a January 29, 2014 Compensation Order on Remand By  
Administrative Law Judge Leslie A. Meek  
AHD No. 08-430B, OWC No. 649188

Matthew Peffer for Petitioner/Cross-Respondent  
Cheryl D. Hale for Respondent/Cross-Petitioner

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

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

On February 12, 2008, Mr. Marlan V. Tolliver worked for William C. Smith Co., Inc. as a building engineer. On that date, he stepped on a carpet tack and injured his left foot.

Mr. Tolliver suffers from pre-existing diabetes, and as a result of compensating for his left foot injury, he began experiencing problems with his right foot. William C. Smith Co., Inc. denied the compensability of Mr. Tolliver's right foot condition, and the parties proceeded to a formal hearing on the issues of medical causal relationship between Mr. Tolliver's right foot condition and his work-related accident as well as the nature and extent of Mr. Tolliver's disability, if any.

On February 22, 2013, an administrative law judge ("ALJ") ruled that Mr. Tolliver had invoked the presumption of compensability and that William C. Smith Co., Inc. had not rebutted the

presumption of compensability.<sup>1</sup> As a result, Mr. Tolliver's right foot injury is compensable; however, the ALJ also ruled that Mr. Tolliver had not proven any entitlement to temporary total disability benefits. Both parties appealed the February 22, 2013 Compensation Order.

On appeal as petitioner and cross-respondent, Mr. Tolliver asserted he was entitled to temporary total disability benefits because he had not reached maximum medical improvement, he was unable to perform his pre-injury employment, and he had not been offered suitable, alternative employment. Mr. Tolliver did not appeal the ruling that his right foot injury is causally related to his work-related accident because William C. Smith Co., Inc. had failed to rebut the presumption of compensability through Dr. Willie E. Thompson's independent medical examination report or Dr. Brian Phillip Bach's testimony.

As respondent and cross-petitioner, William C. Smith & Co., Inc. contended a medical causal relationship between Mr. Tolliver's right foot condition and his work-related accident was not supported by the evidence because Mr. Tolliver had failed to make some initial demonstration of an injury and a work-related event that had the potential of resulting in or contributing to the right foot condition that arose years after his work-related accident. Even if Mr. Tolliver had presented sufficient evidence to invoke the presumption of compensability, William C. Smith & Co., Inc. argued Dr. Bach's deposition and medical records were sufficient to sever the connection between the right foot injury and the compensable work accident. Finally, William C. Smith & Co., Inc. argued Mr. Tolliver had not proven entitlement to wage loss benefits.

In a Decision and Remand Order issued May 17, 2013, the Compensation Review Board ("CRB") ruled Mr. Tolliver had invoked the presumption of compensability; Dr. Bach's opinion is not specific and comprehensive enough to rebut the presumption of compensability; and "the ALJ's ruling that 'Employer presented no evidence to rebut the presumption that Claimant's claim for workers' compensation benefits comes within the provision of the Act' is supported by substantial evidence and is in accordance with the law."<sup>2</sup> Regarding the nature and extent of Mr. Tolliver's disability, the CRB ruled the Compensation Order failed to adequately analyze Mr. Tolliver's entitlement to temporary total disability benefits in that the conclusion that Dr. Bach never directed Mr. Tolliver to remain off of work due to his foot ailments was not accurate. Consequently, the portion of the February 22, 2013 Compensation Order denying Mr. Tolliver temporary total disability benefits was not supported by substantial evidence in the record, was not in accordance with applicable law, and was vacated. This matter was remanded for further consideration of the nature and extent of Mr. Tolliver's disability.

In a Compensation Order on Remand dated January 29, 2014, the ALJ again denied Mr. Tolliver's request for temporary total disability benefits. Both parties appeal the Compensation Order on Remand.

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<sup>1</sup> *Tolliver v. William C. Smith Co., Inc.*, AHD No. 08-430B, OWC No. 649188 (February 22, 2013).

<sup>2</sup> *Tolliver v. William C. Smith Co., Inc.*, CRB No. 13-034, AHD No. 08-430B, OWC No. 649188 (May 17, 2013), p. 6. (Footnote omitted.)

In his appeal, Mr. Tolliver asserts the ALJ failed to follow the directives in the Decision and Remand Order:

Rather than re-analyze the temporary total disability issue with reference to other portions of the record that were omitted in the first Compensation Order, the COR appears to be nothing more than a copy and paste job. The COR does not engage in any new or different analysis regarding this issue.<sup>[3]</sup>

Because Dr. Bach never released Mr. Tolliver to return to pre-injury employment for his left foot injury, Mr. Tolliver argues he is entitled to wage loss benefits. In addition, Mr. Tolliver argues it was improper for the ALJ to address the issue of causal relationship when that portion of the Compensation Order was affirmed by the CRB in the May 17, 2013 Decision and Remand Order.

In response, William C. Smith Co., Inc. contends the ALJ properly denied Mr. Tolliver's request for wage loss benefits because he did not prove that the reason he has not worked since April 21, 2008 is his foot injury. Furthermore, William C. Smith Co., Inc. appeals the ALJ's ruling that Mr. Tolliver's right foot injury is not medically causally related to his on-the-job accident.

In opposition to William C. Smith Co., Inc.'s cross-appeal, Mr. Tolliver asserts

the medical causal relationship of his right foot, as addressed in the Compensation Order of February 22, 2013 and the Decision and Remand Order dated May 17, 2013, is a finding supported by substantial evidence and in accordance with the law, and further, that this issue has previously been litigated and this Honorable Board is precluded from again deciding this issue.<sup>[4]</sup>

Mr. Tolliver continues to assert he is entitled to wage loss benefits.

William C. Smith Co., Inc. requests the CRB reverse the ALJ's ruling that Mr. Tolliver's right foot condition is medically causally related to his February 12, 2008 industrial accident. Mr. Tolliver requests the CRB reverse the denial of temporary total disability benefits.

#### ISSUES ON APPEAL

1. Does the January 29, 2014 Compensation Order on Remand adequately analyze Mr. Tolliver's entitlement to temporary total disability benefits by addressing the deficiencies noted in the May 17, 2013 Decision and Remand Order?
2. Is the January 29, 2014 Compensation Order on Remand supported by substantial evidence in the record and in accordance with the law?

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<sup>3</sup> Memorandum of Points and Authorities in Support of Application for Review, unnumbered p. 3.

<sup>4</sup> Claimant's Opposition to Employer and Carrier's Application for Review, p. 1.

#### PRELIMINARY MATTER

William C. Smith Co., Inc.'s Memorandum of Points and Authorities in Support of Employer/Carrier's Application for Review filed in this appeal on February 28, 2014 is almost verbatim a copy of its Memorandum of Points and Authorities in Support of Employer/Carrier's Application for Review filed in *Tolliver v. William C. Smith Co., Inc.*, CRB No. 13-034, AHD No. 08-430B, OWC No. 649188 (May 17, 2013) on March 25, 2013. The issue raised by William C. Smith Co., Inc. regarding the medical causal relationship between Mr. Tolliver's on-the-job accident and his right foot injury was addressed in the May 17, 2013 Decision and Remand Order; the CRB affirmed the ALJ's ruling that "Mr. Tolliver's right foot injury is medically causally related to his work-related accident is affirmed."<sup>5</sup> This ruling is the law of the case<sup>6</sup> and will not revisited in this Decision and Remand Order.

#### ANALYSIS<sup>7</sup>

The nature and extent of Mr. Tolliver's temporary total disability, if any, was the focus of the remanded portion of this case. In the May 17, 2013 Decision and Remand Order, the CRB explicitly stated:

[Mr. Tolliver] argues his present condition renders him unable to perform the duties of his pre-injury employment, and as a result, he is entitled to temporary total disability benefits. Specifically, Mr. Tolliver asserts Dr. Bach never released him to pre-injury employment because of his left foot injury:

#### Opening Statement on Behalf of Claimant

Mr. Peffer: Your Honor, as the joint pre-hearing statement indicates, the two issues for adjudication here is [*sic*] the medical causal relationship of the right foot, as well as the nature and extent of Mr. Tolliver's disability, if any, and I'd like to start by telling you a little bit about what you're going to hear from Mr. Tolliver, as a person, and then tell you, Your Honor, what Mr.

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<sup>5</sup> *Tolliver v. William C. Smith Co., Inc.*, CRB No. 13-034, AHD No. 08-430B, OWC No. 649188 (May 17, 2013), p. 8.

<sup>6</sup> The law of the case doctrine recognizes that "once the court has decided a point in a case, that point becomes and remains settled unless it is reversed or modified by a higher court." *Kritsidimas v. Sheskin*, 411 A.2d 370, 371 (D.C. 1980).

<sup>7</sup> The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

Tolliver believes, when you look at the evidence, that really the sole issue is, that you're actually going to have to decide, because Mr. Tolliver believes that he has been and continues to be temporarily totally disabled, because of his left foot, and he'll be relying upon the evidence of Dr. Bach, as well as his testimony.

Judge Meek: One second.

Mr. Peffer: Yes, Your Honor.

Judge Meek: I thought you told me you were seeking TTD for the right foot.

Mr. Peffer: No, we're seeking temporary –

Judge Meek: It's the left foot?

Mr. Peffer: -- and total disability benefits, Your Honor.

Judge Meek: Okay, hold on.

Mr. Peffer: And we're also seeking medical care and treatment for the right foot.

Judge Meek: Got you, I'm sorry.

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Mr. Peffer: Dr. Bach, his treating physician, has never released him to his pre-injury employment as a maintenance engineer, which is a fancy title.<sup>[8]</sup>

Although the ALJ addressed Mr. Tolliver's work capacity as a result of his right foot condition, the narrow findings of fact do not lead to the broad conclusion. The ALJ determined

Claimant's evidence fails to show, the current medical condition of his right foot prevents him from working. Dr. Bach's medical reports do not direct Claimant to remain off from work. At hearing, Claimant testified he was no longer able to work after April 21, 2008 but does not attribute this inability to work to his foot ailments. (TR p. 46). At hearing Claimant was asked, ". . . do you recall Dr. Bach ever releasing you to return to work?" Claimant answered, "no." The problem with this verbal exchange

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<sup>8</sup> Hearing Transcript, pp. 18-20.

is that there was no foundation laid to establish the fact that Dr. Bach ever directed Claimant to remain off from work due to his foot ailments.<sup>[9]</sup>

The start of this analysis focuses on Mr. Tolliver's right foot injury and is accurate; however, the conclusion that Dr. Bach never directed Mr. Tolliver to remain off from work due to his bilateral foot ailments is not accurate. At his deposition, the following exchange took place between Dr. Bach and Mr. Peffer:

Q: And when I review your medical records in your file and the ones that I have, have you to date released Mr. Tolliver back to his pre-injury employment as it relates to his left foot?

A: No.<sup>[10]</sup>

We do not hold that this is the only reference in the record to Mr. Tolliver's work capacity, but it is evidence in the record which must be addressed when reaching a conclusion regarding Mr. Tolliver's entitlement to temporary total disability benefits. For this reason, we must remand this matter.

On remand the ALJ wrote the following to address the deficiencies noted in the May 17, 2013 Decision and Remand Order:

As Claimant is seeking TTD benefits from January 26, 2012 to the present and continuing, we must now determine the nature and extent of Claimant's disability. In interpreting the Act, it has been found, and is widely acknowledged, that there is no presumption of the nature and extent of Claimant's disability. "A plaintiff has the burden to prove the nature and extent of his disability by a preponderance of the evidence. Section 7(c) of the federal Administrative Procedures Act has been interpreted to mean that when the evidence is evenly balanced, a benefits Claimant must lose. Merely presenting 'substantial evidence' to support her claim is not necessarily enough to carry the burden of persuading the finder of fact. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Golding-Alleyne v. Dist. Of Columbia Dept. of Employment Services*, 980 A.2d 1209 (DCCA 2009) citations omitted.

Claimant's physician, Dr. Bach, testified in his deposition, that Claimant is still undergoing extensive treatment for his right foot. (TR pp. 25-27). Employer has presented no evidence to controvert Claimant's need for ongoing care to his right foot.

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<sup>9</sup> *Tolliver v. William C. Smith Co., Inc.*, AHD No. 08-430B, OWC No. 649188 (February 22, 2013), pp. 5-6.

<sup>10</sup> Claimant's Exhibit 1, p. 17.

Claimant's evidence fails to show, the current medical condition of his right foot prevents him from working. Dr. Bach's medical reports do not direct Claimant to remain off from work due to the condition of his right foot. At hearing, Claimant testified he was no longer able to work after April 21, 2008 but does not attribute this inability to work to his right foot ailment. (TR p. 46). At hearing Claimant was asked, ". . .do you recall Dr. Bach ever releasing you to return to work?" Claimant answered, "no." The problem with this verbal exchange is that there was no foundation laid to establish the fact that Dr. Bach ever directed Claimant to remain off from work due to his right foot ailment.

Although Dr. Mark Sugar, in his April 27, 2009 IME report concerning Claimant's left foot states, "The patient is unable to return to work in either a fully [sic] duty or light duty position," (CE 6, p.137), there is no evidence to show Claimant did, in fact, stop working because of his right foot condition. Further there is no recent evidence to show Claimant remains off from work as a result of his right foot injury.

Dr. Bach, in four years of treating Claimant's feet, never indicates Claimant's need to remain off work.

While Claimant has established the severity of Claimant's condition he has not established Claimant's inability to work nor the duration of his asserted disability. Claimant has failed to meet his burden of proof to show he is entitled to TTD benefits.<sup>[11]</sup>

The differences between this passage in the January 29, 2014 Compensation Order on Remand and the corresponding passage in the February 22, 2013 Compensation Order are underlined.<sup>12</sup> These minor changes do not address the fundamental problem that prior to his right foot injury, Mr. Tolliver had not been released to return to work for his left foot injury. As a result, the CRB is constrained to remand this matter for the ALJ to address the deficiencies set forth in the May 17, 2013 Decision and Remand Order.

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<sup>11</sup> *Tolliver v. William C. Smith Co., Inc.*, AHD No. 08-430B, OWC No. 649188 (January 29, 2014), unnumbered p. 5. (Emphasis added.)

<sup>12</sup> Changes from plural to singular and corrected spelling errors have not been highlighted.

CONCLUSION AND ORDER

The Compensation Order on Remand fails to adequately analyze Mr. Tolliver's entitlement to temporary total disability benefits. Consequently, the portion of the January 29, 2014 Compensation Order on Remand denying Mr. Tolliver temporary total disability benefits is not supported by substantial evidence in the record, is not in accordance with applicable law, and is VACATED. This matter is remanded for further consideration of the nature and extent of Mr. Tolliver's disability consistent with the directives in the May 17, 2013 Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

  
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MELISSA LIN JONES  
*Administrative Appeals Judge*

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May 8, 2014

DATE