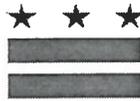


**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-092**

**ELMER BOLDEN,  
Claimant–Petitioner,**

**v.**

**DISTRICT OF COLUMBIA PUBLIC LIBRARY,  
Employer–Respondent.**

Appeal from a April 30, 2015 Compensation Order  
by Administrative Law Judge Fred D. Carney, Jr.  
AHD No. PBL 11-012A, DCP No. 7610090002200-30003

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 OCT 7 PM 12 27

(Decided October 7, 2015)

Michael J. Kitzman for Claimant  
Andrea G. Comentale for Employer

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

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Elmer Bolden (Claimant) injured his right shoulder on July 1, 2003 while handling mail in a hamper filled with boxes of books. Claimant continued to work until September 2003, when he sought medical care for continuing pain and filed a claim for compensation under the Comprehensive Merit Personnel Act of 1978, as amended. D.C. Code §1-623.01 *et seq.*, (the Act) at §1-623.28(a). The claim was accepted and medical care from Dr. Craig Faulks and wage benefits were provided beginning September 21, 2003. An MRI revealed, among other things, that Claimant had sustained a right torn rotator cuff.

Claimant underwent surgical intervention, including right shoulder arthroscopy, labral debridement, subacromial decompression and an open distal clavicle resection. Thereafter he underwent a course of physical therapy. However, he continued to experience pain and following a second MRI, additional surgery was recommended, which Claimant declined.

Claimant was evaluated at Employer's request on September 6, 2005 by Dr. Marc Danziger, who opined that Claimant had reached maximum medical improvement and was able to return to work subject to a 10 pound lifting restriction. He did not return at that time.

On January 27, 2012, Claimant was evaluated at Employer's request by Dr. Anthony Unger, who, after reviewing CT scans and the MRI studies, opined that Claimant suffers from multi-level cervical degeneration and stenosis, most prominently at C3-4 and C4-5, with cervical radiculopathy. He also opined that these conditions are not related to the work injury.

On March 20, 2012, Employer issued a Notice of Determination (NOD) which read in part:

We intend to close your public sector workers' compensation claim. Payments will be terminated April 18, 2012. You no longer meet the requirements for continued claim payments. This conclusion is based an [sic] Additional Medical Evaluation (AME) performed by Dr. Anthony S. Unger on January 27, 2012. Dr. Unger stated your "current diagnosis is cervical radiculopathy ... [and] is not related to his original accident of July 1, 2003.

EE 7.

Claimant contested the NOD by filing an Application for Formal Hearing with the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES) resulting in a formal hearing before an Administrative Law Judge (ALJ) which occurred on February 13, 2013.

On April 30, 2015, the ALJ issued a Compensation Order (CO) denying Claimant's request for reinstatement of his benefits, finding that "Employer has presented substantial evidence to support its termination. Claimant a [sic] has failed to show by a preponderance of the evidence that that his shoulder prevents him from returning to work and has failed to show by a preponderance of the evidence that is [sic] neck condition is related to his employment." CO, p. 7.

Claimant filed an Application for Review (AFR) and memorandum of points and authorities in support thereof (Claimant's Brief) with the Compensation Review Board (CRB) in which he argues that the finding that Claimant's current cervical condition is unrelated to the work injury, and the finding that the shoulder condition doesn't prevent his returning to work, are not supported by substantial evidence.

Employer filed an Opposition to Petitioner's Application for Review and memorandum of points and authorities in support thereof (Employer's Brief), arguing that the AFR "fails to specify how the CO is not supported by substantial evidence", that it misrepresents the contents of the AME reports, and that it is uncontested that Claimant has been authorized to return to light duty work by his treating physician.

Because the CO improperly placed the third step burden of proof under *Mahoney v. District of Columbia Public Schools*, CRB No. 14-067, AHD No. PBL14-042, DCP No. 76000500012005-008 (November 12, 2014) (*Mahoney*) upon Claimant rather than upon Employer, and because the CO contains no findings of fact concerning whether light duty work within Claimant's restrictions has been offered or is otherwise available to Claimant, the denial of reinstatement of temporary total disability benefits is vacated, and the matter is remanded for further consideration.

#### ANALYSIS

We will note preliminarily that both the ALJ and Claimant appear to harbor significant misunderstandings of the current state of the law with respect to the so-called "treating physician preference" on the part of the ALJ, and the "presumption of compensability" on the part of Claimant.

The CO contains a lengthy footnote on page 7 discoursing upon the existence and limitations of the treating physician preference under D.C. § 32-1501, *et seq.*, governing private sector workplace injuries, and was for brief period statutorily incorporated into the Act, but later repealed, and is no longer part of the Act. *See District of Columbia Public Schools v. DOES*, 95 A.3d 1284 (DC 2014).<sup>1</sup>

Claimant's Brief contains a passage on page 2 stating "The Court of Appeals has repeatedly held that the mere statement of a physician's opinion in opposition to the presumption [of compensability] is not sufficient to overcome the presumption because where such an opinion is unaccompanied by a discussion of the reasoning upon which it is based, and where such opinion has been reached in the absence of a review of at least most, if not all, of the relevant medical records, it does not constitute 'substantial evidence'", citing *WMATA v. DOES and Harold Spencer, Intervenor*, 827 A.2d 35 (D.C. 2002).

Unlike the treating physician preference, the presumption of compensability is a creature of statute, specifically, D.C. Code § 32-1521 of the private sector act. The Act contains no such provision, and it has long been held that the law governing disability claims by District of Columbia government employees, including the current Act, contains no such presumptions. *See Brown v. District of Columbia Housing Authority*, ECAB No. 98-12, H&AS No. 97-65, ODC No. 366316 (December 3, 1998); *Gunn v. District of Columbia Department of Corrections*, CRB No. 14-038, AHD No. PBL 09-076, DCP No. 30100527985-001 (June 25, 2014).

We point these errors out, because this matter is being remanded, and the further proceedings undertaken should be free of these misconceptions.

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<sup>1</sup> Although the CRB had held in that case that the repealed provision created a more stringent standard than had been in place under *Kralick v. DOES* 842 A.2d 705, (D.C. 2004) which incorporated the private sector "common law" preference into public sector cases, and that the repeal therefore merely returned the state of the law to *Kralick*, the District of Columbia Court of Appeals (DCCA) disagreed, holding that the repeal of the provision eliminated any such preference in claims brought under the Act.

Turning to the specific issues at hand, although the CO references *Mahoney* and it paraphrases the *Mahoney* process adequately, it does not apply that framework properly.

Under *Mahoney*, a three step process was enunciated as follows:

The employer first has the burden of producing current and probative evidence that claimant's condition has sufficiently changed to warrant a modification or termination of benefits. If the employer fails to present this evidence then the claim fails and the injured worker's benefits continue unmodified or terminated.

If the employer meets its initial burden, then the claimant has the burden of producing reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits. If this burden is met, then the evidence is weighed to determine whether employer met its burden of proving by a preponderance of the evidence that claimant's benefits should be modified or

*Mahoney* at 7.

The CO relies upon the AME report of Dr. Unger to conclude that Employer has made its initial showing. The ALJ wrote:

The report of Dr. Unger is based upon his examination of Claimant and Claimant's medical history. Dr. Unger opined Claimant's current complaints are unrelated to the accepted work injury and are the result of degeneration. (EE 1)<sup>2</sup>. Dr. Unger notes that Claimant was 67 years old at the time of the examination. Therefore, Employer has presented current and probative evidence that Claimant's condition has sufficiently changed to warrant a termination of benefits. Now the burden is on Claimant to show by reliable relevant evidence that conditions have not changed to warrant a termination.

CO at 6.

The CO fails to mention anything that Dr. Unger has to say about the accepted work injury, (the right shoulder), or about Claimant's work capacity. However, review of the report reveals that Dr. Unger does comment upon both these issues. The majority of his report deals with his view that Claimant's cervical condition is unrelated to the work injury, but he also stated "I think at this point in time the claimant can return to work without any restrictions. I think he is capable of working in the capacity that has been outlined in his work description. I believe he does not need further treatment." EE 4, p. 2. The record contains a copy of the job description to which we assume the doctor was referring, EE 5, "Motor Vehicle Operator Leader".

We are hesitant to comment upon whether this evidence is sufficient to meet the threshold showing required of Employer under *Mahoney*, and were it not for the fact that the ALJ proceeded to find, in the second step of his analysis, that Claimant's evidence was sufficient to

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<sup>2</sup> The CO erroneously identifies Dr. Unger's report as EE 1. It is EE 4.

meet Claimant's burden of production in response to this showing, we would be forced to remand for the ALJ to make that determination taking into consideration the relevant contents of Dr. Unger's report. However, taking into account that the ALJ found Claimant's evidence in response to be sufficient to move the inquiry to step three, we will deem the ALJ's failure to be harmless error.

As just intimated, the ALJ proceeded to consider Claimant's testimony and the reports of Dr. Faulk, and concluded that Claimant had adduced substantial evidence that he remains unable to perform his pre-injury duties which include lifting books and boxes overhead. We affirm that conclusion.

The ALJ then wrote the following:

Now the entire body of evidence has to be weighed to determine which is more copious.

The Claimant now has the burden of proving by a preponderance of the evidence that he does in fact continue with a disability that he sustained in the performance of her [sic] duty for Employer.

This brief passage evinces the appearance of one misapprehension, and demonstrates the existence of a second, fatal error.

First, the standard by which the question to be resolved is a preponderance of the evidence, which is not synonymous with "copious". It is the quality of the evidence, not its quantity, that is relevant.

Second, and more significantly, the ALJ placed the burden of proof on Claimant, not on Employer where it belongs, under *Mahoney*.

This error is such that we are forced to vacate the denial of Claimant's claim for continuing benefits, and remand the matter for further consideration.

#### CONCLUSION AND ORDER

The Compensation Order's denial of Claimant's request for reinstatement of benefits was reached by the ALJ improperly placing the burden of proof on Claimant in the third step of the analysis, and is therefore contrary to law and is vacated. The matter is remanded for further consideration of whether Employer's evidence demonstrates, by a preponderance of the evidence, that there has been a change in Claimant's shoulder condition such that he is capable of returning to his pre-injury job without restrictions, or that Employer has offered or demonstrated the existence of suitable, available alternative employment that is within Claimant's limitations as they relate to his right shoulder. The further consideration shall be undertaken in a manner consistent with the foregoing Decision and Remand Order.

*So ordered.*