

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB 15-127

**HENRY GLOVER,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer- Petitioner.**

Appeal from a July 14, 2015 Compensation Order on Remand
by Administrative Law Judge Fred D. Carney, Jr.
AHD PBL No. 12-015A DCP No. 30101082290-0001

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JAN 15 PM 12 54

Harold L. Levi for Respondent¹
Andrea G. Comentale for Petitioner²

(Decided January 15, 2016)

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

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The following is taken from the Decision and Remand Order issued by the Compensation Review Board on December 16, 2014 (the DRO), in the prior appeal in this matter:

Claimant worked for D.C. Public Schools as a bus driver. On October 7, 2010 he injured his right shoulder, neck, and back when he fell after leaning back in a chair. Claimant went home, rested, returned to work, and was able to complete his afternoon route.

The following day, October 8, 2010, Claimant received emergency room treatment at the Veteran's Administration hospital. After x-rays failed to show

¹ Claimant was represented by Johnnie Lewis Johnson III at the formal hearing.

² Employer was represented by Corey P. Argust at the formal hearing.

any fractures, Claimant was prescribed medication and advised to take fourteen days of bed rest.

Claimant came under the care of Dr. Robert Collins, an orthopedic surgeon, on October 19, 2010. Dr. Collins found Claimant disabled from all work until January 26, 2011 when he released Claimant to light duty. On February 16, 2011 Dr. Collins released Claimant to regular work, but noted Claimant might experience some discomfort that would improve over time.

Although Dr. Collins' opined Claimant could do his regular work, Claimant returned to a light duty position on February 17, 2011. Claimant stopped working on March 9, 2011 after Claimant advised his supervisor that he was in pain and was told to go home.

Claimant, with Employer's permission, changed treating physicians to another orthopedic surgeon, Dr. Sankara R. Kothakota, on February 28, 2011, although Dr. Collins examined Claimant on March 2 and March 21, 2011. Neither party submitted the report from Dr. Kothakota's first examination. The first report in evidence from that doctor is dated March 18, 2011 and noted that Claimant was experiencing pain, was scheduled for an MRI at the Veteran's Hospital, and that Claimant told Dr. Kothakota that he had been sent home from work.

Dr. Robert Gordon, orthopedic surgeon, examined Claimant at Employer's request on April 19, 2011. The last entry states "IMPRESSION: Multiple subjective complaints."

Dr. Kothakota examined Claimant again on May 4, 2011. He reported that the MRI showed a partial thickness in Claimant's rotator cuff and that Claimant only could do "sedentary type" work.

Dr. Collins examined Claimant on October 19, 2011 and October 31, 2011. He wrote an Addendum on November 21, 2011 that stated

(Claimant) does have some degenerative arthritic changes of his right shoulder which may get some irritation if he is doing overhead work. However, this would not bar him from going back to full duty. I would place no restrictions on him to full duty. He is released to full duty at this time as far as his injury of 10/07/2010 is concerned.

After receiving this report, Employer notified Claimant on November 30, 2011 that he should return to work. The letter noted that Claimant previously reported to work with his right arm in a sling, although no doctor had told him to wear a sling. The letter further stated that Claimant's supervisor, Drew Morton, was told of the full duty release and that Claimant should follow up with Mr. Morton "to address a return to work date."

Employer sent Claimant a Notice of Determination Regarding Temporary Total Disability (NOD) on January 6, 2012 that advised Claimant it was ending his temporary total disability benefits because he did not return to full duty as requested. The NOD stated:

*Your public sector workers' compensation benefits for continuing temporary total disability benefits are hereby **TERMINATED**.*

Your temporary total disability benefits have ended due to [sic] failure to return to full duty. You were advised in writing by nurse case manager Marlise Skinner that your treating physician, Dr. Robert Collins released you to return to full duty... Dr. Collins stated that you have some degenerative arthritic changes of his right shoulder which may cause some irritation if you are doing overhead work but that this would not bar you from going back to full duty. On November 30, 2011 a letter was mailed to your home along with Dr. Collins [sic] addendum report. You were asked to contact Drew Morton at OSSE to work out a return to work date. To date, you have not contacted Mr. Morton. I called your home on December 14, 2011 and again on December 21, 2011 and each time I left a voice message in which I asked that you contact me to discuss your return to work status. To date, you have not responded to my calls.

Claimant requested reconsideration of the NOD. Employer issued a Final Decision on Reconsideration ("FDOR") on February 10, 2012. The FDOR upheld the decision to end benefits. Claimant filed a request for a formal hearing with AHD and the hearing was held on November 19, 2012.

DRO at 2 – 4.

A formal hearing was held before an administrative law judge (ALJ) on November 19, 2012, and a Compensation Order (the CO) was issued by the ALJ on June 24, 2014. In the CO, the ALJ entered an award for right shoulder surgery and reinstated Claimant's temporary total disability benefits from February 10, 2012 to the date of the hearing and continuing.

Employer appealed the awarded medical and indemnity benefits. Claimant appealed the ALJ's failure to award an attorney's fee and costs.

In the DRO (from which the above quoted background is taken), the CRB vacated the ALJ's decision authorizing surgery because it was not in accordance with the law, inasmuch as Employer had not issued a Notice of Determination denying that surgery. The CRB vacated the decision reinstating benefits because it was not supported by substantial evidence in the record. The CRB affirmed the ALJ's failure to award an attorney fee. The matter was remanded to AHD for further consideration of the claim under the protocol established in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004 (November 12, 2014).

On July 14, 2015, the ALJ issued a Compensation Order on Remand (the COR) in which the ALJ granted Claimant's claim for reinstatement of temporary total disability benefits, finding that the first two prongs of *Mahoney* had been met, and that Employer failed to meet its burden under the third prong.

Employer appealed the COR, filing Employer's Application for Review and memorandum of points and authorities in support thereof (Employer's Brief). Employer argues that the COR is replete with factual errors and unsupported findings, that Claimant has failed to demonstrate that he continues to be disabled as a result of the work injury, and that any alleged incapacity that Claimant has proven is not a condition for which the Public Sector Workers' Compensation Program (PSWCP) has accepted and paid benefits.

Claimant filed Claimant's Opposition to Employer's Application for Review and memorandum of points and authorities in support thereof (Claimant's Brief). Claimant argues that all the complained of allegedly erroneous or unsupported facts in the COR are irrelevant to the case, and that Claimant's injury and attendant incapacity are the same injury for which PSWCP has accepted responsibility and paid benefits, and that the determination that the condition prevents Claimant from performing the pre-injury job is supported by substantial evidence.

For the reasons set forth below, we affirm the COR.

ANALYSIS

Review of the DRO reveals that, although the initial Compensation Order was replete with errors and unsupported factual findings, the CRB made two essential determinations of relevance to the case as it now stands: first, that AHD did not have jurisdiction to consider the claims for surgical intervention and other medical procedures because the PSWCP has yet to issue an NOD denying the requested care, and second, the claim for reinstatement of benefits needed to be analyzed under the *Mahoney* protocols.

Employer first posits that the COR again contains numerous factual errors and unsupported findings. Claimant posits that even if this is so, the complained of errors are irrelevant to the claim for reinstatement of temporary total disability benefits.

Without combing through the list of reputed errors³, we state that we agree with Claimant that none of the supposed errors relate to the central bone of contention in this matter, at this stage: whether or not the condition that the ALJ found to be disabling Claimant from performing his duties as a school bus driver, a partial tear in the rotator cuff which may be in need of surgical intervention, is a condition properly before the ALJ in this matter.

Stepping back from this question briefly, we note that Claimant does not dispute that the first prong of *Mahoney* has been met. That is, Employer has adduced sufficient evidence that

³ In Argument I, Employer asserts that the COR erroneously identifies when Claimant began taking certain prescription medicines, Lisinopril and Diovan, which are unrelated to this case. Employer further argues that the COR erroneously states when and under what circumstances Claimant commenced methadone and Percocet. As discussed below, none of these facts had any bearing on the basis of the COR.

Claimant has been cleared to return to work by his initial treating physician, Dr. Collins. *See* Claimant's Brief, at 2, 9.

While Employer does not explicitly concede that Claimant has adduced sufficient evidence that he remains unable to return to that position, it does not argue that Claimant has the capacity to return to the school bus operator position. Rather, Employer argues that it is not the "accepted condition" that is the source of Claimant's alleged incapacity. Employer's Brief, Argument II, pp. 9 – 10.⁴

The ALJ concluded that Claimant had met the second prong burden, through Claimant's own testimony of continuing ongoing limitations, particularly relating to his inability to work with his arms above shoulder height, and the corroborating medical opinion from Dr. Collins that Claimant is a candidate for surgical intervention. COR, pp. 6 – 7. This evidence is sufficient to meet Claimant's burden under prong two.

Thus, our focus turns to the third prong, that being whether the ALJ's determination that Employer has not demonstrated by a preponderance of the evidence that Claimant's work injury no longer inhibits his ability to perform essential functions of a school bus driver is supported by substantial evidence.

Employer's argument on this score is that the alleged cause of Claimant's incapacity is an injury that the PSWCP has not accepted. It argues that the only injury to the shoulder that has been accepted and for which it has paid benefits is a "shoulder strain" and that because they have not accepted a muscle tear as an injury, any inability to perform the job duties related to that condition cannot be considered. Employer relies primarily upon *Ashton v. District of Columbia Department of Motor Vehicles*, CRB No. 14-007, AHD No. PBL 13-045, DCP No. 30881122563-0001 (2014) for this position.

Claimant disagrees, and argues that Employer has accepted and paid for the injury to the shoulder and that acceptance of a shoulder injury and payment of benefits in connection therewith is sufficient to bring the rotator cuff tear within the claim. Claimant argues that *Ashton* does not apply here, because this case deals with the same body part that was accepted, and that the mere fact that an MRI taken after acceptance of the injury by the PSWCP demonstrates that the injury is more severe than originally thought does not render it a new or different injury.

We agree with Claimant.

We start by noting that the NOD terminating Claimant's benefits makes no reference to the defense now posited by Employer. It simply stated that Claimant had been released to full duty by Dr. Collins, and that despite the fact that overhead work might cause some temporary problems upon that return, that would not bar him from going back to full duty.

Further, we do not accept Employer's argument that a change or expansion of a diagnosis from a strain to a tear effects whether an injury has been accepted and benefits for that injury paid by the PSWCP. It would be one thing if the ALJ found, for example, that Claimant's use of Percocet

⁴ Employer never specifically states where in the *Mahoney* paradigm the ALJ erred. Rather, Employer argues that the allegedly incapacitating condition is not the "accepted" condition, an argument that could be applicable either to prong 2 or 3 of *Mahoney*.

and Methadone were the cause of his inability to return to work. Then we would be called upon to consider Employer's arguments that the record strongly supports a finding that this drug profile pre-dated the work injury, and its assertion that it is not specifically identified by any of the physicians in this case as being related to the work injury.⁵ But that is not the basis upon which the ALJ decided the issue of Claimant's work capacity. It was the ALJ's acceptance that Claimant's job requires that he be able, in emergency situations, to carry a passenger or passengers from the bus that undergirds the decision, and that conclusion is supported by substantial evidence and is not contested by Employer in this appeal.

Otherwise put, the ALJ found that Claimant is unable to perform the functions of his pre-injury job because of a shoulder rotator cuff tear that was not diagnosed until after the initial acceptance of the shoulder injury claim because no MRI had yet been performed. In reaching this conclusion, the ALJ determined that the primary evidence upon which Employer relies, the opinion of Dr. Collins, is unpersuasive because there is no indication that Dr. Collins had a full appreciation of the extent of shoulder exertion the job potentially entails. The ALJ's acceptance of Claimant's testimony in this regard, corroborated as it is by the MRI findings, renders the determination that Employer has not proved by a preponderance of the evidence that Claimant's work injury is no longer preventing him from returning to his job adequately supported by substantial evidence.

CONCLUSION AND ORDER

The relevant findings of fact in the Compensation Order on Remand are supported by substantial evidence and the determination that Employer has failed to meet its burden under the third prong of *Mahoney* is in accordance with the law. The Compensation Order on Remand is affirmed.

So ordered.

⁵ We take this opportunity to acknowledge the points made in Claimant's Brief concerning the problematic situation posed in this case relating to the drug profile and Claimant's job. All we can say is that at this time that issue is not before us, there is no evidence in the record of which we are aware touching upon it, and resolving it is beyond our competence and jurisdiction.