

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

CRB No. 11-050

JALYN GLORE,

Claimant-Petitioner,

v.

NORAIR ENGINEERING CORPORATION AND LIBERTY MUTUAL INSURANCE COMPANY

Employer/Carrier-Respondent.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2011 OCT 6 AM 21

Appeal from a Compensation Order of
Administrative Law Judge Karen R. Calmeise, AHD No. 09-154A

Matthew Peffer, Esquire, for the Petitioner

Christopher Costabile, Esquire, for the Respondent

Before JEFFREY P. RUSSELL¹, MELISSA LIN JONES, and LAWRENCE D. TARR, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

Claimant, Ms. Gore, was employed as a journeyman steamfitter/steamfitter mechanic. As is typical in her profession, she obtains temporary work from different employers on an as-needed basis, either through the union hall, or by locating jobs through her own efforts. She sustained an injury on July 11, 2008 while employed by this employer, Norair, when she fell in a parking garage. A formal hearing was held on April 9, 2009, following which a Compensation Order was issued on May 13, 2009. In that Compensation Order (CO I), the ALJ granted Ms. Gore's claim for relief, awarding temporary total disability benefits from July 12, 2008 through December 1, 2008, and from December 17, 2008 through February 9, 2009.

¹ Judge Russell has been appointed by the Director of DOES as an Interim CRB member pursuant to DOES Policy Issuance No. 11-03 (June 23, 2011).

Although not mentioned in CO I, Ms. Glore returned to work with a different employer, Kinetics. It was found in CO I, however, as a finding of fact, that this return to work was a return to her usual work: "Claimant eventually returned to her usual work on February 9, 2009." CO I, page 3. There are no findings of fact concerning what constituted that "usual work" in CO I.

The work to which Ms. Glore returned on February 9, 2009 involved removing metal wall panels and inspecting fire dampers in several museum buildings along the National Mall. Ms. Glore continued working for Kinetics until May 28, 2009, when the project between Kinetics and the museums for which its work was being performed ended.

Ms. Glore was out of work from May 29, 2009 until she obtained employment with another employer, Pierce Mechanical, on July 10, 2009. Her position title was "firewatch/groundperson". She remained employed by Pierce until October 23, 2009. Upon leaving the employ of Pierce, her status with Pierce was denominated as "do not rehire" due to absenteeism.

Ms. Glore remained off work until she obtained employment commencing April 14, 2010 with Southland Industries, installing pipes which supply oxygen and other gases in hospital rooms. Ms. Glore was laid off from that job on December 3, 2010.

Ms. Glore sought temporary total disability benefits for the period when she was out of work after the Kinetics job ended and the Pierce job commenced, and the period when she was out of work after the employment with Pierce ended and the Southland job commenced.² Norair declined to pay the claimed temporary total disability benefits, and Ms. Glore sought a formal hearing.

That hearing was held before a different ALJ on March 31, 2011, following which a Compensation Order was issued on May 5, 2011 (CO II). In CO II, the ALJ found that "As a journeyman steamfitter/steamfitter mechanic certified by the union, Claimant's job duties include working with heavy pipes, walking up and down ladders, welding, drilling and using hand tools overhead for long periods of time". She also found that "Claimant returned to her regular work on February 9, 2009"³, and that none of the subsequent employments had ended as a result of the work injury. The ALJ denied the claim.

Ms. Glore timely appealed. Norair has filed nothing in opposition to the appeal.

DISCUSSION

Ms. Glore complains in this appeal that the ALJ did not properly analyze her claim under the proper standard, as enunciated by the District of Columbia Court of Appeals in *Logan v. DOES*, 805 A.2d 237 (D.C. 2002). This would include making a determination as to what the physical requirements of her pre-injury job were, and a determination as to whether she has the physical capacity to

² That Ms. Glore is not claiming temporary total disability benefits from and after the date of the layoff from Southland is alluded to, but not explained, by her counsel. See, HT 42 - 43.

³We view the reference in CO I to "her usual work" and CO II to "her regular work" to have substantively the same meaning, and to have been intended in each CO to have meant the same thing, particularly given that they are both used to refer to the same return to work date, February 9, 2009.

perform those physical requirements. The ALJ did not do this in a direct fashion. She did, however, make the same finding that had been made in CO I to the effect that Ms. Gore "returned to her regular work" on February 9, 2009, which impliedly means that, whatever the physical requirements of her "regular work" were, she had regained the capacity to meet those requirements as of February 9, 2009.

Ms. Gore's argument at the formal hearing and in this appeal is that the subsequent employments which she obtained were not "her usual employment" or "her regular work", but were actually light duty jobs which she self-selected based upon her own advance knowledge of what the specific jobs required physically. See, HT 32 – 33.

The ALJ acknowledges that this is Ms. Gore's theory of the case when, on page 4 of CO II she writes:

Although Claimant testified that the work she performed during her periods of employment with Kinetics and Pierce Mechanical were not her regular work duties and the work constituted light duty work, she testified that she applied for and was hired by both employers for the position of journeyman steamfitter or mechanic and that jobs she would be hired for through the union had no light duty classifications. (HT 54)²

...

²Claimant admitted, it was only after she was hired by Pierce as a steamfitter mechanic and she was assigned to a foreman, Mike, did she inform him that she had some limitations and he accommodated her.

CO II, page 4 (footnote as it appears in original).

In the working environment as found by the ALJ in CO II, in order to obtain employment as a steamfitter/steamfitter mechanic, a potential candidate must represent that he or she is capable of performing the full range of duties that such a position entails: that's the practical meaning of there being no "light duty" classifications. The fact that a worker might be able to isolate a job or two that could be expected to be lighter work than the others doesn't change the fact that in order to compete for even those jobs, the worker must present himself or herself as being fully physically capacitated.⁴

It is a claimant's burden to establish entitlement to the claimed level of benefits, and to do so by a preponderance of the evidence. *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986).⁵ The District of

⁴ By this, we mean fully able to perform whatever duties a steamfitter/steamfitter mechanic might be required to perform in any given job.

⁵ On page 4 of CO II, the burden of a claimant with regard to establishing the nature and extent of a claimed disability is described as to "produc[e] substantial credible evidence that she is entitled to the relief that he [sic] is seeking." This is inaccurate. The District of Columbia Court of Appeals wrote in *WMATA v. DOES and Juni Browne, Intervenor*, 926 A.2d 149 (D.C. 2007) (*Browne*):

On the question of the nature and extent of Mr. Browne's disability, the ALJ properly acknowledged that the claimant is not entitled to any presumptions. [citation omitted]: *Dunston v. District of*

Columbia Court of Appeals has established a “burden shifting” approach in which a claimant has the initial burden of demonstrating an injury-related inability to perform the duties of the pre-injury job, which demonstration shifts the burden to the employer to either rebut that showing (i.e., demonstrate through medical evidence or otherwise that the claimant is capable of performing that job), or to demonstrate the availability of suitable alternative employment (either through an offer of modified employment with the employer, or the availability of other jobs in the marketplace for which the claimant could compete and would likely obtain). Upon making such a showing, the burden reverts to the claimant to rebut employer’s evidence of job availability, which can be done by demonstrating that despite diligence in searching for work, that search has not met with success. *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

Bearing in mind the oft-repeated maxim that disability is not just a medical concept but also an economic one which includes the reality of the marketplace, applying *Logan* in this circumstance requires findings of fact as to the physical requirements of the steamfitter/steamfitter mechanic position that Ms. Glore held at the time she was injured working for Norair, and a determination as to whether Ms. Glore was capable of performing those requirements during the periods at issue. If so, she is not entitled to temporary total disability; if not, a determination needs to be made concerning whether Norair has demonstrated the availability during those periods of suitable alternative employment within Ms. Glore’s capacity (availability being jobs in the marketplace for which Ms. Glore could compete and likely obtain). If the evidence establishes such availability of suitable alternative employment, the burden reverts to Ms. Glore to rebut that evidence, by demonstrating that such availability is illusory, in light of a conscientious yet unsuccessful search.

There are no specific findings on these necessary matters in either CO I or CO II. Further, although the ALJ in CO II indicated that she was “relying” upon the opinions of Ms. Glore’s treating physician, Dr. Peter Trent (CO II, page 3), she appears to question their validity elsewhere (CO II, page 4). And, we note that the ALJ appears to accept Ms. Glore’s testimony concerning her physical capacity as credible. From CO II:

Although Claimant was a credible witness regarding the nature of her injuries and symptoms, there is no evidence in the record that Claimant suffered a physical impairment to the extent that she could not work or was physically disabled by her work injuries after February 2009.

CO II, page 5. How this squares with the existence in the record of Dr. Trent’s report of December

Columbia Dep't of Employment Servs., 509 A.2d 109 (D.C. 1986). The worker's compensation act defines disability as a "physical or mental incapacity, because of injury which results in the loss of wages." D.C. Code § 32-1501 (8) [footnote omitted]. Despite the statement by the ALJ in this, and many other cases, that the claimant's burden of proving the extent of a disability is "substantial credible evidence," the correct burden of proof is a preponderance of the evidence [footnote omitted]. *Burge v. District of Columbia Dep't of Employment Servs.*, 842 A.2d 661, 666 (D.C. 2004); *Upchurch v. District of Columbia Dep't of Employment Servs.*, 783 A.2d 623, 628 (D.C. 2001).

Browne, supra, at 149.

11. 2009, wherein he writes the following, is not evident to us:

The patient has been previously employed as a steamfitter, a heavy manual labor job which involved a lot of climbing, lifting and overhead work. In addition to the hip injury, the patient also sustained an injury to the left shoulder and right ankle.

...

The patient has asked me to express an opinion regarding her ability to return to her former employment. Based upon the history of the injury, the treatment which has been rendered, the patient's response to the treatment, the amount of time since the injury and the current examination, I do not think that this patient will be able to return to her previous work as a steamfitter and should seek more sedentary employment.

CE 2, report of December 11, 2009. In fact, the ALJ even quoted this very language earlier in CO II, at page 4. See also, CE 2, reports of August 8, 2009 ("At the present ... we are going to continue the oral medications and the restrictions at work") and March 27, 2009 ("At the present time, the patient is working light duty, but this does involve a considerable amount of walking and ladder climbing. [...] She is to remain on light duty at this time.") While they are not very specific, and the ALJ may ultimately find them unpersuasive if there are reasons to so find, these reports are clearly evidence that Ms. Glore could not perform her pre-injury job, post February 2009.

The ALJ is correct in assuming that, as a general principle, when an injured worker returns to work and then loses that job for reasons unrelated to the work injury, the ensuing wage loss is not deemed to be compensable. In this case, the ALJ made a finding that the return to work was to her *regular* employment, not to suitable alternative employment, but the finding of a return by Ms. Glore to her regular employment is unsupported by substantial evidence, in that the only evidence in this record that we can find concerning the jobs to which she returned is her testimony that they were lighter than the Norair position, including specific details as to what the work entailed.

Thus the denial of the claim must be vacated, and a remand for further consideration and analysis is required. On remand, the ALJ must determine whether Ms. Glore is capable of returning to her pre-injury job, taking into consideration the physical requirements of that job and Ms. Glore's physical capacity. As stated before, if it is determined that she can, the evidentiary basis for that finding must be identified, and the claim should be denied as of the date she regained the capacity to perform the duties of she had at Norair.

However, if after that consideration the ALJ determines that Ms. Glore was not capable of returning to her pre-injury job, the ALJ must proceed to determine whether Ms. Glore had at some point in the relevant period returned to suitable alternative employment, such that subsequent wage loss as a result of the employment ending is not compensable. In that event findings will be required concerning the reasons for the ending of the employment(s), and consideration must be given as to whether the employments are truly "suitable".

In that no claim is made for periods subsequent to Ms. Glore's obtaining employment with Southland on April 14, 2010, the relevant time frame for consideration of whether Ms. Glore had returned to suitable alternative employment is from July 12, 2008 (the date of injury) through April

14, 2010, a period of approximately 91 weeks. From the findings of fact made by the ALJ it is apparent that during that time, Ms. Glore worked for Kinetics for 16 weeks and three days and for Pierce for 15 weeks. Otherwise put, if Ms. Glore's testimony is credible, she was able to obtain work in 32 out of 91 weeks, and at least one reading of her testimony is that she lost the Pierce job due to absenteeism caused by pain and discomfort brought about by walking long distances required due to the size of the project site. See, HT 48 – 49. The ALJ should consider these and any other relevant factors in determining whether either of the subsequent employments were "suitable alternative employment".

If it is determined that either of the jobs constituted suitable alternative employment, then the claim should be granted up to the date she commenced that job, and denied thereafter. However, if neither job is determined to be suitable alternative employment, the claim should be granted during the times that she was not earning wages. This is because Norair has offered no evidence that it offered her a position within her physical capacity and has identified no other suitable jobs available, as is necessary under *Logan*, during the relevant time period.

As is discussed in *Washington Post v. DOES and Adil Mukhtar*, 675 A.2d 37 (D.C. 1996) at 41, evidence that a claimant has been able to earn occasional wages or perform certain kinds of gainful work does not rule out a finding of total disability. If there is not a realistic marketplace for work that is within a claimant's physical capacity, the fact that occasional work is available doesn't necessarily defeat a claim for temporary total disability during those times when a worker is unemployed. See also, *Barfield v. Curtis*, CRB No. 09-058 (December 31, 2009), and cases cited therein.

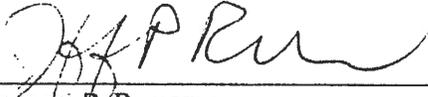
CONCLUSION

The finding that Ms. Glore had returned to her "regular employment" as of February 9, 2009 is not supported by substantial evidence, rendering the conclusion that Ms. Glore's wage loss thereafter non-compensable not in accordance with the law.

ORDER

The denial of Petitioner's claim for temporary total disability is vacated, and the matter is remanded for further consideration consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Law Judge

October 6, 2011
DATE