

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB 15-174

**LARRY D. JONES,
Claimant-Petitioner,**

v.

**TRAYLOR SKANSKA JAYDEE JOINT VENTURE
and ACE/ESIS,
Employer/Carrier-Respondent.**

Appeal from a September 30, 2015 Compensation Order
by Administrative Law Judge Nata K. Brown
AHD No. 13-235A, OWC No. 698422

(Decided April 4, 2016)

David M. Snyder for Claimant
Julie D. Murray for Employer

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

LINDA F. JORY on behalf of the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Larry D. Jones (Claimant) worked for Traylor Skansa Jaydee Joint Venture (Employer) as a welder. In this position, Claimant was required to lift welding torches, oxygen tanks and acetylene bottles which weighed more than 50 pounds. On November 15, 2012, Claimant lifted an oxygen bottle and felt a pop in his stomach. He fell to the ground and dropped the bottle. Claimant was taken by Employer to Concentra, where he was diagnosed with a right inguinal hernia. Claimant was held out of work until November 26, 2012, with restricted activity of no lifting over 10 pounds. Claimant was referred to Dr. Pedro Ceppa for hernia surgery, however Claimant instead made an appointment with Dr. Joel D. Fechter, orthopedic surgeon for November 21, 2012. He was diagnosed with a lumbosacral spine strain secondary to his injury at work on November 15, 2012.

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Dr. Fechter referred Claimant to Dr. Craig Colliver for a surgical consultation with regard to his inguinal hernia. Dr. Colliver repaired the hernia on November 26, 2013. Claimant resumed light duty work on December 2, 2013 cleaning offices in the evenings. Dr. Colliver released Claimant to resume full duty work on January 7, 2014. Dr. Fechter recommended work hardening for Claimant on February 6, 2014.

On April 22, 2014, Claimant presented his claim for temporary partial disability (TPD) benefits and ongoing medical treatment to an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES). On September 30, 2015, the ALJ issued a Compensation Order denying Claimant's claim for TPD and granting Claimant's request for work hardening and EMG nerve conduction studies.

Claimant filed a timely appeal, arguing that the ALJ's finding that Claimant has not demonstrated an entitlement to TPD benefits is not supported by substantial evidence and not in accordance with the law.

Employer filed a timely opposition to the appeal, arguing that the ALJ's decision is supported by substantial evidence and is in accordance with prevailing law.

ISSUE ON APPEAL

Is the September 30, 2015 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS¹

The ALJ properly set forth the standard set forth in *Logan v. DOES*, 805 A.2d 237 (D.C. 2002) (*Logan*) for determining the nature and extent of a disability.²

¹ 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.

² In *Logan*, the District of Columbia Court of Appeals explained the system employed under the Act for determining the extent of disability. A claimant must establish in the first instance that the work injury prevents the performance of the claimant's pre-injury job. If the claimant establishes this, a *prima facie* showing of total disability is established, shifting to the employer the burden of rebutting that showing, either by demonstrating that the claimant can in fact return to the pre-injury job, or showing that the employer has offered a modified position to the claimant which is within the claimant's physical capacity, or showing that there are other suitable alternative jobs available in the employment marketplace for which the claimant could compete in light of claimant's age, education work experience, and physical capacity. If the employer does this, the burden shifts back to the claimant to demonstrate that employer's evidence is faulty or inadequate, by, for example, demonstrating that the claimant has actively and diligently sought employment but failed to obtain work.

The ALJ summarized:

On December 19, 2013, Dr. Colliver recommended that Claimant should stay on light duty until January 7, 2014 and that he could resume full duty after January 7, 2014; however, Claimant had been laid off, and he did not have a full duty job to which he could report. In addition, although the hernia had been repaired, he still had complaints of pain in his back—shooting pain in the left side from his back and wrapping around to his thigh, and an aching pain in the right side of his back. On February 6, 2014, Dr. Fechter examined Claimant, and opined that he had continued difficulties, recommended a work hardening program, and he gave Claimant a light duty work restriction.

As of January 28, 2014, when Claimant was deposed, he testified that his union welding papers were inactive, and that those certificates have since elapsed, as they are active only for six months. To become active, he would have to go to the union hall and, if they had a job as a welder, they would ask him to weld something for them just to show them that he could still weld, and they would sign his welding certification. Claimant further testified that because the welding requires heavy lifting and his back, and with the pain that he has in his back, he did not think that he could do that kind of work. He has not been back to the union halls to look for a job.

Claimant testified that he did not think he could work as a welder; however, he never went back to the union hall to inquire if he was still able to work as a welder, or work in another job which he could perform. He has not submitted substantial, credible testimonial and medical evidence that he is unable to perform his primary job, welding. Claimant has not demonstrated an inability to perform his usual job.

CO at 5.

Notwithstanding Dr. Fechter's light duty restriction and Claimant's testimony that welding requires heavy lifting, the ALJ determined Claimant did not demonstrate an inability to perform his usual job and did not shift the burden to Employer to rebut Claimant's alleged inability or otherwise seek to rebut by establishing the availability of other jobs Claimant could perform.

We must agree with Claimant that with Claimant's testimony at the formal hearing which the ALJ described in the CO and the February 6, 2014 opinion of Dr. Fechter that Claimant required work hardening to maximize his functional abilities, which the ALJ found to be a reasonable and necessary expense, Claimant has demonstrated a *prima facie* case of total disability under the *Logan* test. As we conclude the ALJ did not properly apply the standard set forth in *Logan*, we conclude the determination that Claimant is not entitled to the requested TPD is not supported by substantial evidence and in accordance with the law. We must accordingly reverse this conclusion and remand the CO to the ALJ to determine, in accordance with *Logan*, if Employer can rebut a finding that Claimant remains unable to return to his pre-injury duties of a welder by

presenting opposing medical evidence as to the extent of claimant's disability. *Ridley v. WMATA*, CRB No. 06-66 (November 2, 2006). Should employer meet this evidentiary burden, claimant, in order to sustain a disability finding, must successfully challenge the legitimacy of the employer's evidence *Logan, supra* at 243.

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant has not demonstrated an inability to perform his usual job, and he is not entitled to TPD benefits from December 10, 2013 to the present and continuing is not in accordance with the law and is VACATED. The matter is REMANDED to AHD for the ALJ to determine if Employer has presented sufficient evidence to rebut Claimant's *prima facie* case of disability. If the employer does this, the burden shifts back to the claimant to demonstrate that employer's evidence is faulty or inadequate. The unopposed conclusion that the medical treatment sought by Claimant is reasonable and necessary is AFFIRMED.

So ordered.