

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-126

LUIS ALVAREZ,  
Claimant-Petitioner,

v.

RESTAURANT ASSOCIATES and  
GALLAGHER BASSETT SERVICES,  
Employer/Insurer-Respondent.

Appeal from a October 14, 2014 Compensation Order by  
Administrative Law Judge Linda F. Jory  
AHD No. 10-343D, OWC No. 662108

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
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John R. Noble for the Claimant  
Tony D. Villeral for the Employer

Before MELISSA LIN JONES, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND REMAND ORDER**

FACTS OF RECORD AND PROCEDURAL HISTORY

On June 25, 2009 while working as a dishwasher for Restaurant Associates (“RA”), Mr. Luis Alvarez slipped and struck his left knee. RA voluntarily paid temporary total disability benefits from July 7, 2009 to February 10, 2010, but a dispute arose over Mr. Alvarez’s entitlement to temporary total disability benefits after February 10, 2010.

On September 17, 2012, the parties proceeded to a formal hearing. An administrative law judge (“ALJ”) ruled that Mr. Alvarez’s pain management treatment was medically causally related to his compensable injury and that he was entitled to ongoing temporary total disability benefits and authorization for pain management. *Alvarez v. Restaurant Associates Corporation*, AHD No. 10-343B, OWC No. 662108 (November 11, 2012).

RA appealed the November 11, 2012 Compensation Order to the Compensation Review Board (“CRB”). The CRB affirmed the ALJ’s conclusion that Mr. Alvarez’s left knee condition and post-traumatic arthritis and his corresponding need for pain management and light duty were medically causally related to his work-related injury; the CRB reversed the portion of the Compensation Order concluding that Mr. Alvarez did not voluntarily limit his income in February 2010. *Alvarez v. Restaurant Associates Corporation*, CRB No. 12-190, AHD No. 10-343B, OWC No. 662108 (August 14, 2013).

On remand, the ALJ determined Mr. Alvarez had voluntarily limited his income from February 18, 2010 to February 23, 2010; the ALJ granted Mr. Alvarez temporary total disability benefits for the closed period of February 11, 2010 to February 17, 2010 and for February 24, 2010 and continuing. *Alvarez v. Restaurant Associates Corporation*, AHD No. 10-343B, OWC No. 662108 (September 30, 2013). The CRB affirmed the September 30, 2013 Compensation Order. *Alvarez v. Restaurant Associates Corporation*, CRB No. 13-133, AHD No. 10-343B, OWC No. 662108 (January 24, 2014).

The parties proceeded to a second formal hearing on September 16, 2014 to assess Mr. Alvarez’s entitlement to ongoing wage loss benefits and medical benefits. The ALJ denied the claim for relief. *Alvarez v. Restaurant Associates*, AHD No. 10-343D, OWC No. 662108 (October 14, 2014).

Mr. Alvarez appealed the October 14, 2014 Compensation Order. He takes issue with the ALJ’s recitation of the claim for relief and asserts that if RA is successful in terminating benefits, the effective date should be October 14, 2014. Mr. Alvarez also argues that reliance on Dr. David Johnson’s opinion is in error because Dr. Johnson’s opinion was rejected previously. Finally, Mr. Alvarez disagrees with the ALJ’s credibility ruling. For these reasons, Mr. Alvarez requests the CRB reverse the decision to terminate wage loss benefits, and he requests medical treatment continue.

In response, RA asserts the ALJ’s indication that Mr. Alvarez was seeking an award is harmless error because RA “provided sufficient new evidence to terminate temporary total disability benefits.” Memorandum of Points and Authorities in Response to Claimant’s Application for Review, p. 4. RA also asserts the ALJ properly relied on Dr. Johnson’s opinions and on the lack of objective test results to support Dr. Andrew Siekanowicz’s finding of total disability. Finally, RA asserts “medical treatment was not at issue.” *Id.* at p. 5. RA requests the CRB affirm the October 14, 2014 Compensation Order.

#### ISSUES ON APPEAL

1. What is the legal effect of the ALJ’s misstating the claim for relief?
2. Did the ALJ err by relying on Dr. Johnson’s opinions?
3. Is the ALJ’s credibility ruling supported by substantial evidence?
4. Was authorization for medical treatment at issue, and if so, did the ALJ deny authorization for ongoing medical treatment?

## ANALYSIS<sup>1</sup>

The Compensation Order on appeal lists the claim for relief as follows:

Claimant seeks an award of temporary total disability benefits from March 24, 2012 to the present and continuing and temporary partial disability from February 24, 2012 to February 25, 2012 and payment of all causally related medical expenses.

*Alvarez v. Restaurant Associates*, AHD No. 10-343D, OWC No. 662108 (October 14, 2014). In fact, RA was under an obligation to pay Mr. Alvarez ongoing temporary total disability benefits pursuant to the September 2013 Compensation Order; therefore, the burden of proof rested with RA:

Generally, the burden is on the party asserting that a change of circumstances warrants modification to prove the change. *See Nader v. de Toledano*, 408 A.2d 31, 48 (D.C. 1979), *cert. denied*, 444 U.S. 1078, 62 L. Ed. 2d 761, 100 S. Ct. 1028 (1980). In the context of workers' compensation law, the burden of showing a change of conditions has also been held to be on the party claiming the change, whether a claimant or employer. 8 *Larson*, *Larson's Workers' Compensation Law*, §81.33(c) at 15-1194.32; *see also e.g., Dillon v. Workmen's Compensation Appeal Bd.*, 536 Pa. 490, 640 A.2d 386, 390 (1994); *Ziegler v. Department of Labor & Indus.*, 14 Wash. App. 829, 545 P.2d 558 (1976). The burden may shift once the moving party establishes his case. 8 *Larson, supra*, § 81.33 (c) at 15-1194.42.

*Washington Metropolitan Area Transit Authority v. DOES*, 703 A.2d 1225, 1231 (D.C. 1997). The ALJ, however, did not place the burden on RA; she placed it on Mr. Alvarez:

Pursuant to the Court of Appeals decision in *Otis Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109 (D.C. 1986), it has been consistently held in this jurisdiction that our Act does not provide claimant with a presumption regarding the nature and extent of his/her disability. Thus, claimant must affirmatively show the "nature and extent" of her disability. *Thomas Logan v. District of Columbia Dept. of Employment Services*, 805 A.2d 237 D.C. App. (August 22, 2002), (hereinafter *Logan*), *citing Dunston, supra*. The Court in *Logan*, has set forth a burden shifting analysis or test to utilize when

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<sup>1</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 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 Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order 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).

evaluating evidence regarding the “extent” of claimant’s disability. Citing the District of Columbia Circuit Court in *Crum v. General Adjustment Bureau*, 238 U.S. App. D.C. 80, 738 F.2d 474 (1984), the Court held “Once the claimant demonstrates an inability to perform his her usual job, a *prima facie* case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform.[”] *Logan*, *id* at 240. Employer can also rebut claimant’s case by presenting opposing medical evidence as to the extent of claimant’s disability.

Thus, claimant has the burden of proving by a preponderance of the evidence that he is entitled to the requested relief. Where employer meets its evidentiary burden, claimant, in order to sustain a disability finding, must either successfully challenge the legitimacy of the employer’s evidence of available employment, or demonstrate diligence, but lack of success, in obtaining other employment. *Logan*, *supra* at 243.

To demonstrate his inability to perform his pre-injury dishwashing duties claimant submits the most recent report of Dr. Siekanowicz. Dr. Siekanowicz found claimant to be unable to perform his pre-injury duties and provided a referral for evaluation for possible unicompartamental joint replacement or an osteotomy. Dr. Siekanowicz also stressed that an arthritic brace had been ordered over the last two years but claimant was still waiting for it. Dr. Siekanowicz’s report meets claimant’s burden of demonstrating an inability to perform his usual job, and a *prima facie* case of total disability is established. Thus, pursuant to *Logan* the burden shifts to employer to demonstrate the availability of other employment which claimant can perform or to present opposing medical evidence as to the extent of claimant’s disability.

Employer relies on the June 4, 2013 report and the more recent report of Dr. Johnson dated April 2, 2014, his deposition and the deposition transcript of Dr. Chandrashekar J. Kalmat of the PMI. Following the April 2, 2014 examination, Dr. Johnson reported that his opinion following his previous April 17, 2013 examination had not changed. On June 4, 2013, Dr. Johnson issued an addendum with regard to his examination of claimant on April 17, 2013:

I believe on the basis of my previous examinations, especially the last one on April 17, 2013, that the patient is now at maximum medical improvement as it relates to his left knee injury sustained on June 25, 2009. No further treatment is indicated for the left knee related to that injury, and the patient has no restrictions in his ability to work in his previous occupation as a dishwasher, full-time and full duty.

EE 1 at 3.

Dr. Johnson testified that Dr. Siekanowicz's diagnosis of arthritis is unsubstantiated by objective evidence given the fact that his reports don't ever reference such an x-ray. Dr. Johnson explained in his deposition, his opinion differs from Dr. Siekanowicz as claimant's diagnostic testing was "relatively normal except for the post-surgical changes you would expect, but no evidence of any significant wearing or arthritis or evidence of osteophytes etc., etc.". EE 4 at 37.

Employer is correct that Dr. Siekanowicz never refers to any diagnostic test results. Moreover, the entire record is devoid of any diagnostic test results which would support a diagnosis that would prohibit claimant from working as a dishwasher.

Even more damaging to claimant's position is employer's submission of Dr. Chandrashekar J. Kalmat of PMI. Dr. Kalmat testified that he prescribed Tramadol, a narcotic, for claimant's pain but that claimant tested negative for narcotics and he subsequently had to discharge him from his care. Dr. Kalmat explained that claimant told him he took the Tramadol every day so Dr. Kalmat expected to see evidence of the Tramadol in claimant's urine test. While Dr. Kalmat would not testify that he discharged claimant because he thought claimant was selling the Tramadol as opposed to taking it himself, the fact that claimant didn't take the prescribed pain medication for his alleged painful knee calls into question claimant's level of pain in his left knee, as well as his credibility.

As such, the undersigned is not persuaded that the reports of Dr. Siekanowicz establishes by a preponderance of evidence that claimant remains entitled to temporary total disability benefits based on the injury to his left knee.

*Alvarez v. Restaurant Associates*, AHD No. 10-343D, OWC No. 662108 (October 14, 2014).

Because the ALJ placed the burden on the wrong party, the law requires we vacate the October 14, 2014 Compensation Order.

The remaining issues are moot, but for purposes of clarification, the CRB does point out that medical benefits were at issue:

Judge Jory: And the only issue of which we will address today is the nature and extent of Claimant's disability. And you're taking out voluntary limitation of income?

Mr. Villeral: Yes.

Judge Jory: Okay.

Mr. Noble: Your Honor, also the – we did ask or are asking for medical approval of arthritic knee brace, and the referral to Dr. Omohundro. . . to

determine whether he needs arthroplasty or an osteotomy. And that is in my exhibits, the report that sets that forth.

Judge Jory: I understand, but is there an issue to that? Are you not going to pay for that?

Mr. Villeral: Our IME physician says that that's – first that – first he says that there's no evidence that the Claimant has arthritic changes or arthritis. And second, he doesn't recommend that treatment.

Judge Jory: Okay. So is this a reasonableness and necessity issue 'cause I have to have a UR report.

Mr. Villeral. This would be a reasonableness and necessity issue. I was unaware of this issue previously, but I'm not sure if he told –

Mr. Noble: I put it in that medical treatment was at issue for the Claimant.

Mr. Villeral: Okay.

Judge Jory: Well, you would be entitled – if I were to award benefits, you would be entitled to payment of causally-related medical benefits. Now, if they're going to take issue with that, then you'll have to come back.

Mr. Noble. Okay.

Judge Jory: Because I won't be able to address the reasonableness.

HT pp. 6-8. If the ALJ had ruled that Mr. Alvarez's work-related injury had healed, he would not be entitled to ongoing medical benefits, but the ALJ did not do so. The ALJ ruled Mr. Alvarez was capable of returning to his pre-injury position as a dishwasher, albeit based upon the wrong burden of proof. On remand, the ALJ must address Mr. Alvarez's entitlement to wage loss benefits and medical benefits.

CONCLUSION AND ORDER

Because the ALJ applied the wrong burden of proof in a case for modification of a prior Compensation Order, the October 14, 2014 Compensation Order is not in accordance with the law and is VACATED. On remand, the ALJ shall address Mr. Alvarez's entitlement to wage loss benefits and medical benefits. The remaining issues are moot.

FOR THE COMPENSATION REVIEW BOARD:



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MELISSA LIN JONES

*Administrative Appeals Judge*

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March 9, 2015

DATE