

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-030

MARVIN E. DIAZ,
Claimant-Petitioner,

v.

CLARK CONCRETE CONSTRUCTION and
ZURICH NORTH AMERICA,
Employer/Carrier-Respondents

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 DEC 3 AM 8:58

Appeal from a February 20, 2014 Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. 14-039, OWC No. 705928

Michael J. Kitzman for Claimant
Todd S. Sapiro for Employer

Before: HENRY W. MCCOY¹, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HENRY W. MCCOY for the Compensation Review Board. JEFFREY P. RUSSELL, *concurring.*

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, who worked for Employer as a carpenter, tripped over a two by four on June 11, 2013 and fell, twisting his left knee and ankle. Claimant's foreman took him to an on-site clinic where a cold pack was applied and pain medication provided. Claimant returned to work

¹ Judge McCoy, although a member of the Compensation Review Board, was temporarily assigned to be Chief Administrative Law Judge of the Administrative Hearings Division Chief as of August 26, 2014. By the terms of his temporary assignment, (Director's Administrative Issuance No. 14-03), Judge McCoy continued to be responsible for his Compensation Review Board assignments prior to August 26, 2014. Judge McCoy was assigned to this case prior to August 26, 2014.

the following day but left foot pain made it difficult to walk. Employer took Claimant to its health center in Sterling, Virginia where he was given a brace for his ankle and advised to apply cold packs and to return to work as the pain would allow.

Claimant was laid-off on August 7, 2013 and started treating with the practice of Phillips and Green on August 9, 2013 where he initially saw Dr. Richard Meyer. Claimant was diagnosed with a contusion/sprain of the left knee, left leg, foot, and ankle. Dr. Meyer determined Claimant was not capable of returning to work full time with the walking, standing and climbing that his pre-injury job entailed. Dr. Meyer's also determined after an MRI that a "Morton's Neuroma" finding in the left ankle was not related to the work injury.

Claimant underwent a course of physical therapy and on September 23, 2013 was seen by Dr. Neil Green who ordered an MRI of the left knee. This MRI was never performed as it was not approved by Employer. On October 7, 2013, Dr. Green continued Claimant in an off work status.

On October 23, 2013, Claimant underwent an independent medical examination (IME) by Dr. Clifford Hinkes at Employer's request. It was Dr. Hinkes' opinion that none of the requested care for Claimant's left knee was causally related to the work injury and that he could return to his pre-injury job as a carpenter.

Claimant received treatment from other doctors at Phillips and Green. Claimant saw Dr. Thomas Wagner, Jr. on November 4, 2013 where an examination revealed weakness in the quadriceps and physical therapy was ordered to strengthen the left knee and ankle. Claimant saw Dr. Fredric Salter on November 19, 2013, who continued his physical therapy. Dr. Jeffrey Phillips examined Claimant on December 26, 2013 and administered a steroid injection to the foot and deemed Claimant unable to work.

Claimant filed a claim for temporary total disability benefits from August 7, 2013 to the present and continuing and payment of causally related medical expenses. Following a formal hearing, an administrative law judge (ALJ) determined Claimant had proved entitlement to wage loss benefits for the period August 7, 2013 through October 23, 2013 and denied any payment for medical expenses related to Claimant's left knee.² Claimant filed a timely appeal with Employer filing in opposition.

On appeal, Claimant argues the ALJ did not accord the opinions of the various treating physicians at Phillips and Green with the treating physician preference and the ALJ erred in denying ongoing wage loss benefits by relying upon the IME physician's assessment and by the ALJ rendering a medical opinion. Employer counters that as the ALJ properly applied the law to the facts and the Compensation Order should be affirmed.

² *Diaz v. Clarke Concrete Construction*, AHD No. 14-039, OWC No. 705928 (February 20, 2014).

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is 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.³ See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

At the formal hearing below in this matter, the initial issue for resolution was whether Claimant's alleged left knee problems and disability were causally related to his work-related injury. There is no dispute that Claimant invoked the presumption⁴ as to medical causal relationship⁵ and that Employer rebutted⁶ the presumption, whereby the evidence was weighed without the benefit of the presumption with Claimant having the burden of proving by a preponderance of the evidence that his alleged left knee problems and disabling condition are causally related to the work injury. It is the ALJ's determination of no causal relationship that Claimant takes issue.

Claimant argues in this appeal that the ALJ erred in concluding that his left knee complaints are not causally related to the June 2013 work injury. Specifically, Claimant argues the ALJ failed to accord the opinions of his treating physicians the preference they were entitled to under the law in this jurisdiction and the ALJ provided "no record-based explanation for the rejection of the opinion of the treating physicians."⁷ We disagree.

The ALJ reviewed Claimant's evidence on medical causation and reasoned:

Claimant submits the reports of the physicians of Phillips and Green. A thorough review of the records of the numerous physicians at Phillips and Green who have examined claimant reveal only one report that relates a left knee problem with the work injury, which is the initial report wherein Dr. Meyer provides his initial impression as:

³ "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

⁴ *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

⁵ *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995).

⁶ *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004).

⁷ Claimant's *Memorandum of Points and Authorities in Support of Application for Review*, p. 5.

Secondary to the injuries sustained 6-11-13 the patient has:

1. Contusion/sprain, left knee.
2. Contusion/sprain, left leg.
3. Contusion, left foot.
4. Contusion, left ankle.

The diagnoses noted above are a direct result of the history as outlined during this orthopedic consultation.

CE 1 at 30.

The remaining reports of record do not provide any causal relation opinions from any of the physicians of Phillips and Green. It is noted that while Dr. Meyer accepts claimant's history and associates the contusion diagnosis that he assessed claimant with or "the history as outlined during this orthopedic consultation" he specifically explains that he does not believe that the Morton's neuroma finding on the left foot MRI is related to the injuries that claimant sustained on 6-11-13. Nevertheless, the most recent report from Phillips and Green is dated December 26, 2013 and it is noted that as of December 26, 2013 claimant complained only of pain in his foot which Dr. Phillips treated with steroid/Xylocaine injections. Without more in the form of an actual causal relationship opinion from a medical professional, such as a physician of Phillips and Green, the undersigned cannot conclude that claimant has met his burden of establishing without the benefit of the presumption that any problem claimant has with his left knee are [sic] related to the work injury by a preponderance of the evidence.⁸

As the above quoted passage from the CO demonstrates, the ALJ has not only provided a "record-based explanation" for her conclusion that Claimant has not met his burden of proof by a preponderance of the evidence, she has also given due deference to the medical opinions of Claimant's treating physicians. Contrary to Claimant's assertion, the ALJ has not rejected the opinions of his treating physicians, she has found them wanting in establishing a causal relationship between his alleged disabling left knee condition and the June 11, 2013 work injury.

Claimant faults the ALJ's decision to give greater credence to the opinion of the IME physician, Dr. Hinkes, when his assessment "ignores the findings of the MRI and Dr. Hinkes' incorrect evaluation of the actual findings shown."⁹ We see no error as the ALJ noted in the quote presented above that Dr. Meyer, Claimant's treating physician, specifically said that the Morton's Neuroma on the left ankle MRI was not related to the June 11, 2013 injury. Claimant's further argument referencing the definition of a grade II sprain found in research on the internet with the accompanying URL, is not appropriate for our consideration as it was never admitted into evidence and assessed by the ALJ during her deliberations.

⁸ CO, p. 4-5.

⁹ Claimant's Memorandum of Points and Authorities in Support of Application for Review, p. 6.

In conducting a comprehensive review and assessment of the opinions of the treating physicians, the ALJ has accorded them the preferential treatment required under the law. It is noted in particular that it is only the initial treatment report by Dr. Meyer that provides an opinion of causal relationship with none of the subsequent reports, by any of the other treating physicians at Phillips and Green, providing an opinion as to causal relationship, although they repeat the left knee diagnosis. With the ALJ expressly stating she reviewed the other treating physician opinions for a statement as to causal relationship and found none and also noting that the most recent treating physician report recorded no mention of left knee pain, the ALJ's conclusion of no causal relationship between the left knee condition and the work injury is supported by substantial evidence in the record and will not be disturbed.

Claimant next challenges the ALJ's determination that he is not entitled to temporary total disability benefits after October 23, 2013. Claimant argues that the ALJ erred in finding the IME opinion of Dr. Hinkes more persuasive than the opinions of his treating physicians. Claimant contends that the ALJ failed to account for Dr. Hinkes failure to account for the MRI findings with regard to his left ankle and the ALJ substituted her own medical judgment and relied on that judgment instead of the treating physician opinions in reaching the conclusion to deny ongoing wage loss benefits.

It is now well-established that when the nature and extent of a disability is at issue, the injured worker must prove his/her entitlement to benefits by a preponderance of the evidence.¹⁰ In addition, the Act does not provide a presumption when nature and extent are at issue.¹¹ To aid in this analysis, the D.C. Court of Appeals established a burden shifting device in the matter of *Logan v. DOES*.¹²

Under *Logan*, a claimant must establish an inability to return to his pre-injury employment. Once the claimant makes this showing, he establishes a *prima facie* case of total disability and the burden shifts to employer to present sufficient evidence of suitable alternative employment to overcome a finding of total disability. If the employer meets this evidentiary burden, the claimant may refute the employer's evidence - - thereby sustaining a finding of total disability - - either by challenging the legitimacy of the employer's evidence of available employment or by demonstrating diligence, but a lack of success, in obtaining other employment.¹³

We disagree with the concurring opinion to the extent that it relies upon *Alexander*¹⁴ in this case and to the extent that it contends the majority holds *Logan* applicable only in cases of permanent total disability. To begin, the concurring opinion seems to rely upon the following language from *Alexander* :

¹⁰ *Golding-Alleyne v. DOES*, 980 A.2d 1209 (D.C. 2009).

¹¹ *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986).

¹² 805 A.2d 237 (D.C. 2002).

¹³ *Id.*, at 243.

¹⁴ *Alexander v. WMATA*, CRB No. 12-151, AHD No. 11-252, OWC No. 678308 (March 27, 2013).

We also take this time to point out what may be perceived as an erroneous statement of law in the prior DRO which seems to allude to the *Logan* [footnote omitted] analysis as being inapplicable to cases involving temporary as opposed to permanent disability claims. Under the Court's interpretation of the statute in *Logan*, once a claimant has met the burden under *Dunston* [footnote omitted] on the question of inability to return to the pre-injury job, the law presumes that claimant cannot perform any other job as well. Under the Court's ruling, there is no distinction to be made between the burdens borne by the parties with respect to the extent (e.g., partial vs. total) of disability, regardless of its nature (e.g., temporary vs. permanent). The Court continued in its practice of expressing a strong affinity for interpreting the Act in a fashion consistent with the Longshore and Harbor Workers' Compensation Act [footnote omitted], in this instance, even where the language of the two acts differ. Presumably, the Court would therefore countenance, indeed, require, application of the analysis that it commands with respect to assessing the extent of disability, using the standards established in assessing earning capacity in *Washington Post v. DOES*, [675 A.2d 37 (D.C. 1996)] and in *Joyner v. DOES*, [footnote omitted] in cases of temporary as well as total disability.¹⁵

We don't dispute that *Logan* can apply to claims for temporary total disability benefits; however, in setting forth her interpretation of the burden shifting device under *Logan*, the ALJ stated that once the claimant made a *prima facie* showing of total disability, the employer could rebut 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 to persons such as the claimant for which the claimant could compete in light of claimant's age, education work experience, and physical capacity.”*¹⁶

Then, in applying the initial step under *Logan*, the ALJ determined, Claimant made a *prima facie* showing to establish that he was totally disabled. Although the ALJ questioned the efficacy of the treating physician opinions that Claimant could not work, that opinion has remained consistent from all the physicians who treated Claimant at Phillips and Green and there is no record of them releasing him to work in any capacity. In executing the shift in the burden of production to Employer, the ALJ posited that Employer could rebut Claimant's *prima facie* showing by *demonstrating that the claimant can in fact return to the pre-injury job*.

¹⁵ *Id.*

¹⁶ CO, p. 5 (Emphasis added).

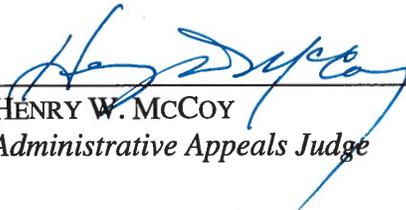
Instead of determining Claimant's work capacity without the benefit of any presumption, the ALJ applied the burden shifting device established in *Logan*, which only applies if the claimant is unable to return to pre-injury work but is able to return to some work. This is not appropriate when determining the nature and extent of disability, and specifically when applying *Logan*, as it sets up an internally inconsistent analysis when as here, the ALJ first determines that Claimant has shown that he is temporarily and totally disabled and then shifts the burden to Employer to show, and accordingly finds, that he is able to return to full duty.

Although the ALJ cites the burden-shifting device under *Logan*, her reliance upon *Logan* is harmless error because what she ultimately relies upon in reaching a decision is contained in her statement that Employer can demonstrate that Claimant can in fact return to his pre-injury job. Stated another way, the ALJ has weighed the competing medical evidence and determined the IME opinion of Dr. Hinkes to be more persuasive in reaching a decision that Claimant was capable of returning to full duty work as a carpenter. As such, the misapplication of *Logan* by the ALJ is deemed harmless and the decision that Claimant has not proven entitlement to disability benefits after October 23, 2013 is supported by substantial evidence in the record.

CONCLUSION AND ORDER

The February 20, 2014 Compensation Order is supported by substantial evidence and is in accordance with the law and therefore AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

December 3, 2014
DATE

JEFFREY P. RUSSELL, *concurring*:

I concur with the outcome of this case, but write separately to point out an error that I believe is contained in the majority decision. The burden shifting scheme for determining whether a claimant is disabled as established in *Logan* is not applicable only in cases where the claim is for permanent disability benefits. The court made no distinction between temporary disability and permanent disability. See *e.g.*, *Alexander v. WMATA*, CRB No. 12-151, AHD No. 11-252, OWC No. 678308 (March 27, 2013). I will refrain from further delaying the issuance of this decision with additional argument, given that it does not affect the outcome.



JEFFREY P. RUSSELL
Administrative Appeals Judge