

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-061

MICHAEL DREW,
Claimant-Petitioner,

v.

SEVERN CONSTRUCTION COMPANY and
CHARTIS INSURANCE COMPANY,
Employer/Insurer-Respondent.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
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Appeal from an April 25, 2014 Compensation Order on Remand
by Administrative Law Judge Amelia G. Govan
AHD No. 11-373A, OWC No. 677581

Richard W. Galiher, Jr. for the Petitioner
Joel E. Ogden for the Respondent

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

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In 2001, Mr. Michael Drew worked for Severn Construction Company (“Severn”). His job duties included driving and standing for most of his shift, climbing up and down trucks, bending, reaching, heavy lifting, and dispersing cones weighing approximately 16 pounds.

Mr. Drew injured his back and neck in a work-related car accident. Severn paid Mr. Drew temporary total disability benefits from January 14, 2011 through March 12, 2012; Severn deducted Mr. Drew’s unemployment benefits from his temporary total disability benefits payments.

Mr. Drew’s treating physician, Dr. Eric Dawson, did not release Mr. Drew to return to work before his contract of hire expired on March 4, 2011, but on May 24, 2011, Dr. Dawson released

Mr. Drew to semi-sedentary, light duty employment with no excessive bending, pushing, stooping, pulling, crouching, or lifting from floor to waist. Similarly, an October 2011 functional capacity examination tested Mr. Drew at the sedentary to light physical demand level with deficits in squatting, bending, lifting, carrying, sitting, standing, and reaching to and above the shoulder. Work hardening was recommended at that time.

By February 3, 2012, Dr. Dawson opined Mr. Drew was capable of driving and of intermittently lifting 50 pounds. Nonetheless, Mr. Drew did not return to his pre-injury employment.

MCI offered Mr. Drew a job to commence March 12, 2012, and Severn stopped paying temporary total disability benefits as of that date. MCI, however, hired someone else.

At a formal hearing, Mr. Drew requested “temporary partial disability benefits from January 14, 2011 to the present and continuing, based upon the differential between his average weekly wage of \$685.33 and the amount of unemployment benefits he has received.”¹ In a Compensation Order dated October 25, 2013, an administrative law judge (“ALJ”) awarded Mr. Drew “temporary partial disability benefits from January 14, 2011 to the present and continuing, based upon the difference between his average weekly wage of \$685.33, at the compensation rate of \$456.89, and the dollar amount of unemployment benefits he has received” and vocational rehabilitation.²

On appeal, the Compensation Review Board (“CRB”) vacated the October 25, 2013 Compensation Order because the ALJ had made contradictory findings of fact regarding Mr. Drew’s work capacity:

The findings of fact acknowledge that the Claimant was released to work to drive with the only restriction being no lifting over 50 pounds. According to the job duties outlined in the findings of fact, the limitations do not inhibit the Claimant from performing this job. We are also uncertain as to what “significant physical impairments” the ALJ is referring to above and beyond the restrictions outlined by the treating physician, Dr. Dawson. [Footnote omitted.]^[3]

On remand, the ALJ needed to reconcile the findings of fact and to apply *Logan*.⁴ In addition, the ALJ needed to clarify the award of benefits:

¹ *Drew v. Severn Construction Company*, AHD No. 11-373A, OWC No. 677581 (October 25, 2013), p. 2.

² *Id.* at p. 11.

³ *Drew v. Severn Construction Company*, CRB No. 13-139, AHD No. 11-373A, OWC No. 677581 (March 13, 2014), p. 5.

⁴ *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

Neither party appealed the award of vocational rehabilitation or the denial of a penalty for failure to timely controvert.

The Claimant was seeking temporary partial disability, arguing that unemployment benefits constitute wages and as such, the Claimant's disability was only partial. As discussed below, we reject this argument and the Claimant's opposition that the award of temporary partial disability is supported by the substantial evidence in the record. The ALJ concluded the Claimant is temporarily and partially disabled and then seemingly awards benefits based on a formula that reflects a conclusion that the Claimant is temporarily and totally disabled. This is in error. As we are remanding for a correct determination of the nature and extent of the Claimant's disability under *Logan*, as discussed above, the ALJ is directed to clarify the award, if any, after further consideration of the nature and extent of the Claimant's disability.^{5]}

Finally, the CRB affirmed Severn's entitlement to a dollar-for-dollar credit for Mr. Drew's unemployment benefits. The credit applied to the payment of temporary total disability benefits, not to Mr. Drew's average weekly wage.

On remand, the ALJ denied Mr. Drew's claim for relief, and Mr. Drew appeals the Compensation Order on Remand; however, the arguments presented are difficult to delineate. For that reason, they are incorporated into the analysis below.

In response, Severn asserts there is no reason to overturn the ALJ's ruling that Mr. Drew is not entitled to wage loss benefits because he has been capable of performing his pre-injury work since February 3, 2012 or the ruling that Severn is entitled to a dollar-for-dollar credit of unemployment benefits against the payment of workers' compensation indemnity benefits. Severn contends both of those rulings are supported by substantial evidence in the record, and it requests the CRB affirm the Compensation Order on Remand.

ISSUES ON APPEAL

1. Is the April 25, 2014 Compensation Order on Remand supported by substantial evidence and in accordance with the law?
2. Does the April 25, 2014 Compensation Order on Remand adequately analyze Mr. Drew's entitlement to temporary total disability benefits by addressing the deficiencies noted in the March 13, 2014 Decision and Remand Order?
3. Did the ALJ properly assess Mr. Drew's work capacity?
4. Did the ALJ properly apply *Logan* to Mr. Drew's work capacity?
5. Is Mr. Drew entitled to a ruling on his entitlement to permanent partial disability benefits based on wage loss?

⁵ *Drew v. Severn Construction Company*, CRB No. 13-139, AHD No. 11-373A, OWC No. 677581 (March 13, 2014), p. 6.

PRELIMINARY MATTERS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.⁶ The CRB lacks authority to review its own Decision and Remand Orders. In addition, it lacks authority to exercise administrative control over the Office of Hearings and Adjudication, and only in compelling circumstances will the CRB even recommend an ALJ hold a new hearing⁷ or “hear argument of counsel addressing the remanded issues.”⁸

There are no such compelling circumstances in this case. Any intervening changes to Mr. Drew’s condition can be adequately addressed by the modification procedures provided in §32-1524 of the Act.

Mr. Drew also objects to the CRB’s failure to include as part of the standard of review an obligation to liberally construe the Act to achieve its humanitarian purpose; however,

with respect to resort to the “humanitarian purposes of the Act”, the [District of Columbia Court of Appeals] has written:

When our cases speak of the “humanitarian purpose” of the statute, they refer specifically to the presumption of compensability, D.C. Code §36-321(1) (1988), which enables a claimant more easily to establish his or her entitlement to benefits and is intended to favor awards in arguable cases. See *Ferreira v. District of Columbia Department of Employment Services*, 531 A.2d 651, 655 (D.C. 1987). The reason for this presumption is simply that a worker’s sole remedy for a work related injury is the remedy provided by the statute; consequently, if the statutory benefits are unavailable for any reason, the worker will not be compensated at all for the injury. However, when it is undisputed that a claimant’s injury arose out of his or her employment and is therefore compensable, “the presumption is no longer part of the case” because it is no longer necessary to effectuate the

⁶ Section 32-1521.01(d)(2)(A) of the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* (“Act”). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand 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).

⁷ See *Crawford v. National Rehabilitation Hospital*, CRB No. 13-028, AHD No. 10-380, OWC No. 625645 (September 20, 2013).

⁸ Applicant/Claimant’s Memorandum of Law, p. 2.

humanitarian purpose of the law. *Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109, 111 (D.C. (1986).

4934, Inc. v. DOES, 605 A.2d 50 (D.C. 1992), at 57. See also, *WMATA v. Reid*, 666 A.2d 41 (D.C. 1995) at 48, footnote 12.

Moreover, as the [Court] has also written:

While the principle of liberal construction of workers' compensation laws "allows doubts to be resolved favorably to the employee, it does not relieve the courts of the obligation to apply the law as it is written and in accordance with its plain meaning." *National Geographic Soc'y v. District of Columbia Dep't of Employment Servs.*, 721 A.2d 618, 622 (D.C. 1998).

Adjei v. DOES, 817 A.2d 179 (February 20, 2003) at 184.^[9]

In this case, the presumption of compensability was not relevant to resolution of the issues. At the formal hearing, it was Mr. Drew's burden to prove his entitlement to his claim for relief by a preponderance of the evidence without the benefit of the presumption of compensability, and on appeal, the CRB is constrained to uphold the Compensation Order on Remand if it is supported by substantial evidence.

ANALYSIS

On remand, the ALJ needed to make appropriate findings regarding Mr. Drew's work capacity and to apply *Logan* to Mr. Drew's situation, if necessary. To begin, the ALJ found Mr. Drew's

usual work duties included driving a "crash" truck, flagging, climbing, and throwing cones. Claimant's usual work duties required driving and standing for most of his work shift, as well as climbing up and down on trucks, bending, reaching and heavy lifting. On a regular basis, he dispersed cones weighing 15.84 lbs.^[10]

Against this baseline, the ALJ found

- On "May 24, 2011 Dr. Dawson restricted Claimant to semi-sedentary, light duty employment with no excessive bending, pushing, stooping, pulling, crouching or lifting floor to waist."¹¹

⁹ *Eason v. Center Radiology*, CRB No. 14-040, AHD No. 04-156, OWC No. 590269 (July 9, 2014).

¹⁰ *Drew v. Severn Construction Company*, AHD No. 11-373A, OWC No. 677581 (April 25, 2014), p. 4.

¹¹ *Id.*

- In October 2011, Mr. Drew tested at a “sedentary into [*sic*] light physical demand level, with deficits performing a functional squat, repetitive squatting, bending, lifting, carrying, sitting, standing, and reaching to and above the shoulder. The examiner opined that Claimant was not capable of returning to work, in any capacity, at that time and recommended a program of work hardening.”¹²
- By February 3, 2012, Mr. Drew was capable of driving “with 50-pound lift intermittently,”¹³ and Dr. Dawson “did not specifically restrict [Mr. Drew] from the prolonged standing, climbing, bending, reaching, lifting and throwing 15 lb. cones which his usual work duties required.”¹⁴
- No suitable, alternative employment was offered to Mr. Drew at an undisclosed time when he was capable of light duty.¹⁵
- On March 12, 2012, Mr. Drew was capable of working for MCI “cleaning buses, with prospective duties as a driver.”¹⁶
- By September 2012, Dr. Dawson had imposed a 50-pound lifting restriction.¹⁷

The ALJ then reached the conclusion that Mr. Drew is not entitled to temporary total disability benefits:

In sum, the most persuasive medical opinion indicates Claimant has significant problems which affected his work performance and activities of daily living. In fact, Claimant’s testimony, which has been deemed credible in all respects, indicates he overcame daily issues related to his work injuries, to perform his duties on the days he was able to report to work. However, when the *Logan* burden shifting analysis is applied to the facts at bar, Claimant has not met his burden of proving entitlement to the relief sought. He has not demonstrated inability to perform his usual job and, thus, has not established a *prima facie* case of temporary total disability. No further Discussion is necessary, and the claim for relief with regard to wage loss benefits must fail. *Logan, supra.*^[18]

¹² *Id.* at p. 5.

¹³ *Id.*

¹⁴ *Id.* at p. 7.

¹⁵ *Id.* at p. 5.

¹⁶ *Id.*

¹⁷ *Id.* at p. 6.

¹⁸ *Id.* at p. 7.

Mr. Drew raises concerns about the ALJ's weighing of the facts and application of *Logan*.¹⁹ Without reweighing the evidence as Mr. Drew urges us to do, the ALJ's analysis remains problematic because the ALJ has not made specific, uncontradicted rulings regarding Mr. Drew's work capacity beginning in January 2011 at the start of his claim for relief.²⁰ For example, in May 2011, Dr. Dawson restricted Mr. Drew "to semi-sedentary, light duty employment with no excessive bending, pushing, stooping, pulling, crouching or lifting floor to waist;"²¹ if these restrictions are not consistent with performing his pre-injury duties, a *Logan* analysis is required. The same goes for the remaining time periods as established by the ALJ's other findings set forth above.²² Until such an analysis is performed, the law requires we remand this matter.

In response to Mr. Drew's argument that the ALJ's use of the phrase "wage loss benefits" is ambiguous, confusing, and erroneous because no claim for wage loss benefits was made, a claim for wage loss benefits was made, a claim for temporary partial disability benefits. There is no merit to the argument that the ALJ's use of the phrase "wage loss benefits" in the context of "the wage loss benefits claimed from January 14, 2011 to the present and continuing" *Id.* at p. 11, restricts Mr. Drew from requesting wage loss benefits in the future as circumstances may warrant.

¹⁹ Applicant/Claimant's Memorandum of Law at p. 3:

The ALJ's [Compensation Order on Remand ("COR")] and the CRB's [Decision and Remand Order] erred by disregarding undisputed evidence of record that Drew had a continuing total loss of earning capacity, because of Dr. Dawson's physical restriction of prolonged standing and other physical limitations impacting his previous job duties for the Employer, which required standing "most" of the time[.] Therefore the ALJ's omission of such material facts skews the ALJ's burden shifting analysis of *Logan v. DOES*, 805 A.2[d] 237 (D.C. 2002), which the CRB wanted the ALJ to use in determining a *prima facie* case of total disability herein (COR p.5). However, her italicized finding that ["his treating physician did not specifically restrict him from the prolonged standing, climbing, bending, reaching, lifting and throwing 15 lb[.] cones" (COR 7) is not supported by substantial evidence, and contradicted by Dr. Dawson's testimony (D 44-45) and her own findings of his "usual work duties". (COR, p. 4) Thus, the ALJ errs by substituting her findings of no physical restrictions (COR, p.7), which are unsupported by the record, for Dr. Dawson's multiple physical restrictions with findings, which include continuing prolonged standing and other limitations, which were also documented in the 2011 Comprehensive Rehabilitation FCE findings[.] Furthermore, Dr. Dawson did not release Drew to fully unrestricted duty on February 3, 2012 because of his continuing physical restrictions, and Dr. Dawson's testimony does not support the ALJ's italicized findings (COR, p.7) and her erroneous conclusion that "Claimant has not met his burden of proving entitlement to the relief sought. He has not demonstrated inability to perform his usual job and thus has not established a *prima facie* case of temporary total disability." (COR p.7)

²⁰ Although an ALJ is not required to "inventory the evidence and explain in detail why a particular part of it was accepted or rejected, *Washington Hospital Center v. DOES*, 983 A.2d 961 (D.C. 2008), "when evidence is contradictory, the contradiction must be addressed." *Braxton v. Marty's Restaurant*, CRB No. 09-032, AHD No. 06-092, OWC No. 618296 (January 29, 2009).

²¹ *Drew v. Severn Construction Company*, AHD No. 11-373A, OWC No. 677581 (April 25, 2014), p. 4.

²² Because the District of Columbia is a voluntary payment jurisdiction, the fact that Severn paid Mr. Drew temporary total disability benefits is not dispositive of his entitlement to such benefits.

The ALJ went on to consider “what benefits are due to Claimant”²³ despite her ruling that “the claim for relief with regard to wage loss benefits must fail.”²⁴ Consequently, in order to avoid issues which are capable of repetition on remand, the CRB addresses Mr. Drew’s argument that because the ALJ finds the offset of a credit for unemployment benefits against the payment of temporary total disability benefits is unfair, she

should have reversed and remanded her Conclusion of Law for further proceedings to deduct Federal and State taxes from the weekly unemployment[] payments and then deduct the net amount from Drew’s compensation payment for each week when he was paid unemployment benefits through December 8, 2012[.] Furthermore, [i]t is inconsistent for the ALJ to simply follow prior precedent, allowing the dollar-for-dollar credit, when the issue of the calculation of the proper amount of the credit has not been reviewed by the CRB in its [Decision and Remand Order], and the ALJ herein finds it to be unfair to include taxes, and result in a double recovery by the Employer herein^[25]

as follows:

The issue of a dollar-for-dollar credit of unemployment benefits against the payment of workers’ compensation benefits is settled:

The CRB spoke definitely on this issue in the matter of *Beckwith v. Providence Hospital*, CRB No. 07-138, AHD No. 06-139, OWC No. 615744 (September 7, 2007) and affirmed in *Gibson v. Aramark Corporation*, CRB No. 08-007, AHD No. 07-293, OWC No. 635657. In *Beckwith*, the CRB acknowledged that while unemployment benefits are not advance payments of compensation within the meaning of D.C. Official Code §32-1515(j), the Director has held, and the CRB has affirmed, that an employer is nevertheless entitled to a credit for an employee’s receipt of unemployment benefits. *Id.* citing *Stanford v. Cary International, Inc.*, Dir. Dkt. No. 99-68, OHA No. 99-144, OWC No. 533475 (April 30, 2002), and *Flanagan v. Auger Enterprises*, Dir. Dkt. No. 94-65, H&AS No. 92-714, OWC No. 198453 (May 11, 1995). The CRB then clarified the employer was entitled to the credit, not because unemployment benefits qualify as advance payments of compensation but to prevent an employee from receiving a double recovery of monies [from] an employer. *Watts v. Guardian Service Group*, CRB No. 07-55, AHD No. 05-053 (May 18, 2007).

The CRB in *Beckwith* concluded by holding:

²³ *Id.* at p. 7.

²⁴ *Id.*

²⁵ Applicant/Claimant’s Memorandum of Law at p. 5.

“Thus, not only is an employer’s entitlement to a credit for an employee’s receipt of unemployment benefits during the disability period well settled in this jurisdiction as a result of prior Agency holdings, such a credit supports the policy against a double recovery and the impropriety of duplicative benefits, while ensuring that an injured employee does not receive more money under wage-loss legislation while not working than that employee earned before he or she was injured.”

Beckwith at 4.

It is thus well established in this jurisdiction that an employer is entitled to a credit for unemployment benefits received by an injured employee at the same time the employee received workers’ compensation benefits. [*Stanford*], *supra*.^[26]

The ALJ, as the undersigned has done,²⁷ is free to express her discontent with the state of the law, but she is not free to disregard it.

In essence, Mr. Drew argues that although the issue of a dollar-for-dollar credit of unemployment benefits may be settled, the application of that credit is not. The CRB disagrees.

As the ALJ noted, by definition, “wages”

means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from other than the employer.^[28]

To apply the credit to reduce Mr. Drew’s average weekly wage (as opposed to applying the credit to reduce the payment of wage loss benefits) effectively deems unemployment benefits to be wages.

Finally, Mr. Drew argues that if he is not entitled to temporary partial disability benefits, he is entitled to permanent partial disability benefits. The CRB cannot agree.

Ordinarily, the due process concerns addressed in *Transportation Leasing*²⁹ would prevent Mr. Drew from recovering benefits that were not requested in the Joint Pre-Hearing Statement,

²⁶ *Young v. J&J Maintenance, Inc.*, CRB No. 08-225, AHD No. 08-253, OWC No. 618904 (January 29, 2010).

²⁷ See the dissenting opinion in *Young, supra*.

²⁸ Section 32-1501(19) of the Act.

²⁹ *Transportation Leasing v. DOES*, 690 A.2d 487 (D.C. 1997).

namely temporary total disability benefits. In this case, however, Mr. Drew has been requesting temporary total disability benefits all along; he just has been referring to them as temporary partial disability benefits in his attempt to apply his unemployment benefits to his average weekly wage rather than to the payment of his wage loss benefits. The same semantics cannot be applied to his request for permanent partial disability wage loss benefits raised on appeal.

There is no dispute that Mr. Drew did not request permanent partial disability benefits based upon wage loss at the formal hearing, and Severn was not on notice that it should prepare to defend against such a claim. A claim for temporary total disability benefits requires different proof than a claim for permanent partial disability benefits based upon wage loss; the defenses to a claim for temporary total disability benefits require different proof than the defenses for permanent partial disability benefits based upon wage loss. Consequently, to avoid a due process violation, Mr. Drew cannot now assert entitlement to permanent partial disability wage loss benefits:

The due process protection recognized by the D.C. Court of Appeals in *Transportation Leasing v. District of Columbia Department of Employment Services*, 690 A.2d 487 (D.C. 1997) stands as a bar to grant relief that has not been requested, as well the ALJ reaching and deciding underlying issues that give rise to relief where, as in the instant case, the lack of notice and opportunity to present evidence and argument addressing such issues results in prejudice to the opposing party. Accordingly, the ALJ cannot award benefits for relief not claimed by a party and substitute it for another form of relief. [Footnote omitted.]^[30]

³⁰ *Camp v. D.C. Department of Health*, CRB No. 13-080, AHD No. PBL08-096A, DCP No. 761010-0001-1999-0030 (September 26, 2013) (Citations omitted.)

CONCLUSION AND ORDER

The April 25, 2014 Compensation Order on Remand is not supported by substantial evidence, is not in accordance with the law, is not compliant with the March 13, 2014 Decision and Remand Order, and is VACATED. On remand, the ALJ is to provide a detailed analysis of Mr. Drew's work capacity based upon the record. The analysis must indicate what periods, if any, Mr. Drew was not capable of working; what periods, if any, Mr. Drew was capable of working his pre-injury position; and what periods, if any, Mr. Drew was capable of working modified duty. Then, the ALJ is to apply *Logan* to any time periods when Mr. Drew was capable of some type of work (as opposed to temporarily totally disabled). All of this scrutiny is necessary to determine Mr. Drew's entitlement to temporary total disability benefits with a dollar-for-dollar credit for unemployment benefits against the payment of awarded indemnity benefits. At the formal hearing, Mr. Drew did not request permanent partial disability based on wage loss, and the ALJ is without authority to award such benefits at this time.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

August 28, 2014

DATE