

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services  
Labor Standards Bureau

Office of Hearings and Adjudication  
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice  
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CRB No. 08-016

MIZLAL TESFAI TEKLU,

Claimant-Petitioner/Cross Respondent,

vs.

JURYS DOYLE HOTEL AND TRANSCONTINENTAL INSURANCE COMPANY,

Employer/Carrier-Respondent/Cross Petitioner,

Appeal from a Compensation Order of  
Administrative Law Judge Fred D. Carney, Jr.  
AHD No. 05-241, OWC No. 601765

Stephen A. Bou, Esq., for Petitioner/Cross Respondent

Joseph C. Veith, III, Esq., for Respondent/Cross Petitioner

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL and LINDA F. JORY, *Administrative Appeals Judges*.

E. COOPER BROWN, *Chief Administrative Appeals Judge*, for the Majority; JEFFREY P. RUSSELL, *Administrative Law Judge*, concurring in part and dissenting in part:

**DECISION AND REMAND ORDER**

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance No. 05-01 (February 5, 2005).<sup>1</sup>

<sup>1</sup> Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended; D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including

## BACKGROUND

Petitioner/Cross-Respondent (Claimant)<sup>2</sup> sustained a work-related right elbow injury in January of 2003 for which she received medical attention while continuing to work at her regular employment up until February of 2004, when her treating physician directed that she refrain from work pending surgery. Surgery was performed on her elbow in April of 2004, and in June Claimant attempted, with her physician's approval, to return to her former employment full duty. Claimant's attempt to return to work was unsuccessful, and after a subsequent unsuccessful attempt to return to work with light duty restrictions in July, Claimant remained off work until November 6, 2004 when she again unsuccessfully attempted to return to work with light duty restrictions. Up until November Respondent/Cross-Petitioner (Employer) had been voluntarily paying Claimant temporary total disability wage loss benefits, but discontinued further payments upon Claimant's unsuccessful attempt at that time to return to work.

Claimant subsequently filed a claim with the Department of Employment Services (DOES) seeking temporary total disability wage loss benefits from November 6, 2004 to the present and continuing, plus payment of casually related medical expenses. This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD), DOES Office of Hearings and Adjudication. In that Compensation Order, which was issued on September 20, 2007, the Administrative Law Judge (ALJ) granted Claimant's claim for causally related medical care, but denied her claim for temporary total disability benefits because the ALJ determined that Claimant was instead permanently totally disabled as a result of the work injury to her right arm. However, because no claim specifically denominated as a claim for "permanent total disability benefits" had been made, the ALJ disallowed an award of such benefits, citing as a bar for so doing *Transportation Leasing v. D.C. Dept. of Employment Services*, 690 A.2d 487 (D.C. 1997). As a result, Claimant was denied disability wage loss benefits of any kind.

Claimant filed an Application for Review (AFR) with the CRB on October 19, 2007, challenging the Compensation Order's denial of Claimant's request for temporary total disability benefit. On October 22, 2007, Employer filed a Cross-Application for Review (CAFR) seeking reversal of the ALJ's finding that Claimant is permanently totally disabled, arguing that the ALJ's finding of permanency violated Employer's due process rights under *Transportation Leasing, supra*. Subsequent to the filing by Claimant of an opposition memorandum to Employer's Application for Review, oral argument was scheduled and held before the Review Panel on December 6, 2007.

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responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

<sup>2</sup> Although by convention and regulation the CRB generally denominates a party by reference to their status relative to the appeal, *i.e.* as "Petitioner" or "Respondent," for clarity's sake the parties will in this case be referred to by their designations before AHD.

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "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. D. C. Dep't. of Employment Serv's.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB is 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.

Pursuant to the Compensation Order herein appealed, the ALJ initially determined that Claimant's complained-of right arm impairment (consisting of right elbow partial immobility, and pain, swelling, occasional numbness and tingling in her elbow, wrist and hand) arose out of and in the course of her employment, based upon the determination that Claimant had presented evidence sufficient to invoke the Act's presumption of causality, which presumption, the ALJ found, the Employer had failed to overcome. The ALJ then concluded that the extent of Claimant's disability was total based upon Claimant's showing that she was unable to return to her pre-injury regular employment and the lack of credible evidence by Employer that Claimant could return to full employment or that it had offered Claimant suitable alternative employment. Based upon the finding that Claimant's right arm condition had reached maximum medical improvement, the ALJ further determined that the nature of Claimant's disability was permanent. While holding that Claimant was thus entitled to permanent total disability benefits, the ALJ nevertheless disallowed such an award citing *Transportation Leasing v. D.C. Dept. of Employment Services, supra*, as a bar because Claimant had presented a claim for temporary total disability benefits only. The ALJ further reasoned that because her disability was found to be permanent, Claimant was not entitled to an award of temporary total disability benefits. Thus, Claimant was denied disability wage loss benefits of any kind, although awarded payment of causally related medical expenses.

The issues raised by the parties on appeal focus upon the ALJ's determination of the nature and extent of Claimant's disability. Claimant asserts that the denial of temporary total disability benefits is unsupported by substantial evidence because the underlying finding that Claimant's disability status as permanent was premature and not supported by substantial evidence. As grounds for its appeal, and in opposition to Claimant's appeal,<sup>3</sup> Employer asserts that the ALJ's finding that Claimant is totally disabled is not supported by substantial evidence because the record does not, in Employer's view, contain evidence of medically imposed restrictions that are incompatible with the requirements of Claimant's pre-injury job. Employer further asserts that

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<sup>3</sup> Although Employer did not file a separate response or opposition to Claimant's AFR, the arguments and matters contained in the Memorandum of Points and Authorities accompanying Employer's CAFR are deemed to constitute such a response in opposition to Claimant's AFR.

the ALJ's finding of total disability is not in accordance with the law because, it is argued, the ALJ placed the legal burden of demonstrating that Claimant was able to return to her pre-injury job or to some other suitable alternative employment upon Employer, when the burden properly rests upon Claimant to prove the nature and extent of her disability.

Additionally, the parties challenge the ALJ's application of *Transportation Leasing, supra*, to the instant case. Employer argues that the ALJ's finding of permanent total disability violated its due process rights under *Transportation Leasing* because Employer was not afforded notice and an opportunity to present evidence and argument addressing the issue of whether Claimant's disability was permanent as opposed to temporary. Conceding that no notice was afforded Employer, Claimant argues that Employer was not prejudiced as a result, but that the ALJ misapplied *Transportation Leasing* in barring Claimant from an award of the requested relief of temporary total disability benefits.

It is well established in this jurisdiction that the claimant bears the burden of proving entitlement to the level of disability benefits sought under the Workers' Compensation Act, as there is no presumption as to the nature and extent of a claimant's disability. *Dunston v. D.C. Dept. of Employment Services*, 509 A.2d 109 (D.C. 1986). Thus, a claimant must establish both the *nature* of his or her disability, *i.e.* whether it is temporary or permanent, and the *extent* thereof, *i.e.* whether the disability is partial or total.

In the instant case, the ALJ found that Claimant had sustained her burden in proving that her disability was total. We find that the ALJ's determination with respect to the extent of Claimant's disability is consistent with applicable legal authority and supported by substantial evidence of record.

"A claimant suffers from *total* disability if his injuries prevent him from engaging in the only type of gainful employment for which he is qualified." *Washington Post v. District of Columbia Dep't of Employment Servs.*, 675 A.2d 37, 41 (D.C. 1996) (emphasis added); *see also Washington Metro. Area Transit Auth. v. District of Columbia Dep't of Employment Servs.*, 703 A.2d 1225, 1229 (D.C. 1997). "Total disability does not mean absolute helplessness, . . . and the claimant need not show that he is no longer able to do any work at all." *Washington Post*, 675 A.2d at 41 (internal citations omitted). Instead, "an employee who is so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled." *Id.*

*Logan v. D.C. Dep't of Employment Services*, 805 A.2d 237, 241 (D.C. 2002).

"Deciding the extent of disability in any case has both a procedural and a substantive component." *Id.* at 242. For total disability, the claimant must initially establish that he is unable to return to his usual employment. Once this *prima facie* case is made, in order to overcome a finding of total disability "the burden shifts to the employer to establish suitable

alternate employment opportunities available to claimant considering his age, education and work experience.” *Id.*<sup>4</sup>

Applying these legal principles to the instant case, the ALJ determined that Claimant successfully established that she was unable to return to her pre-injury employment. The ALJ cited, and properly relied upon, the medical opinion of Claimant’s treating physician, who imposed permanent restrictions against heavy lifting and repetitive use of her right arm, and Claimant’s testimony (which the ALJ found credible) that her regular pre-injury job, to which she attempted unsuccessfully to return on two separate occasions, required of her that she engage in lifting and repetitive right arm use that exceeded the restrictions imposed by her physician.

Employer’s assertions on appeal that the evidentiary record does not support the finding that Claimant is unable to return to her pre-injury job are of no avail. To begin with, Employer’s disagreement with the ALJ as to which medical opinions should be accepted and/or relied upon - those provided by Claimant’s treating physician, Dr. Levitt, or those of Dr. Gunther (to whom Claimant was referred by Dr. Levitt for a single consultation) and Dr. Neviaser, an independent medical examiner (IME) retained by Employer - is a matter resting squarely with the ALJ. *See Canlas v. D.C. Department of Employment Services*, 723 A.2d 1210, 1212 (D.C. 1999) (requiring adequate explanation and/or justification by the ALJ only in those instances where the treating physician’s opinion is rejected). Regarding Employer’s argument that there was no medical restriction limiting “repetitive use” of the right arm during the period for which benefits are sought, not only does the evidence of record not fully support Employer’s contention,<sup>5</sup> the medical records of the treating physician are such that the ALJ could legitimately conclude that the restriction against repetitive use of Claimant’s right arm, having been imposed as permanent prior to the period in question, remained in effect inasmuch as Dr. Levitt did not subsequently expressly rescind the restriction.

Employer’s challenge to the manner by which the ALJ determined that Claimant’s regular job required lifting in excess of Claimant’s abilities is also to no avail. As further grounds for challenging the ALJ’s determination that Claimant was unable to resume her pre-injury regular job duties, Employer argues that the ALJ erred by taking administrative notice of the weight of the hotel mattresses Claimant was required to lift, and that by requiring Employer to prove that lifting such mattresses did not exceed the 25 pound lifting restriction imposed by Claimant’s treating physician the ALJ impermissibly shifted the burden of proof of disability from Claimant to Employer. It is true that an ALJ is limited to taking administrative notice of facts “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Renard v. D.C. Dept. of Employment Services*, 673 A.2d 1274 (D.C. 1996). It is also true that the burden of proving the extent of one’s disability is on the claimant. *Dunston*,

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<sup>4</sup> If the employer meets this evidentiary burden, “the claimant may refute the employer’s presentation - 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. Absent either showing by the claimant, he is entitled only to a finding of partial disability.” *Logan*, 805 A.2d at 243.

<sup>5</sup> Contrary to Employer’s assertion that there was no evidence that Claimant was restricted from repetitive use of the right arm for the period here in question, Dr. Levitt on November 19, 2004, expressly restricted Claimant, permanently, from not only lifting more than 25 pounds but also against repetitive use of her arm. *See* CE No. 3.

*supra*. However, we do not find either of these legal principles to have been violated in the instant case. Review of the Compensation Order in its entirety indicates that notwithstanding the discussion set forth in footnote 3 thereof pertaining to the issue as it arose in open hearing, the ALJ ultimately made no express finding of fact as to whether the weight of the mattresses Claimant was required to lift exceeded 25 pounds. Instead, the ALJ's express finding of fact relevant to the question of Claimant's post-injury lifting ability, *i.e.* "lifting and turning mattresses requires lifting that exceeds Claimant's abilities", CO at 3, was based primarily, if not exclusively, upon Claimant's testimony (which the ALJ deemed credible) about her post-injury lifting limitations. CO at 6.<sup>6</sup>

For the foregoing reasons, we affirm the ALJ's determination that the *extent* of Claimant's disability is total. We thus turn to the question of whether the ALJ's determination that the *nature* of Claimant's disability is permanent is consistent with applicable legal authority and supported by substantial evidence of record. However, before we can address this question we must first address whether, as Employer contends, the lack of prior notice and opportunity to address the issue of permanency violated Employer's due process rights.

In addressing the issue of what rights, if any, a party has to prior notice and opportunity to be heard within the context of a claim for workers' compensation, the Court of Appeals in *Transportation Leasing* first established the nature of the right in question:

We have held that "in general, an individual is entitled to fair and adequate notice of administrative proceedings that will affect his [or her] rights, in order that he [or she] may have an opportunity to defend his [or her] position." . . . We have observed, moreover, that this notice guarantee has its "roots in constitutional due process." . . . We also have stressed that this notice requirement embraces the proposition that an agency "may not change theories in midstream without affording reasonable notice of the change." . . . The "requirements of procedural due process are met if upon review the court is satisfied that a complainant was given adequate opportunity to prepare and present his [or her] position to the [hearing examiner] and that no prejudice resulted from the originally deficient notice."

690 A.2d at 489 (citations omitted).

In *Transportation Leasing*, the claimant presented a claim for permanent partial disability wage loss benefits. The ALJ found that the claimant had sustained a work-related injury to his neck and upper left extremity, but denied entitlement to wage loss benefits because the claimant had voluntarily limited his income. Nonetheless, the ALJ ruled without prior notice to the parties that the claimant was entitled to a schedule award because the evidence of record supported a finding that the claimant's upper extremity was permanently partially impaired. On appeal the

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<sup>6</sup> The Compensation Order indicates, at fnt 3, that in response to Employer's assertion that the imposed 25 pound weight restriction was not exceeded by the mattress lifting required of Claimant, the ALJ invited Employer to submit, post-hearing, evidence in support of its contention. We do not necessarily view this as an impermissible shifting of burdens of proof, as Employer contends, particularly in light of the fact that the ALJ appears to have been satisfied by the testimony of Claimant that she could not accomplish the lifting requirements of her job. Rather we view the ALJ's action as affording Employer the opportunity to present evidence in support of its contention – an opportunity which Employer waived.

court reversed the ALJ's schedule award, holding that the lack of notice of the possibility that a scheduled loss would be considered "substantially prejudiced Transportation Leasing in the preparation of its defense." 690 A.2d at 489.

In the instant case there is no dispute as to the lack of notice. As previously noted, Claimant presented a claim for benefits based upon a *temporary* total disability. Notwithstanding, the ALJ found that the nature of Claimant's disability was permanent. The ALJ did so, as Claimant concedes, without having afforded Employer prior notice and the opportunity to present evidence or argument on the issue of permanency. Thus, the only question before us for determination is whether Employer was prejudiced as a result of this lack of notice.

In the instant case Employer's counsel asserted at oral argument before this Review Panel that the lack of notice denied Employer the opportunity to conduct discovery and present evidence and argument addressing whether Claimant's condition had reached maximum medical improvement (MMI) and whether Claimant's disability was, as a result, permanent. Employer's counsel conceded that there was evidence that Claimant's condition had reached MMI in the doctors' reports, but argued that Employer did not seek to challenge or otherwise address that evidence because the permanency of Claimant's disability was not at issue. Having been presented with a claim for temporary total disability, Employer felt justified in defending on the grounds that Claimant was not disabled within the meaning of the Act and could thus return to her former employment.

Claimant argues, on the other hand, that no prejudice resulted to Employer from the lack of notice because Employer, in defending against the claim of temporary total disability, nevertheless presented evidence addressing the issue of permanency. Claimant asserts that by presenting evidence (in the form of medical expert reports) that Claimant is not currently disabled, Employer effectively addressed the issue of whether or not the disability was ongoing and thus permanent. Additionally, Claimant argues, there was no issue of a schedule loss as there was in *Transportation Leasing*, and even if there had been, so too that issue was addressed by Employer's experts who had concluded that there was no permanent impairment or ratable disability. Thus, Claimant asserts, the fact that the ALJ classified Claimant's wage loss as permanent, as opposed to temporary, is not an independent basis for reversal.

As *Transportation Leasing* points out, the fact that the evidence is in the record by which a party could have defended itself is irrelevant to the due process question of whether the party was prejudiced as a result of the lack of adequate notice of the claims against which it would have to defend. Notwithstanding the fact that Transportation Leasing had challenged the claimant's claim that he suffered from current and ongoing injury, arguably a defense against evidence submitted by the claimant that he suffered a 17% permanent impairment to his upper extremity, the Court held that Transportation Leasing was substantially prejudiced in the preparation of its defense because it had not been afforded the opportunity to present evidence or argument specifically challenging the claimant's impairment rating. 690 A.2d at 490. "The question, however, is not whether sufficient evidence supports the hearing examiner's findings and conclusions but whether [the party] received adequate notice to inform [it] of all the claims it would have to defend." 690 A.2d at 489 n.2. Moreover, even if the issue or new claim is raised for consideration during the course of the hearing, *Transportation Leasing* dictates that the

defending party is entitled “at the least, to a continuance to assemble and present the necessary evidence to counter the new claim.” *Id.*

Furthermore, the Director has rejected the argument that a party’s prejudice resulting from the lack of notice is diminished because the relief requested and the relief granted are both based upon wage loss, as opposed to the situation in *Transportation Leasing* where the wage loss relief was supplanted by a schedule award. See, *Renard v. Renovex Construction Company*, Dir. Dkt. No. 00-89, OHA No. 92-533 (March 21, 2001). Nor is the evil remedied “by observing that the outcome would perhaps or even likely have been the same. It is the *opportunity* to present argument . . . which must be supplied.” *Rodale Press v. F.T.C.*, 407 F.2d 1252, 1257 (DC Cir. 1968).

Pursuant to the Scheduling Order issued in proceedings before AHD, the parties are required to jointly execute and file in advance of the formal hearing a joint pre-hearing statement and stipulation identifying, *inter alia*, the issues to be presented and the claim for relief that is sought. Absent formal amendment to that documentation,<sup>7</sup> Employer had every reason in the instant case to expect that the ALJ would rule on the claim for relief as presented, and adjudicate only those issues identified by the parties in their stipulation and joint pre-hearing statement. In light of this well-established procedure, we find Employer assertion of prejudice well-founded.<sup>8</sup> Accordingly, we must vacate the Compensation Order’s determination that the *nature* of Claimant’s disability was permanent, and remand the case to AHD for further proceedings consistent with this opinion, including affording to Employer the opportunity to present evidence and argument on the issue of permanency. The due process protection recognized by the court in *Transportation Leasing* stands as a bar not merely to the grant of relief that has not been requested, but as a bar to reaching and deciding the underlying issues giving rise to that 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.

In remanding this case for further proceedings relative to the nature of Claimant’s disability, we are obliged to additionally point out that in determining whether a disability is permanent, more than a determination of whether Claimant’s condition has reached maximum medical improvement is required. Also to be determined is whether Claimant’s condition has continued for a lengthy period and, additionally, whether the condition appears to be “of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.” *Logan*, 805 A.2d at 241 (quoting *Smith v. D. C. Dep’t of Employment Servs.*, 548 A.2d 95, 98 n.7 (D.C. 1988)). See also 4 Larson, *Workers’ Compensation Law* § 80.04, at 80-13

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<sup>7</sup> The Scheduling Order requires submission by the parties of the Joint Pre-Hearing Statement (JPHS) in advance of the formal hearing. Once signed and submitted, as the JPHS expressly states, the JPHS “may not be altered, changed or modified after submission to the Office of Hearings and Adjudication except by Order of the Administrative Law Judge”, and all motions to amend the JPHS or the stipulation form, as the Scheduling Order further directs, must also be filed with AHD in advance of the formal hearing.

<sup>8</sup> The court in *Transportation Leasing* clearly discounted the notion that the parties should be subjected to a game of “risk assumption” in pursuing or defending against a claim for disability compensation, noting that the employer therein, in constructing its defense, was fully justified in relying upon the pre-hearing conference and accompanying order as to the claim that the claimant would press at hearing. 690 A.2d at 490.

(2002 ed.) ("Permanent means lasting the rest of claimant's life. A condition that, according to available medical opinion, will not improve during the claimant's lifetime is deemed to be a permanent one."). In his dissent, Judge Russell argues that the evidence of record supports the conclusion that Claimant's condition meets the standards for permanency established by the court in *Logan*. While we might agree with our colleague's assessment of the evidentiary record, required nevertheless are findings of fact relative to this issue that are not ours to make but exclusively within the jurisdiction of the ALJ to render. *Rovinski v. American Combustion Industries*, CRB No. 07-91, AHD No. 06-341 (June 5, 2007).

A final issue presented by this case is, as Judge Russell suggests in his dissent, whether attainment of maximum medical improvement and permanency *as a medical matter* terminates entitlement to temporary total disability benefits arising from an injury to a scheduled member. We agree that this issue has never been directly addressed by the agency or the D.C. Court of Appeals. However, because we are of the opinion that Employer's due process rights were violated by the fact that the ALJ reached and addressed the issue of permanency without affording Employer the opportunity to present evidence and argument on the issue, we do not reach this issue at this time.

#### CONCLUSION

The Compensation Order of September 20, 2007 is supported by substantial evidence and is in accordance with the law with respect to the determination that the extent of Claimant disability is total. Because the ALJ's determination that Claimant's disability is permanent was rendered without adequate notice to Employer that the issue of permanency was to be addressed, and because the lack of notice prejudiced Employer in its defense, that part of the Compensation Order herein appealed addressing the permanency of Claimant's disability is not in accordance with applicable law governing the due process protections to be accorded parties to proceedings under the Act, as articulated in *Transportation Leasing, supra*.

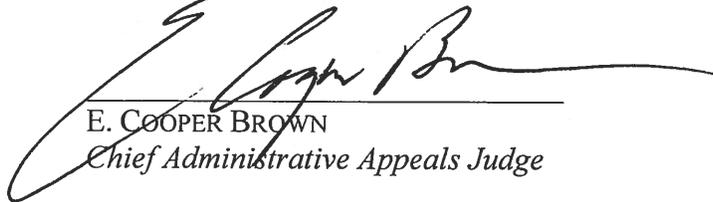
#### ORDER

The Compensation Order herein appealed is AFFIRMED IN PART, AND REVERSED AND REMANDED IN PART. The Compensation Order's finding and determination that that Claimant is totally disabled is AFFIRMED, as is the award of causally related medical care. The Compensation Order's finding and determination that Claimant is permanently disabled is VACATED, with the matter REMANDED to AHD for further proceedings consistent with this Decision and Remand Order.<sup>9</sup>

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<sup>9</sup> In remanding this case to AHD for further proceedings relative to the nature of Claimant's disability, we make clear that we are not necessarily directing that the ALJ address upon remand the issue of permanency. Our holding merely dictates that should, upon remand, Claimant seek to amend her claim or the ALJ *sua sponte* determine that the issue of permanency be addressed, fair and adequate notice be afforded Employer coupled with the right to present evidence and argument thereon. Otherwise there is nothing in the Decision and Order issued herein that would preclude the ALJ from entering an award of temporary total disability.

FOR THE COMPENSATION REVIEW BOARD:



E. COOPER BROWN  
*Chief Administrative Appeals Judge*

January 23, 2008

DATE

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, concurring in part and dissenting in part:

I concur in the majority decision relating to the findings of total disability. I dissent from the majority decision relating to the application of *Transportation Leasing* to this case, and to the issue relating to termination of wage loss benefits where a work injury is related to a schedule body part only.

The majority misstates the nature of the issues that have not been addressed by the DCCA. Although to my knowledge the question of whether the attainment of maximum medical improvement and permanency *as a medical matter* terminates entitlement to temporary total disability benefits arising from an injury to a scheduled member, has never been directly addressed in an Agency or District of Columbia Court of Appeals decision, the question of whether the attainment of *legal* permanency terminates such entitlement is without doubt answered in the affirmative in *Smith*. The unanswered question is whether the attainment of medical permanency of a condition acts in such a fashion; in other words, is medical permanency a sufficient and necessary end point in entitlement to temporary total disability benefits where an injury is solely to a schedule body part. I think not. Rather, I believe that, in schedule injury cases, "legal" permanency requires two matters to be considered: whether there is medical permanency under *Logan*, and whether there is employability once that is achieved.

In my view, the system of compensation created under the Act has sufficiently identifiable structural components that the following distillation accurately reflects its general schematic.

A worker who is injured and rendered unable to work is entitled to wage replacement benefits based upon a total wage loss until such time as the worker returns to work, or until such time as the worker is capable of returning to work, in either of which cases the worker is deemed to have become employable. Thereafter, where the injury is to a schedule body part, and assuming medical permanency, at this point the worker is deemed permanently partially disabled and entitled to an award under the schedule, but is entitled to no additional disability based upon actual wage loss. If, on the other hand, the injury is to a non-schedule body part, the worker is entitled to continued receipt of disability benefits based upon either actual wage loss (whether

total or partial), or if the employer is able to demonstrate that the worker is capable of earning more than the actual wages (that is, the injured worker is voluntarily limiting wages by working in a job that pays less than another job which the worker could obtain if the worker so chose), the worker's ongoing entitlement is calculated based upon what the worker has the potential to earn.

In other words, where the injury is solely to a schedule body part, a worker is entitled to total disability benefits until the worker is demonstrably able to return to work in some suitable capacity and his condition is medically permanent (or stable, under the *Logan* tests), and is thereafter entitled only to a schedule award, regardless of the degree of actual wage loss.

Thus, in the case of *Tinordi v. Washington Capitals, et al.*, OHA/AHD No. 00-267A, OWC No. 538220 (Compensation Order, November 20, 2003), an ALJ awarded a hockey player a permanent partial disability under the schedule to his foot, for an injury sustained that ended his hockey career, but where the player had returned (by stipulation) to suitable alternative employment paying substantially less than he earned playing hockey, and the ALJ denied ongoing partial disability benefits for wage loss. The schedule award was made at the request of the employer, and not the claimant, and was in fact made over the claimant's objections, because he argued that his condition was not yet permanent (based upon the fact that he was in fact on a predictable and deteriorating medical course that would ultimately lead to a total ankle fusion and a far greater medical impairment), and that he was entitled to ongoing wage loss differential payments until permanency was achieved.

The ALJ rejected the argument as to there being no permanency, relying upon *Safeway Stores v. District of Columbia Department of Employment Services*, 806 A. 2d 1214 (D.C. 2002) and the definition of "permanency" enunciated by the court in *Logan v. District of Columbia Department of Employment Services*, 805 A.2d 237 (D.C. 2002) to resolve the permanency issue. Then, the injury having been determined to be both a schedule injury and a permanent one, and the claimant having returned to suitable alternative employment, the ALJ reasoned that under *Smith v. District of Columbia Department of Employment Services*, 548 A.2d 95 (D.C. 1998), the only permanency benefits that were available to the claimant were the benefits available under the schedule.

The claimant appealed that decision, and the ALJ's decision and award were sustained by the CRB. See, *Tinordi v. Washington Capitals, et al.*, CRB No. 03-160, OHA/AHD No. 00-276A, OWC No. 538220 (July 20, 2006). No further appeals were taken.

In the case before us, Claimant has sought neither an award of permanent total disability, nor an award for the schedule disability to her right arm. Rather, she has sought ongoing wage loss benefits, and argues that she is entitled to them because her disability is not yet permanent, in part because Claimant has not been offered or obtained any vocational rehabilitation or job placement assistance.

The majority and I disagree with Claimant's assertion that the ALJ's finding that Claimant's injury has attained permanency under *Logan* is erroneous; it clearly has gone on for a long enough time to qualify (the original injury date is January 20, 2003), and there is nothing presented by either party that suggests that there is any anticipation of medical improvement

awaiting the mere passage of additional time. Consistent, therefore, with the *Tinordi* cases (and more importantly, with the Court of Appeals cases, *Logan, supra, Smith, supra, and Safeway Stores, supra*, cited therein upon which the *Tinordi* decisions were based), had Claimant returned to suitable alternative employment, and had *either* party sought to have her scheduled permanency determined and awarded, her entitlement to ongoing wage loss benefits beyond the schedule award would have to be denied, and her claim would be limited to whatever appropriate award could be made under the schedule.

However, Employer has made no such showing of employability (or at least, such showing as it attempted to make, based upon a claim by the IME physician that Claimant's injuries have resolved without permanent residual impairment effecting employability has been rejected by the ALJ), and Claimant has not returned to work. Thus, unlike the claimant in *Tinordi*, Claimant remains totally disabled from any employment at all, as a result of the work injury. And, as previously discussed, Claimant's condition meets the standards for permanency established by the court in *Logan*.

Thus, in my view, the ALJ was correct in assessing Claimant's disability status as being one of permanent total disability. Indeed, the majority finds no fault with such a finding based upon the record evidence.<sup>10</sup>

All that remains, therefore, is what to make of the ALJ's failure to award benefits for that level of disability, under *Transportation Leasing, supra*. I view the majority's handling of that issued as being misplaced.

In the cited case, the court reversed an award under the schedule that had been made by a hearing examiner,<sup>11</sup> because the hearing occurred within the context of a claim by the claimant for ongoing wage loss benefits. The hearing examiner denied the wage loss claim, finding that the lack of wages was the result of a voluntary limitation of income on the claimant's part. However, although (unlike in *Tinordi*) neither party had sought a determination of entitlement to a schedule award, the hearing examiner made such an award.

The court ruled that the employer was prejudiced by the hearing examiner's making such an award, because the employer had no reason to expect such an issue to be raised, and had no opportunity to defend the schedule loss claim. The fact that one component of a schedule loss claim is now and always has been the percentage degree of permanent medical impairment that an injury has caused, the lack of knowledge that such a claim is going to be considered obviously places a party under a distinct disadvantage: the party has no opportunity to obtain a specific medical impairment rating and to review the impairment rating that the other side intends to present in order to obtain possible rebuttal evidence.

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<sup>10</sup> By this I mean that the majority has identified no record evidence that suggests that Claimant's condition is merely temporary, or that her disability is anything other than total. The majority seems to require, however, something more. What that "something more" might be, however, no one, including the parties at oral argument, or in their pleadings, nor the majority in its decision, identifies.

<sup>11</sup> The case was decided prior to the reclassification of hearing examiners to ALJs.

This is very different from the case before us, in which the only issue that was decided was that of disability based upon an ability or inability to perform work in return for wages. Employer was fully aware that that was the issue, and therefore had the same opportunity and motive to marshal whatever evidence it felt was relevant in defense of Claimant's clearly expressed claim that she has been and remains physically unable to work in her pre-injury job as a result of the injury (thereby rendering her totally disabled). The "extent" part (*i.e.*, total or partial) of the equation is the same in this case as it would have been had the claim been for permanent as opposed to temporary (the "nature" part) disability benefits.<sup>12</sup> Hence, there is no basis upon which the Employer can make a claim that it would have produced additional evidence on the issue, had it known that a permanent total award might have been made, instead of just a temporary total award.

Otherwise put, Employer's defense in this case, presented fully at the formal hearing, was that Claimant was "permanently totally recovered" from her work injury. Rather than attempting to defend the case by demonstrating some lesser level of employability than a full capacity to return to the pre-injury job, and hence seek termination of wage loss benefits as the Act contemplates, Employer placed all its defensive eggs in the "no residual incapacity" basket. That Employer made this tactical decision was conceded at oral argument. See, Transcript of Oral Argument, page 40, line 13, through page 42, line 21. And, the medical evidence submitted by Employer at the formal hearing could not be clearer: Employer was asserting that Claimant "sustained a contusion of the elbow" and demonstrated "no evidence that she has a permanent impairment" and is "perfectly capable of working" having reached "maximum medical improvement" and being "fully capable of normal work ... [with] no measurable impairment" (EE 1, Report of Dr. Robert Neviasher, May 18, 2005, page 2). See also, EE 3, Report of Dr. Stephen F. Gunther, September 13, 2004, page 2 ("I have no reason to feel that she has any permanent impairment. There is just nothing to go on").

One has little sympathy for the argument that Employer could have offered, in the alternative, evidence to the effect that Claimant could be expected to improve in the future, because she currently suffers from some medical condition with a treatment option which has a reasonable expectation of success. The workers' compensation disability process is not intended to contemplate such gambits; it is intended to secure prompt, regular and voluntary payment of benefits to injured workers. We are asked to take employers at their word when they assert that they have in good faith taken a position relative to the capacity of an injured worker to return to work. It is not too much to expect that an employer make a coherent and consistent defense.

Employer's suggestion at oral argument that it is somehow prejudiced by being saddled with a permanent total award because such an award is premature, given the lack of any attempt at vocational rehabilitation having been attempted, is the equivalent of the clichéd appeal to mercy as an orphan by a child convicted of killing his parents: the lack of such an attempted vocational

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<sup>12</sup> There was once an argument that could have been made, that "permanent total disability" requires proof beyond mere inability to return to pre-injury job and a permanency finding, because the Act states that for permanent total disability to be awarded, a claimant must establish an inability to "earn wages in the same or any other employment", thus creating an additional element to the "extent" part of the disability equation, the "any other employment" requirement, than exists for temporary total disability. The court rejected that argument in overturning the ALJ and Director's decisions in *Logan*, eliminating any perceived distinction between the "total" in temporary total disability and the "total" in permanent total disability.

rehabilitation course is Employer's decision, driven by a desire to avoid the costs of such benefits. See, Transcript of Oral Argument, page 41, line 19 through page 42, line 6. Employer gambled that the ALJ would find that Claimant was permanently totally recovered, and lost.

While the majority could stake its decision upon the claim that as a policy matter the Agency would prefer that only a specifically requested claim for relief can be considered at a formal hearing, reliance upon *Transportation Leasing* and prejudice analysis is faulty, in that Employer in this case defended the claim based upon the theory that the medical condition had in fact resolved without residuals, which is merely another way of saying that the condition has become permanent and is completely gone. The majority now invites Employer to take an alternative approach, one which necessarily is in direct conflict with the one already taken.

And, I would add, even where there is a permanent total disability award, an employer remains free to seek a modification if at some time in the future, a change in medical or other conditions (including one presumes the commencement and/or completion of vocational rehabilitation efforts) occurs rendering a claimant employable, at which time the fact or degree of disability can be modified, if the conditions so warrant.

Thus, in this case, I believe that the proper course is a remand to the ALJ with instructions to award permanent total disability benefits. Accordingly I dissent from the remand for further consideration.

JEFFREY P. RUSSELL  
*Administrative Appeals Judge*