

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

**Office of Hearings and Adjudication**  
**COMPENSATION REVIEW BOARD**



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**CRB No. 07-170**

**RAFAEL MARTINEZ,**

**Claimant-Respondent,**

**vs.**

**NECO CONSTRUCTION AND ZURICH AMERICAN INSURANCE Co.,**

**Employer-Petitioner.**

Appeal from a Compensation Order of  
Administrative Law Judge Fred D. Carney, Jr.  
AHD No. 05-222, OWC No. 604309

Jamie L. Desisto, Esq., for Petitioner

Mary Buonanno, Esq., for Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, SHARMAN MONROE and FLOYD LEWIS, *Administrative Appeals Judges*.

E. COOPER BROWN, *Chief Administrative Appeals Judge*, for the Review Panel:

**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 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005). Pursuant to 7 D.C.M.R § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) and the Office of Workers' Compensation (OWC) under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Official Code § 32-1501 *et seq.* (the Act).

## OVERVIEW

In July of 2002, Claimant-Respondent (Respondent) sustained multiple injuries arising out of and in the course of his employment as the result of being run over by an 18-wheel fully-loaded sludge truck owned by a third party. Employer-Petitioner (Petitioner) provided voluntary payments of temporary total disability benefits up until December of 2004, whereupon Respondent filed the instant claim. Concurrently with his pursuit of benefits under the Workers' Compensation Act, Respondent instituted a third-party claim against the driver and owner of the truck which resulted in a settlement unbeknownst to Petitioner prior to the formal hearing held before the Administrative Hearings Division (AHD), Department of Employment Services, pursuant to the instant claim.

This appeal, filed on September 28, 2007, follows the issuance of a Compensation Order by AHD on August 28, 2007 pursuant to which the Administrative Law Judge (ALJ) granted Respondent's claim for permanent total disability benefits commencing December 27, 2004 and for payment of causally-related medical benefits. As grounds for this appeal, Petitioner asserts that the ALJ's determination of permanent total disability is unsupported by substantial evidence of record and contrary to applicable law; that Respondent unjustifiably refused to participate in vocational rehabilitation, thereby warranting suspension of benefits under the Act; that the ALJ committed reversible error by awarding compensation notwithstanding the bar against recovery imposed by D.C. Official Code § 32-1535(g) where a claimant enters into a settlement agreement without the approval of the employer; that Respondent wrongfully withheld from Petitioner settlement proceeds to which Petitioner was entitled as reimbursement for voluntary compensation payments that had been made; and that the ALJ wrongfully denied Petitioner's post-hearing request to reopen the evidentiary record pursuant to D.C. Official Code § 32-1520(c).

Respondent opposes the appeal, arguing that the award of permanent total disability benefits is supported by substantial evidence of record; that Respondent justifiably refused to participate in vocational rehabilitation to the extent that such vocational rehabilitation consisted of job leads exceeding Respondent's physical capacity; that Section 32-1535(g) does not bar recovery of the awarded benefits inasmuch as Petitioner was not prejudiced as a result of Respondent's third-party settlement; and that the ALJ afforded Petitioner the opportunity to adduce additional evidence post-hearing through a conference call that resulted in admission of limited evidence pertaining to the third-party settlement.

For the reasons hereafter discussed, this Review Panel affirms the ALJ's determination that Respondent is permanently totally disabled. We nevertheless reverse the Compensation Order's award of permanent total disability compensation pursuant to D.C. Official Code § 32-1535(g), and remand the case for further proceedings consistent with this Decision and Remand Order including further evidentiary development pursuant to D.C. Official Code § 32-1520(c) in order to ascertain whether Petitioner has received the full reimbursement to which it is entitled in light of the third-party settlement.

## ANALYSIS

As an initial matter, the scope of review by the 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.

The claim for relief identified in the Compensation Order herein appealed is for permanent total disability benefits commencing December 27, 2004.<sup>1</sup> C.O. at 2. Before the Administrative Hearings Division, the parties stipulated that Respondent sustained physical injuries, as hereinafter described, arising out of and in the course of his employment. *Id.* The issues before AHD, that are now before the CRB on appeal, focused upon the nature and extent of Respondent's disability, whether Respondent voluntarily limited his income by failing to cooperate with vocational rehabilitation, and whether Respondent's settlement with a third party bars Respondent from recovery under the Workers Compensation Act.<sup>2</sup>

Turning first to the issue of the nature and extent of Respondent's disability, 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. Concerning the *extent* of disability, the Court of Appeals noted in the leading case of *Logan v. D.C. Dep't of Employment Services*, 805 A.2d 237 (D.C. 2002):

"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*

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<sup>1</sup> Within the discussion portion of the Compensation Order, at page 6, it is stated that Respondent also sought "multiple schedule awards." However, since the ALJ appears to have rejected any such claim(s), *see* discussion at pp. 10-11 of C.O., and because Respondent does not challenge the ALJ's decision with respect to the purported schedule award claim(s), the propriety of the denial of the asserted schedule award claim(s) is not before the CRB on appeal, and thus not herein addressed.

<sup>2</sup> Subsumed within these broadly defined issues, as hereinafter discussed, are a number of related issues including Petitioner's challenge to Respondent's claim that he also suffered psychological injury arising out of and in the course of his employment in the form of post traumatic stress disorder, and whether the ALJ erred as a matter of law in refusing to grant Respondent's request to reopen the record before AHD to adduce additional evidence.

*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.*

805 A.2d at 241.

"Deciding the extent of disability in any case has both a procedural and a substantive component." *Logan, supra*, 805 A.2d 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.* 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.

In the instant case Petitioner does not challenge the ALJ's determination that Respondent successfully met his initial burden of establishing that he was unable to return to his pre-injury employment as a laborer in the construction field.<sup>3</sup> Petitioner contends, however, that the ALJ nevertheless committed reversible error in concluding that Respondent was totally disabled because, Petitioner asserts, a labor market survey which it had introduced into evidence demonstrated the availability of suitable alternate employment opportunities. Employer's Exhibit (EE) 5.

Upon examination of the labor market survey and the job opportunities identified therein, the ALJ rejected the report as adequate proof of the existence of suitable alternative employment in light of Respondent's physical limitations and his educational and language limitations. Based upon the ALJ's findings and our review of the evidentiary record, we conclude that the ALJ's rejection of the labor market survey as evidence of suitable alternative employment is supported by substantial evidence of record. Based on the evidence of record, the ALJ determined that Respondent was capable of medium physical demand level work with restrictions against heavy lifting. The ALJ also found that Petitioner has no formal education, is illiterate in his native language Spanish, does not speak, read or write English, and does not drive. These restrictions and limitations the ALJ contrasted against the positions identified in the labor market survey, noting that "seven of the positions required some English speaking; one required a high school

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<sup>3</sup> In the instant case the parties do not contest the ALJ's finding that Respondent sustained physical injuries resulting from his accidental work injury that prevent him from returning to his pre-injury employment.

diploma; one required a driver's license; four were cashier positions; and three exceeded the medium level that work hardening found [Respondent] capable of lifting" and critical information regarding distances to the various job sites or the availability of public transportation was lacking. C.O. at 4. Accordingly, the ALJ rejected the labor market survey as evidence of the availability of suitable alternative employment. C.O. at 9-10.

Petitioner having failed to rebut Respondent's *prima facie* showing of total disability, we accordingly affirm the ALJ's ultimate conclusion that the *extent* of Respondent's disability is total.

In light of our affirmation of the ALJ's determination that Petitioner failed to prove the availability of suitable alternate employment opportunities, other arguments raised by Petitioner challenging the ALJ's determination of total disability are rendered moot, and will not be addressed. For example, Petitioner asserts that Respondent failed to present evidence of having diligently sought to secure alternative employment on his own volition. However, the requirement under *Logan* that a claimant demonstrate diligence in his efforts to secure alternative employment is only required of a claimant as rebuttal evidence, in order to sustain a finding of total disability where the employer has first established the availability of suitable alternative employment. *Logan*, 805 A.2d at 243. Moreover, because we affirm the ALJ's determination that the job opportunities presented by Petitioner did not constitute suitable alternative work, we do not reach or need to address Petitioner's contention on appeal that Respondent unreasonably refused to participate in the vocational rehabilitation efforts undertaken by Petitioner because he was an undocumented worker.<sup>4</sup>

We thus turn to an examination of whether the ALJ's further determination that Respondent's disability is *permanent* is supported by substantial evidence of record and consistent with applicable legal authority. As explained in *Logan*, whether a disability based upon wage loss is permanent, as opposed to temporary, requires more than a determination of whether the claimant's condition has reached maximum medical improvement. Also to be determined is whether the claimant's condition has continued for a lengthy period and 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 (2002 ed.). In the instant case, the ALJ based his conclusion that Respondent's disability was permanent upon the finding that Respondent's orthopaedic injuries (*i.e.* the injuries to Respondent's legs, neck, back and head) had reached maximum medical improvement and concluded, based upon the opinion and impairment ratings assigned to Respondent's resulting physical condition of by his treating physician, see C.O. at 9

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<sup>4</sup> In any event, this argument appears somewhat spurious given that there is no evidence of record that Respondent actually refused to participate in the labor market survey research that was undertaken at Petitioner's behest. Rather, the vocational case manager testified that she did not personally see Respondent because, "It was understood that Mr. Martinez is undocumented. . . ." Moreover, no evidence was presented that the labor market survey, once completed, was ever presented to Respondent, and thus no evidence that he did refuse, or would have refused, to pursue any of the job leads identified therein. See HT at 74.

and 10, that Respondent was as a result permanently partial impaired.<sup>5</sup> C.O. at 3-4. While the ALJ, in reaching his conclusion of permanency, did not expressly articulate the legal test established in *Logan*, we nevertheless find that his conclusion is consistent with the legal principles governing the determination of permanency and further supported by substantial evidence of record. Thus, we affirm the ALJ's conclusion, as set forth in the Compensation Order, that Respondent's disability is permanent.<sup>6</sup>

We next turn to Petitioner's contention that the ALJ committed reversible error by awarding compensation notwithstanding D.C. Official Code § 32-1535(g) which, Petitioner argues, bars recovery under the Act in light of a \$600,000 third-party settlement that Respondent had previously entered into without Petitioner's knowledge or prior approval. Petitioner's argument was rejected before AHD based upon the determination that no prejudice has resulted to Petitioner due to Respondent's repayment of the voluntary payments of compensation that Petitioner had previously made and because Petitioner "has a credit toward any future compensation benefits awarded Claimant from the third party settlement."<sup>7</sup> C.O. at pg. 5.

D.C. Official Code § 32-1535<sup>8</sup> "allows a worker injured on the job by a third party to sue the third party without forfeiting the right to workers' compensation from his or her employer, so

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<sup>5</sup> Petitioner's IME did not contest the conclusion that Respondent's condition had reached maximum medical improvement, nor the permanency of his impairment; merely disputing the date by which maximum medical improvement was reached and the degree of impairment. *See* C.O. at 8.

<sup>6</sup> Our affirmation of the ALJ's determination of permanency is based exclusively upon Respondent's physical condition, as discussed in the text of our decision. To the extent that the ALJ's determination of permanency is also based upon Respondent's contention that he additionally suffers permanent disability resulting from post traumatic stress disorder, that aspect of the ALJ's determination is rejected. Not only, as the ALJ expressly noted, is there no medical opinion that Respondent's psychological condition is permanent, C.O. at 9, the evidentiary record is completely devoid of any medical opinion that not only did Respondent's work injuries cause his psychological condition, but that Respondent has failed to present credible evidence demonstrating that his physical injuries and their aftereffects (or sequelae) could have caused the same or similar emotional injury in a person of normal sensibilities not significantly predisposed to such injury, necessary in order to invoke the statutory presumption that an emotional or psychological condition, claimed to be the consequence or medical sequelae of an employment-related physical injury, arises out of and in the course of one's employment. *Roberta West v. Washington Hospital Center*, CRB No. 99-97, H&AS No. 99-276A (Supplemental Decision & Order, August 5, 2005).

<sup>7</sup> The total lien amount claimed by Petitioner is \$97,473.84, for voluntary payments of compensation from July 2, 2002 to July 29, 2002, and from November 9, 2002 to December 26, 2004. Although the Compensation Order appears to suggest that the total amount was paid over to Petitioner, the parties on appeal indicate that only two-thirds of the total amount was actually paid to Petitioner; with the remaining one-third, according to Respondent, "allotted to [Respondent's] attorney for collection of the compensation lien on behalf of the carrier and employer." Claimant-Respondent's *Memorandum of Points and Authorities*, pg. 2, ftnt 2.

<sup>8</sup> D.C. Official Code § 32-1535 states in relevant part:

Subsection (a): "If, on account of a disability or death for which compensation is payable under this chapter, the person entitled to such compensation determines that some person other than those enumerated in § 32-1504(b) is liable for damages, he need not elect whether to receive such compensation or to recover damages against such third person."

Subsection (b): "Acceptance of such compensation under an award in a compensation order filed with the Mayor shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within 6 months after such award."

long as the amount recovered from the third party is less than the entitled employer compensation.” *Pannell-Pringle v. Dept. of Employment Services*, 806 A.2d 209, 212 (D.C. 2002). However, subsection 32-1535(g) “prohibits the injured employee from recovering workers’ compensation benefits if the suit against the third party is settled without the written approval of the employer.” *Id.* “The purpose of the approval requirement is to prevent the employer from being prejudiced by a low settlement that would leave the employer liable for the remainder of the employee’s entitled compensation.” *Id.* at 212 n.5.

In the instant case, Petitioner was rightfully entitled to reimbursement for the voluntary payments of compensation it had made to Respondent up to the limit of the settlement amount.<sup>9</sup> Where an employer claims entitlement to reimbursement for voluntary compensation payments made prior to the third-party settlement, the issue of actual prejudice resulting to the employer from the settlement is relevant to the extent that the employer is entitled to reimbursement for the amount by which its subrogation right is impaired, *i.e.* “the amount for which the claim was settled, but nothing more.” *Pannell-Pringle*, 806 A.2d at 215, quoting *Travelers Insurance Co. v. Haden*, 418 A.2d 1078, 1084 (D.C. 1980).

With respect to Respondent’s right to *further* compensation under the Act, had Petitioner approved Respondent’s third-party settlement prior to or at the time of settlement, Respondent would be entitled to recover the *excess* of the amount to which Respondent is entitled under the Act over and above the \$600,000 third-party settlement amount. D.C. Official Code § 32-1535(f). However, where there has been, as in the instant case, an unauthorized third-party settlement, Section 32-1535(g) conclusively presumes prejudice to the employer; no proof of actual prejudice is required. *Pannell-Pringle, supra*. Accordingly, in light of Respondent’s failure to secure Petitioner’s approval of the settlement, Section 32-1535(g) serves as an absolute bar to any further recovery under the Act.<sup>10</sup>

Finally, we turn to the issue of Petitioner’s post-hearing request before AHD to reopen the record to present additional evidence. The Court of Appeals has construed the provisions of D.C. Official Code § 32-1520(c)<sup>11</sup> and 7 DCMR § 223.4<sup>12</sup> to require reopening of the evidentiary

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Subsection (f): “If the person entitled to compensation institutes proceedings within the period ascribed in subsection (b) of this section, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Mayor determines is payable on account of such injury or death over the amount recovered against such third person.”

Subsection (g): “If compromise with such third person is made by the person entitled to compensation or such representative of any amount less than the compensation to which such person or representative would be entitled under this chapter, the employer shall be liable for compensation as determined in subsection (f) of this section, only if the written approval of such compromise is obtained from the employer and his insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise in a form and manner prescribed by the Mayor.”

<sup>9</sup> Although, as noted *infra*, there exists a question as to whether Petitioner’s subrogation rights were fully satisfied and Petitioner properly reimbursed out of the settlement proceeds for the voluntary payments it had made.

<sup>10</sup> Inasmuch as Section 32-1535(g) stands as a bar to recovery of further compensation only, the ALJ was nevertheless correct in awarding the payment of causally-related medical benefits.

<sup>11</sup> “No additional information shall be submitted by the claimant or other interested parties after the date of hearing, except under unusual circumstances as determined by the Mayor.” D.C. Official Code § 32-1520(c).

record for the receipt of additional evidence during the period between the formal hearing and issuance of the compensation order only upon a showing of *unusual circumstances*, and then only if it is determined that the evidence is material and relevant. *Young v. D.C. Dept of Employment Services*, 681 A.2d 451, 456 (D.C. 1996). *See also, Jones v. D.C. Dept. of Employment Services*, 584 A.2d 17, 19 (D.C. 1990) (affirming the Director’s interpretation of Section 32-1520(c) and the regulation to require “a two-step process. First, there must be the showing of unusual circumstances, and only then can the hearing be reopened for [the receipt of] material and relevant evidence.”).

While the term “unusual circumstances” has not been explicitly construed, the purpose underlying the applicable test was articulated in *Young, supra, i.e.* “to prevent a hearing from being reopened simply for the purpose of introducing new or additional evidence when that evidence could have reasonably been presented at the hearing.” 681 A.2d at 456. Thus, the test is little different from that under former Section 32-1522(b)(2) upon a motion presented to the Director to adduce additional evidence: “Whether ‘reasonable grounds existed for not introducing [the evidence] at the initial hearing’ and whether the evidence is material, *i.e.* whether it relates to the original claim for compensation.” *Bennett v. D.C. Dept of Employment Services*, 629 A.2d 28, 30 (D.C. 1993), citing *King v. D.C. Dept of Employment Services*, 560 A.2d 1067, 1073 (D.C. 1989).

In the instant case, the ALJ convened a conference call in response to Petitioner’s post-hearing motion to reopen the record, at which time “counsel was informed that any decision on the petition would be made in the Compensation Order.” C.O. at 4. Subsequently, as part of the Compensation Order that is herein appealed, the ALJ ordered the reopening of the record for the limited purpose of “entry of evidence that Claimant settled his third party claim for \$600,000, and that the Employer’s lien in the amount of \$95,951.45 was paid on November 21, 2005.” C.O. at 5. The ALJ having thus granted Petitioner’s motion, there would seem to be nothing of merit in Petitioner’s challenge on appeal to the ALJ’s ruling. However, as the Director of DOES has previously held, where the hearing record is reopened for the submission of additional evidence, the ALJ must reopen the record in such a way as to afford the parties the opportunity for cross examination and rebuttal as necessary. *Jones v. George Hyman*, Dir. Dkt. No. 87-17, H&AS No. 86-597 (Oct. 3, 1989). This did not occur in the instant case. As a result, the CRB is now presented with competing factual and procedural contentions relative to the third-party settlement, including the actual amount of the lien amount repaid,<sup>13</sup> that this Review Panel is not

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<sup>12</sup> “If the [Administrative Law Judge] believes that there is relevant and material evidence available which has not been presented at the formal hearing, the [ALJ] may order the parties to acquire and submit the evidence. The [ALJ] may also continue the hearing to allow the parties to develop the evidence or, at anytime prior to the filing of the compensation order, reopen for receipt of the evidence.” 7 DCMR § 223.4.

<sup>13</sup> As Petitioner notes in its memorandum on appeal, while the Compensation Order states that the lien amount of \$95,951.45 was paid, Petitioner contends that the total lien amount for voluntary compensation payments made was actually \$97,473.84, and that Respondent actually paid only two-thirds of that amount, retaining the remaining one-third to pay Respondent’s attorney’s fee. While Respondent disputes on appeal the total lien amount, asserting the \$95,951.45 sum to be correct, Respondent nevertheless acknowledges in his memorandum on appeal that only \$63,967.64 was actually paid over to Petitioner; contrary to what is stated in the Compensation Order; that “the remaining one third was allotted to claimant’s attorney for collection of the compensation lien on behalf of the carrier and employer.” The Compensation Order notes the existence of a dispute between the parties as to whether

in a position to evaluate given the lack of an evidentiary record, or any record, available for review. Given our holding that Section 32-1535(g) bars Respondent from any recovery under the Act for his permanent total disability, the lack of any post-hearing record would seemingly constitute harmless error. However, as the discourse at footnote 13 below attests, findings of fact based upon the development of an evidentiary record related to the reopening of the record is necessary particularly insofar as the issue of Petitioner's subrogation rights is concerned. Contrary to the ALJ's assertion that Respondent's right to the payment of an attorney's fee from the lien amount is not presently at issue, whether Respondent's attorney is entitled to withhold legal fees from the lien amount attributable to the voluntary payments of compensation previously made, or whether instead Petitioner is entitled to full recovery of its voluntary payments, is an issue that necessarily is before the agency in this case and must be resolved, initially by AHD, as it goes to the very question of the scope and extent of Petitioner's subrogation rights.

#### CONCLUSION

The Compensation Order's determination that Respondent is permanently totally disabled is supported by substantial evidence of record and in accordance with applicable law. In light of the third-party settlement entered into by Respondent without Petitioner's prior approval, the Compensation Order's award of permanent total disability compensation is in violation of D.C. Official Code § 32-1535(g) which bars any further award of compensation. Due to the necessary evidentiary development required in order to determine Petitioner's subrogation rights resulting from its voluntary payment of disability compensation benefits, the ALJ committed reversible error by not convening an evidentiary hearing upon ordering that the record be reopened post-hearing pursuant to D.C. Official Code § 32-1520(c).

#### 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 permanently totally disabled is AFFIRMED, as is the award of causally related medical care. The Compensation Order's finding and determination that Respondent is entitled to the award of permanent total disability compensation is VACATED, and this matter REMANDED to the Administrative Hearings Division for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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E. COOPER BROWN  
*Chief Administrative Appeals Judge*

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Respondent was entitled to retain a portion of the lien amount to pay his attorney's fees. Yet, at the same time the Compensation Order suggests that one-third of the lien amount was paid to Petitioner at the time the third-party settlement was entered into, with the remaining two-thirds paid in November of 2005 when negotiations between Petitioner and Respondent, presumably over the amount to be repaid, broke down. C.O. at 4.

April 25, 2008

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DATE