

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-159

GERALDINE RENWICK,  
Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,  
Self-Insured Employer-Respondent.

Appeal from a November 13, 2013 Compensation Order of  
Administrative Law Judge Amelia G. Govan  
AHD No.07-108D, OWC No. 587264

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 APR 9 PM 12 01

Krista DeSmyter, for the Petitioner  
Mark H. Dho, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, HENRY W. MCCOY and HEATHER C. LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**BACKGROUND<sup>1</sup>**

Petitioner was employed by Respondent as a bus operator when, on February 19, 2003, she fell while inspecting her bus. She injured her right shoulder and underwent two surgical repair procedures which have not successfully returned her to a condition in which she can continue to operate a bus for Respondent.

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<sup>1</sup> The scope of review by the CRB is generally 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

Petitioner sought an award of permanent total disability benefits in a formal hearing on July 11, 2013 before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services. On November 13, 2013, the ALJ issued a Compensation Order denying the claimed permanent partial disability, awarding instead ongoing temporary total disability benefits and vocational rehabilitation services.

Petitioner appealed the Compensation Order (CO) to the Compensation Review Board (CRB), arguing that on this record she is permanently totally disabled as a matter of law. Respondent opposed the appeal, asserting that the ALJ's conclusion that there is evidence of the existence of suitable alternative employment is supported by substantial evidence and the denial of the claimed permanent total disability award is in accordance with the law. Respondent did not appeal and does not contest the award of ongoing temporary total disability benefits.

We vacate and remand for entry of an award of permanent total disability, and further findings of fact concerning the date the award should commence.

#### DISCUSSION AND ANALYSIS

In *Logan v. DOES*, 805 A.2d 237 (D.C. 2002), the District of Columbia Court of Appeals ruled (DCCA) that the standards relating to the burdens of production under the Act in cases of permanent total disability claims are to be construed as they were under the federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, (hereinafter, the LHWCA).<sup>2</sup> The Court reached this conclusion, despite the fact that the language of the Act as it relates to permanent total disability is in a significant way at variance with the language of the LHWCA.

D. C. Code § 32-1508 reads in pertinent part:

Compensation for disability shall be paid to the employee as follows:

(1) In case of total disability adjudged to be permanent, 66 2/3% of the employee's average weekly wages shall be paid to the employee during the continuance thereof. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any 2 thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined only if, as a result of the injury, the employee is unable to earn any wages in the same or other employment.

33 U.S.C. § 908 reads in pertinent part:

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66 2/3% of the employee's average weekly wages shall be paid to the employee during

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<sup>2</sup> The Court cited and relied upon *Crum v. General Adjustment Bureau*, 238 U.S. App. D.C. 80, 738 F.2d 474 (1974), a LHWCA case, as persuasive authority for its holding concerning production burdens under the Act.

the continuance of such disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any 2 thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. *In all other cases permanent total disability shall be determined in accordance with the facts.*

(emphasis added).

Although the language of the LHWCA and the Act are obviously similar, the authors of the Act replaced the italicized final sentence of the predecessor statute with “[i]n all other cases permanent total disability shall be determined *only if*, as a result of the injury, the employee is unable to earn any wages in the same or *other employment*” (emphasis added).

Thus, it was arguable that, unlike the LHWCA, the Act created as a specific and necessary (“only if”) factual prerequisite that a claimant not only establish that he or she is unable to return to his or her pre-injury employment (the standard for “total disability” of any nature under the LWHCA), but also that he or she be unable to earn wages in “other employment” as well. In so constructing the statute, the authors of the Act arguably defined the *prima facie* showing to include such a requirement in cases of permanent total disability (and notably, not in any other class of disability). Consonant with the principal that claimant is not entitled to a presumption regarding the nature and extent of disability, but rather, must present substantial credible evidence that he or she has a disability entitling him or her to the requested level of benefits (*Dunston v. DOES*, 509 A.2d 109 (D.C. 1986)), it could be concluded that, as with all other elements of nature and extent, claimant was obligated to demonstrate this element as an initial matter. In fact, in *Logan*, that is what the ALJ did in the Compensation Order. That is, although the ALJ found Mr. Logan to be incapable of returning to his pre-injury employment, he denied the claim for permanent total disability because the ALJ rejected Mr. Logan’s labor market expert’s opinion that there were no “other” employments available. See, *Logan v. Federal Express*, OHA No. 00-404, OWC No. 285314 (October 3, 2000). And, in practice, that is what the ALJ in this case did.

The DCCA disagreed with the ALJ in *Logan*, holding that once a claimant has met the burden under *Dunston* on the question of inability to return to the pre-injury job, the law presumes that the claimant cannot perform any other job either. And, under the ruling, the inquiry into the nature of a disability (i.e., whether it is permanent or temporary) is totally distinct from the determination of its extent (i.e., partial or total), and there is no difference in assessing “extent” in cases of temporary as opposed to permanent disability. The Court continued in its practice of expressing a strong affinity for interpreting the Act in a fashion consistent with the LWHCA, in this instance even where the language of the two acts differ.

The effect of the court’s approach is that, rather than consider what might happen at some time in the future, where a claimant’s condition “has continued for a lengthy period, and [...] appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period”, the time is ripe for consideration of the extent of claimant’s disability. If a claimant demonstrates the inability to return to the pre-injury employment, claimant has made a *prima facie* showing of entitlement to an award of permanent total disability, shifting to the employer the obligation of showing that claimant is (not “may become”) “employable” under LWHCA standards, as expressed in Upon employer’s having done so, the burden then shifts back to

claimant to demonstrate the invalidity of employer's evidence of employability as set forth in *Washington Post v. DOES and Mukhtar, Intervener*, 675 A.2d 37 (D.C. 1996) and *Joyner v. DOES*, 502 A.2d 1027 (D.C. 1986).

The *Logan* court explicitly adopted this approach and explained that claimant could overcome the employer's showing of employability by "showing that he has diligently sought appropriate employment but has been unable to secure it".

The ALJ in the case under review could not be clearer: Petitioner has done everything requested of her in a vocational rehabilitation and job search process that has been ongoing since 2008 and continued unabated yet unavailing until 2013. There is no evidence cited by the ALJ that Petitioner has adopted a "passive" or "negative" attitude towards returning to employment. Indeed, the ALJ found that Petitioner not only applied for all the job leads to which she was directed, but that she also sought out job leads on her own initiative, independent of the leads provided by a series of rehabilitation counselors at least eight in number.

As the CRB has held in the past:

It must be understood that "permanent total disability" is a statutory construct, and in many senses, it is a term of art which has the meaning that the legislature and the D.C. Court of Appeals have ascribed to it; as such, the meaning may be somewhat at odds with the meaning the phrase would have if the words were understood in their vernacular sense. Thus, a person is permanently and totally disabled if (1) he or she has reached permanency in connection with the medical condition caused by the work injury, (2) he or she is unable to return to the pre-injury job because of the effects of that medical condition, and (3) there is no suitable alternative employment available in the relevant labor market.

While a permanently and totally disabled person remains under an obligation to cooperate with an employer's efforts to return that person to the labor market and while that person's entitlement to ongoing permanent total disability benefits is contingent upon that cooperation, that person is nonetheless permanently and totally disabled until such time as that person is employable. Then, the person's condition may be said to have changed, rendering him or her either only partially disabled or not disabled at all, depending upon the level of wage earning capacity that has been recovered.

*Braswell v. Greyhound Lines, Inc.*, CRB No. 12-120, AHD No. 09-519A, OWC No 603794 (November 13, 2012).

Accordingly, in a case such as this, where (1) a claimant's disabling condition has become permanent (as defined by *Logan*), (2) the claimant is unable to return to the pre-injury employment due to that condition, (3) has been found to have done all that has been requested in the vocational rehabilitation process and (4) diligently sought out employment, that person is, as a matter of law, permanently and totally disabled as that term is defined under the Act and *Logan*, "until such time as that person is employable" (*Braswell*).

On these facts we have no choice but to vacate the denial of the claim for permanent total disability, and remand for further fact finding so as to establish the date that said status was attained, and enter an award accordingly.

CONCLUSION AND ORDER

The finding that there exists suitable alternative employment for Petitioner is unsupported by substantial evidence in the record, and, given the undisputed fact that Petitioner's disabling injury is permanent, the conclusion that Petitioner is not permanently totally disabled is contrary to law. The denial of a permanent total disability award is vacated. The matter is remanded for further findings of fact concerning the date that this status was achieved and the entry of an award of permanent total disability as of that date.

FOR THE COMPENSATION REVIEW BOARD:



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JEFFREY P. RUSSELL  
*Administrative Appeals Judge*

April 9, 2014

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DATE