**COMPENSATION REVIEW BOARD**

**CRB No. 12-086**

**EMMANUEL J. ROBERTS,**

**Claimant–Petitioner,**

**v.**

**BISCAYNE BAY GROUP and TOWER GROUP INSURANCE,**

**Employer and Carrier-Respondents**.

Appeal from a Compensation Order by
The Honorable Linda F. Jory
AHD No. 12-075, OWC No. 679203

David J. Kapson, Esquire for the Petitioner
Anthony J. Zaccagnini, Esquire for the Respondent

Before HEATHER C. LESLIE,[1] LAWRENCE D. TARR, and JEFFREY P. RUSSELL,[2] *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

## DECISION AND ORDER

### OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the May 8, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for disability benefits after August 10, 2011. The ALJ granted the Claimant's request for causally related medical benefits including an MRI of the right knee. We AFFIRM.

[1]Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

[2]Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20. 2012).

## FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was a fifth year steam fitter apprentice for the Employer. The physical duties of this job involved kneeling, bending, lifting and climbing stairs.[3] On March 7, 2011, the Claimant suffered an injury to his right knee when he slipped and fell on black ice at the National Zoo where he was working for the Employer. The Claimant subsequently sought medical treatment.

The Claimant ultimately came under the care and treatment of Dr. Joel Fechter. Dr. Fechter diagnosed the Claimant with a right knee contusion and initially opined the Claimant was unable to work because of his knee condition.

On May 2, 2011, the Employer sent the Claimant for an independent medical evaluation (IME) with Dr. David Johnson on May 2, 2011. Dr. Johnson opined the Claimant was able to perform light duty work and recommended and MRI due to the Claimant's continued complaints.

On May 6, 2011, Dr. Fecther noted the Claimant was returning to full duty work on May 9, 2011. The Claimant followed up on July 18, 2011, with Dr. Fecther's associate, Dr. Harvey Mininberg who noted the Claimant was making significant improvement. On September 28, 2011, the Claimant again sought treatment with Dr. Fechter who noted the Claimant's increased symptoms. Dr. Fecther restricted the Claimant from squatting, kneeling, and lifting. Dr. Fecther recommended an MRI. The Claimant last visited Dr. Fechter on January 20, 2012. Dr. Fecther continued the Claimant's physical restrictions and continued to recommend an MRI.

In June of 2011, the Claimant returned to work for a different Employer installing HVAC units. The Claimant was only able to complete half a day. On June 17, 2011, the Claimant submitted a separation notice with his union, Steamfitter's Local 602. The Claimant returned to school in the fall of 2011.

On March 6, 2012, the Employer sent the Claimant for a further IME with Dr. Robert Gordon. Dr. Gordon opined the Claimant suffered a soft tissue injury only to his right knee which had resolved. Dr. Gordon further opined there were no physical restrictions the Claimant should be under.

The Employer paid the Claimant temporary total disability benefits until August 9, 2011 when they ceased.

A Formal Hearing was held on April 10, 2012. The Claimant requested an award of temporary total disability from August 10, 2011 to the present and continuing, interest, and payment of causally related medical expenses including an MRI of the right knee. The Employer sought a credit towards any awarded workers compensation benefits paid to claimant after he was released for full duty by his treating physician on May 9, 2011 and for any unemployment benefits the Claimant simultaneously received. The issues presented were: 1) whether the Claimant's alleged disability was causally related to the injury of March 7, 2011; 2) the nature and extent of the Claimant's disability; and 3) whether the Claimant voluntarily limited his income.

[3] *Roberts v. Biscayne Bay Group*, AHD No. 12-975, OWC No. 679203 (May 8, 2012).

A CO was issued on May 8, 2012. The ALJ granted the Claimant's request for reasonable medical treatment to the right knee including, but not limited to, an MRI of the right knee. The Claimant's request for ongoing disability benefits was denied as the ALJ found the Claimant to have voluntarily limited his income.

The Claimant timely appealed. The Claimant argues that the finding that he was not entitled to temporary total disability from August 10, 2011 to the present and continuing is not supported by the substantial evidence in the record. The Employer timely opposed.[4]

## THE STANDARD OF REVIEW

The scope of review by the CRB 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. S*ee* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. ("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 must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id*. at 885.

## DISCUSSION AND ANALYSIS

The Claimant primarily argues that he sustained his burden, that of preponderance of the evidence, in proving he was entitled to the benefits claimed.[5] While not explicitly stated, the Claimant seems to argue first that the ALJ was in error in not finding that he had established a *prima facie* case of disability which the Employer would then seek to rebut by establishing the availability of other jobs which the Claimant could perform, quoting *Logan v. DOES.*[6]

A review of the CO reveals the following discussion.

> Claimant's claim for relief is for temporary total disability benefits from August 10, 2011 to the present and continuing. Although claimant conceded he was released to full duty on May 9, 2011, he asserted that he did attempt to go back to work as a steam fitter with a different employer in June but was unable to perform at his pre-

[4] The Employer did not appeal the finding that the Claimant's right knee condition is medically causally related to the work injury or the award of causally related medical treatment, including the MRI. As such, those issues will not be addressed.

[5] Claimant's argument unnumbered, 6. The Claimant erroneously states his burden was to prove by substantial credible evidence his entitlement to the requested level of benefits. As the District of Columbia Court of Appeals has stated, the Claimant's burden when nature and extent is at issue is that of preponderance of the evidence. *WMATA v. DOES and Browne, Intervenor*, 926 A.2d 140 (D.C. 2007). See also *Burge v. DOES*, 842 A.2d 661, 666 (D.C. 2004); *Upchurch v. DOES.*, 783 A.2d 623, 628 (D.C. 20001). For purposes of this appeal, we will analyze whether or not the Claimant sustained his burden, that of a preponderance of the evidence, as stated above.

[6] 805 A.2d 237 (D.C. 2002).

injury capacity due to his knee. See HT at 16. Employer asserts claimant disregarded recommendations from his physicians twice: first, from Concentra when he was released for light duty and employer provided light duty and second, when Dr. Fechter released him to full duty on May 9, 2011. Employer asserts that Dr. Fechter conceded at his deposition that there was no change in his full duty release when claimant was examined on July 18, 2011 by Dr. Minenberg and that claimant's disability status was conveniently revised by Dr. Fechter in September after he decided to resign from a new job and he inexplicably began reporting increased symptoms several months after his initial injury.

Employer asserts that claimant voluntarily limited his income by going to school and taking care of his newborn son. HT at 19. Employer's voluntary limitation of income argument is supported by the evidence of record. Although no testimony was elicited from claimant regarding the reasons for his resignation on June 17, 2011, the record contains the separation notice claimant completed which indicates he was resigning from the steam fitters local 602 on June 17, 2011. The record is however is [sic] devoid of any medical evidence that claimant resigned due to his knee injury as there is no evidence that claimant sought treatment for his knee after May 9, 2011 until July 18, 2011 when he saw Dr. Fechter's partner, Harvey N. Minenberg. The report of July 18, 2011 reveals Dr. Minenberg did not change Dr. Fechter's full duty status release at that time. The report does not indicate claimant was complaining of any pain in his knee on July 18, 2011 and Dr. Minenberg reported:

> The right knee on inspection shows no abrasions, bruising or discoloration. On examination, there is no tenderness. No synovitis or effusion. No inflammation or induration. [sic] No pain with mobility. No instability.

CE 1 at 7. Neither the evidentiary record nor counsel for claimant's closing argument explains why claimant's claim for relief begins on August 10, 2011, other than the possibility that his unemployment ended on or near that time. *See* EE 6 at 4. Nevertheless, claimant has not established that on August 10, 2011 he was unable to perform his pre-injury duties. Thus, pursuant to the test in *Logan*, claimant has not established a *prima facie* case of total disability, which the employer must seek to rebut by establishing the availability of other jobs which the claimant could perform. *Logan*, *id* at 240.

CO at 5-6. We find no error in the above analysis. The ALJ listed several cogent reasons why she found the Claimant had failed to establish a *prima facie* case of total disability which is supported by the substantial evidence in the record. We will not disturb this finding on appeal. As the Claimant failed to establish a *prima facie* case of total disability after August 10, 2011, the burden did not shift to the Employer to rebut by establishing the availability of other jobs.

We also reject the Claimant's reliance on our recent decision in *Fuentes v. Willard Intercontinental Hotel*.[7] As the Claimant concedes in argument, there is a "lack of medical reports covering the

[7] CRB No. 11-149, AHD No. 11-235 (May 9, 2012).

entire period" claimed. Claimant's argument unnumbered, 8. As the Claimant points out, while it is true that the Act does not require a medical condition be the subject of a written medical restriction before it can be the basis for a wage loss based award of benefits, we did caution in *Fuentes,*

> Such written restrictions may make adjudication of disputed claims easier, and the lack of such a restriction certainly can, in some instances, be a legitimate basis for denying a claim.[8]

Such is the case *sub judice* where the ALJ found the lack of restrictions a basis for denying the claim for relief. We find no error in the ALJ's conclusion.

Finally, the Claimant argues that "the ALJ's finding that neither Dr. Fecther's September restrictions or Mr. Roberts' testimony that he is pursuing a job that requires sitting retroactively nullifies his decision to separate himself from the steamfitter's union is not supported by the substantial evidence." Claimant's argument unnumbered, 9. On this point, the ALJ stated,

> [T]he undersigned is mindful that Dr. Fechter did place restrictions on claimant when he was examined on September 28, 2011, however, as employer correctly asserts, claimant had already made the decision to go to school and take care of his newborn son. The undersigned further acknowledges that claimant testified that he did not think he was capable of his pre-injury duties as a steam fitter today. HT at 35. Claimant made a clear-cut decision to end his steamfitting career and seek another type of employment. See HT at 12, 40. Thus, neither Dr. Fechter's September restrictions nor his testimony that he is pursuing a job that requires sitting retroactively nullifies his decision to separate himself from the steamfitter's union. HT at 33. To the contrary, with claimant separating himself from the steamfitters union, even if claimant was successful in establishing he had physical restrictions that prevented him from performing his pre-injury duties on August 10, 2011, employer may have been precluded from offering him any type of employment.
>
> Conveniently, claimant was not directly asked why he completed the separation form. However, in that claimant made the decision without any confirmation that his knee injury was permanent or untreatable, the undersigned is not persuaded that the decision to return to school and totally relinquish his steamfitter designation was due to the work injury. See *Burge v. District of Columbia Dept. of Employment Services*, 842 A.2d 661 (February 2004), (Burge) wherein the Court of Appeals agreed that Burge's doctor's letter which rendered her incapable of playing professional basketball in the future, was written after Burge had voluntarily chosen to leave the game to pursue other interests and the outcome may have been different had it been written earlier.

CO at 6.

The ALJ took into consideration the Claimant's arguments and rejected them, relying in part on the District of Columbia's reasoning enunciated in *Burge, supra*. We find no error in this. What the Claimant is essentially asking the CRB to do is to re-weigh the evidence in the Claimant's favor. As

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[8] *Id*. at 5.

we stated above, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion.[9]

## CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the May 8, 2012 Compensation Order is **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

July 10, 2012
DATE

[9] *Marriott, supra* at 885.