

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-025

RUTH E. PROCTOR,
Claimant-Petitioner,

v.

CB RICHARD ELLIS and ZURICH INSURANCE CO.,
Employer/Carrier-Respondents

Appeal from a February 7, 2014 Compensation Order on Remand by
Administrative Law Judge Leslie A. Meek
AHD No. 11-122, OWC No. 673456

David M. Snyder¹, for the Petitioner
Mark E. Bertram, for the Respondents

Before: HENRY W. MCCOY and HEATHER C. LESLIE, *Administrative Appeals Judges* and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HENRY W. MCCOY, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was working for Employer as a real estate coordinator on July 28, 2010 when she fell while exiting an elevator. Claimant was off work from September 8, 2010 to October 31,

¹ At the formal hearing, Jason Zappasodi, of the same firm, ChasenBoscolo, appeared on behalf of Claimant.

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2010, returning to light duty work after November 18, 2010. Claimant worked light duty until January 1, 2011 when Employer terminated her position.

Claimant filed a claim requesting temporary total disability benefits from January 1, 2011 to the present and continuing and causally related medical expenses. In a November 15, 2011 Compensation Order, an Administrative Law Judge (ALJ) denied the claim for wage loss benefits, but awarded ongoing medical expenses.² Claimant filed a timely appeal and on June 4, 2013, the Compensation Review Board (CRB) issued a Decision and Remand Order (DRO) returning the matter to allow the ALJ to determine the availability of suitable alternative employment in accordance with the finding that Claimant was capable of light duty work.³

On remand, the ALJ again denied Claimant's request for temporary total disability benefits because at the time her job was terminated and after, Claimant was only temporary partially disabled.⁴ Claimant has timely appealed with Employer filing in opposition.

On appeal, Claimant argues the ALJ erred in finding that working light duty prior to being laid off precluded the subsequent receipt of temporary total disability benefits and the ALJ misapplied the shifting burden device established in *Logan*⁵. Employer counters that as the ALJ properly applied the law to the facts and the Compensation Order on Remand (COR) should be affirmed.

STANDARD OF REVIEW

The scope of review by the CRB, 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.⁶ *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545, at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are 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.

² *Proctor v. CB Richard Ellis*, AHD No. 11-122, OWC No. 673456 (November 15, 2011) (CO).

³ *Proctor v. CB Richard Ellis*, CRB No. 11-142, AHD No. 11-122, OWC No. 673456 (June 4, 2013) (DRO).

⁴ *Proctor v. CB Richard Ellis*, AHD No. 11-122, OWC No. 673456 (February 7, 2014) (COR).

⁵ *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

⁶ "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. DOES*, 834 A.2d 882 (D.C. 2003).

In the COR under review, the ALJ has again denied Claimant's request for temporary total disability (TTD) benefits ostensibly because Claimant was "capable of light duty" and therefore not totally disabled. The question on remand to be answered was whether suitable alternative employment was available within Claimant's restrictions to perform light duty as she was not capable of performing the full extent of her pre-injury job duties. In the instant appeal, Claimant argues that the ALJ committed error in ruling that since Claimant was performing light duty work when Employer eliminated the position, she was precluded from receiving TTD benefits and that the ALJ misapplied the *Logan* standard. We agree as to both.

There is no dispute that after Claimant was injured at work she remained off work until November 18, 2010 when she was released to light duty work with restrictions, including working no more than six hours a day. As the ALJ found, the evidence shows Claimant returned to a light duty position with Employer on November 19, 2010, who accommodated her restrictions, and Claimant continued working light duty until Employer eliminated the position effective January 1, 2011.

In addressing Claimant's disability status, the ALJ stated:

Claimant has established she was not temporary totally disabled for the claimed period of January 1, 2011 to the present and continuing. Claimant returned to work with Employer in a light duty position and suffered a partial wage loss that Employer voluntarily paid. Claimant's case established the availability of employment that Claimant could perform at a wage loss, and further establishes the fact that Claimant is temporarily partially disabled. Therefore the burden does not shift to Employer to establish the availability of alternative, suitable employment.⁷

The ALJ is not correct in this assessment. The evidence is such that Claimant stopped working light duty on December 31, 2010 because Employer eliminated the position effective January 1, 2011. From that date to the present and continuing, Claimant was not working, not light duty, and especially not full duty performing her pre-injury duties, which were beyond her restrictions. As such, circumstances exist for Claimant to make a *prima facie* showing of total disability, which would shift the burden to Employer to establish the availability of suitable alternative employment, in accordance with *Logan*.

The ALJ went on to reason:

Upon returning to a light duty position where her wages were reduced, the nature and extent of Claimant's disability/wage loss became temporary in duration and partial in character. Claimant's employment with Employer was terminated for reasons unrelated to her disability on January 1, 2011. The nature of Claimant's disability did not automatically convert to total disability upon her being terminated.⁸

⁷ COR, p. 5.

⁸ *Id.*

The ALJ is correct in stating that when Claimant returned to a light duty position at a reduced wage, she suffered a partial wage loss and therefore was considered temporarily and partially disabled. However, her situation changed when Employer eliminated the position, basically laying off Claimant, whereby Claimant's previous partial wage loss now became total.

Under the Act, it is appropriate for an injured employee to receive temporary partial disability benefits when they return to work, where because of the work injury, they earn a wage less than the average weekly wage earned before the work injury.⁹ Further, recognizing that it is well-settled that the Act is a wage loss statute and disability means physical or mental incapacity because of injury which results in the loss of wages, when Claimant's position was eliminated not because of poor performance and when she was still capable of working, she did automatically convert to total disability because of the total wage loss.

Regarding Claimant's argument that the ALJ misapplied *Logan*, we agree. In the COR, the ALJ stated

While *Logan supra*, establishes a prima facie [sic] case of total disability once a Claimant shows an inability to perform his/her usual job, such is not the case in this instance. Claimant's evidence moved this matter beyond the point of the prima facie [sic] requirement as Claimant presented evidence that her disability wage loss is partial.¹⁰

The ALJ is mistaken in her assessment that Claimant's "disability wage loss is partial." While such was case when Claimant was working light duty, that situation changed effective January 1, 2011 when her position was eliminated by Employer and her wage loss became total. Claimant has requested temporary total wage loss benefits starting January 1, 2011. It is from that point that the ALJ has to evaluate the extent of Claimant's wage loss, not prior.

The ALJ concluded by stating:

Claimant has requested TTD benefits from January 1, 2011 to the present and continuing, however Claimant's evidence shows that as of November 18, 2011 she was not totally disabled, she was temporarily partially disabled as she was capable of working light duty. Claimant, at hearing showed she was temporarily partially disabled at the time she returned to work in a light duty position, through to the time of her termination and after being terminated. Claimant has failed to show she was temporarily totally disabled and therefore is not entitled to the claim she seeks.¹¹

The ALJ persists in her misapprehension of the nature and extent of Claimant's disability. There is no dispute that Claimant is unable to perform her pre-injury job duties. When Employer

⁹ See D.C. Code § 32-1508(5).

¹⁰ COR, p. 5.

¹¹ Id., pp. 5-6.

made available a light duty position at a salary less than her pre-injury average weekly wage, Claimant became temporarily and partially disabled under the statute, because she only suffered a partial wage loss. However, when that light duty position was eliminated on January 1, 2011, Claimant's wage loss became total, and because it is the law of the case that she cannot perform her pre-injury job duties, a *prima facie* showing is made that she is temporarily and totally disabled and the burden under Logan shifts to Employer to identify suitable, alternative employment.

Claimant is not disqualified from receiving TTD benefits because she was capable of working light duty when Employer terminated her position. Claimant met her *prima facie* case under *Logan* when the position was terminated, as a matter of law. We therefore remand this case to the ALJ to apply the remaining elements of the *Logan* analysis.

CONCLUSION AND ORDER

Because the ALJ failed to apply properly the Logan burden shifting protocol after Claimant's light duty position was eliminated, the February 7, 2014 Compensation Order on Remand is not supported by substantial evidence and is not in accordance with the law, and is VACATED IN PART. The denial of temporary total disability benefits is VACATED and this matter is REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

May 9, 2014
DATE