

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 16-009**

**SANTINO QUARANTA,  
Claimant-Respondent,**

**v.**

**D.C. UNITED C/O MAJOR LEAGUE SOCCER  
and GREAT DIVIDE INSURANCE COMPANY,  
Employer and Insurer-Petitioners.**

Appeal from a Compensation Order issued December 30, 2015 by  
Administrative Law Judge Douglas Seymour  
AHD No. 13-355A, OWC No. 680357

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 JUL 18 PM 1 42

(Decided July 18, 2016)

Benjamin T. Boscolo for Claimant  
David O. Godwin, Jr., and Sheryl A. Tirocchi for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Claimant was employed as a forward and midfielder for Employer. As described in the Compensation Order (CO) and uncontested by the parties:

On May 25, 2011, Claimant, during a practice held at RFK Stadium, was accidentally struck on the right temple by the elbow of a teammate, Perry Kitchen. Claimant immediately experienced "black spots" and received medical treatment. Claimant became nauseous, droopy-eyed, and experienced pressure and headaches. Claimant did not improve and Dr. Kevin Gilbert, the team physician, referred him to Dr. Crutchfield in Baltimore. Dr. Crutchfield

administered three (3) steroid injections, which provided relief for 7 to 10 days before the headaches returned. HT 35-40, 62, 63

CO at 3.

Claimant returned to work and finished the season. At the end of the season, Claimant underwent an exit exam and indicated he was “physically able to perform all of the duties required in a professional soccer player.” Employer’s exhibit 4. Claimant also indicated his concussion symptoms had resolved. *Id.* Claimant’s contract with Employer ended on December 31, 2011. Claimant had other opportunities to play but instead Claimant announced his retirement.

Claimant followed up with Dr. Crutchfield on April 30, 2013. In the follow-up note generated from this visit, Dr. Crutchfield noted Claimant had “retired and got better when he initially rested, but as he has slowly increased his physical activity and workouts, he still gets intermittent dizziness and unsteadiness with headaches.” Claimant’s exhibit 1. Dr. Crutchfield recommended medication and possibly nerve blocks. *Id.* In a follow-up visit on January 8, 2014, Dr. Crutchfield noted Claimant “sustained too many concussions while playing, so he decided to stop playing.” *Id.*

In a letter dated April 8, 2014, Dr. Crutchfield opined:

It is with a high degree of medical probability given the lack of other traumatic injuries in this patient’s medical history given to me, that his injuries while playing professional soccer have led to a chronic recurrent inflammatory condition of the occipital nerve which leads to recurrent headaches that at times may be debilitating and prevent him from performing his job.

Claimant’s exhibit 2.

On October 15, 2014, Claimant was seen by Dr. Richard Restak at Employer’s request for the purpose of an independent medical evaluation (IME). Employer’s exhibit 1. After describing his review of the medical records, the history as related by Claimant, and the results of Claimant’s physical examination, Dr. Restak opined Claimant’s current condition and symptoms are causally related to the May 2011 injury. *Id.* Dr. Restak also noted Claimant was not able to recover and return to professional soccer. *Id.*

After his professional soccer career ended, Claimant became a soccer coach and an owner/operator of Pipeline Soccer League. Claimant is also employed by NBC as an on air soccer analyst.

A full evidentiary hearing occurred on October 22, 2015. Claimant sought an award of permanent partial disability benefits based on wage loss from January 1, 2012 to the present and continuing and interest on accrued benefits. The issues presented for adjudication were 1) the average weekly wage; 2) the nature and extent of Claimant’s disability; and 3) whether Claimant

voluntarily limited his income. The CO was issued on December 30, 2015.<sup>1</sup> The Administrative Law Judge (ALJ) determined Claimant's average weekly wage at the time of the injury was \$2,403.84.<sup>2</sup> The ALJ awarded permanent partial disability based on wage loss pursuant to D.C. Code § 32-1508(3)(V)(ii)(II) at a weekly compensation rate of \$864.54 from January 1, 2012.

Employer timely appealed. Employer argues:

- Claimant has not established a *prima facie* showing that he is disabled from returning to his pre-injury employment. Employer's argument at 5.
- Employer has submitted sufficient evidence to rebut the Claimant's showing of total disability. Employer's argument at 8.
- The award of \$864.54 per week in permanent partial wage loss benefits from January 1, 2012 to present and continuing is not supported by substantial evidence and is not legally correct. Employer's argument at 10.
- The ALJ failed to consider material evidence in the record, specifically Dr. Marla Shapiro's July 25, 2011 report and the fact that Claimant returned to his pre-injury employment. Employer's argument at 12.
- Claimant completed a Major League Soccer Physical Exit Examination which cleared the Claimant to play professional soccer. Employer's argument at 13.
- Claimant participated in the MLS Re-Entry Draft. Employer's argument at 14.

Claimant opposes the appeal, arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

### ANALYSIS<sup>3</sup>

With respect to assessing entitlement to permanent partial disability based on wage loss, D.C. Code § 32-1508(3)(V)(i) states:

In other cases the employee shall elect:

(I) To have his or her compensation calculated in accordance with the formula set forth in either sub-subparagraph (ii)(I) or (II) of this subparagraph; and

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<sup>1</sup> While the Administrative Law Judge signed the CO on December 29, 2015, the certificate of service indicates the order was not served upon the parties until December 30, 2015.

<sup>2</sup> Employer did not appeal the average weekly wage determination.

<sup>3</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.

(II) To receive the compensation at the time the employee returns to work or achieves maximum medical improvement.

(ii) The compensation shall be 66 2/3% of the greater of:

(I) The difference between the employee's actual wage at the time of injury and the average weekly wage, at the time of injury, of the job that the employee holds after the employee becomes disabled; or

(II) The difference between the average weekly wage, at the time the employee returns to work, of the job that the employee held before the employee became disabled and the actual wage of the job that the employee holds when the employee returns to work.

Employer argues that Claimant did return to his pre-injury employment as a professional soccer player for the fall 2011 season after the injury. In support of its argument, Employer points to Claimant's testimony and medical records showing Claimant not only returned to professional soccer, but did not complain of lingering symptoms that would inhibit his ability to play with Employer or any other soccer team.

In addressing this argument, the ALJ outlined the burden shifting scheme enunciated in *Logan v. DOES*, 805 A.2d 237 (D.C. 2002) and determined Claimant had satisfied his burden by establishing a *prima facie* case that he is incapable of returning to his pre-injury job, relying upon Claimant's testimony and the medical records of Dr. Crutchfield. The ALJ further determined based upon the evidence presented, at the third step of the *Logan* analysis that Claimant had proven by a preponderance of the evidence that he is temporarily and totally disabled from January 1, 2012 to the present and continuing. *See* CO at 6-7.

Claimant sought, and argued, for permanent partial disability benefits based upon wage loss, submitting evidence showing his wages earned after January 1, 2012. *See* Hearing Transcript at 14. Claimant never claimed nor argued he was temporarily and totally disabled, therefore the *Logan* analysis was not warranted, and the conclusion that Claimant was temporarily and totally disabled is in error.

The ALJ proceeded to analyze Claimant's request under D.C. Code § 32-1508(3)(V)(ii)(II). The CO states:

In this case, Claimant seeks permanent wage loss benefits pursuant to § 32-1508(3)(v)(ii)(II), thus seeking wage loss benefits based on the two-thirds the difference between the average weekly wage at the time he returned to work (professional soccer player) and the actual wage of the job Claimant held when he returned to work (owner and coach of Pipeline Soccer). Claimant also seeks to have benefits paid on the date he returned to work, January 1, 2012. CWCA [Claimant's Written Closing Argument] at 9.

As found above, Claimant's average weekly wage at the time of his May 25, 2011 accident was \$2,403.84. Claimant argues that his average weekly wage in 2012 was \$2,692.30, which is based on a projected annual salary of \$140,000.00, comprised of the \$10,000.00 from the Nike Endorsement Agreement and Claimant's projected annual salary of \$130,000.00 as a professional soccer player in 2012. EE 5 at 34. Claimant also argues, and I so find, that his actual wage when he returned to work on January 1, 2012, which is based on his tax return, which reflected a total of \$57,566.00 in earnings, was \$1,107.03 ( $\$57,566.00 \div 52 \text{ weeks} = \$1,107.03$ ). EE 5. Thus, Claimant argues, his permanent partial wage loss is \$1,585.28 ( $\$2,692.30 - \$1,107.03 = \$1,585.28$ ), and his resulting permanent partial compensation rate is \$1,056.85 ( $\$1,585.28 \times 2/3 = \$1,056.85$ ).

Employer argues, under Section § 32-1508(3)(V)(ii)(II), that Claimant, in fact, did not initially return to work on January 1, 2012, but rather on August 6, 2011, when he returned to D.C. United and then played out the remainder of the 2011 season, and perhaps the playoffs as well. EE 11 at 17-19. Thus, Employer argues, Claimant's election to begin his wage loss benefits upon his return to work on January 1, 2012 is inconsistent with § 32-1508(3)(V)(ii)(II), which provides that said election begins "....at the time the employee returned to work." Employer argues that under this interpretation, Claimant would have a \$0.00 (zero) wage loss because he went back to work earning the same wages he was earning before the May 25, 2011 accident. EWCA However, since I have found that Claimant was totally disabled and unable to return to his pre-injury job as of January 1, 2012, I reject Employer's argument.

CO at 8-9 (Footnotes omitted).

The above analysis is in error. Claimant has not sought temporary total disability and never argued that he was temporarily and totally disabled after January of 2012. It is also uncontested by the parties that after the work injury, he returned to his pre-injury job when he played a season of professional soccer, and potentially the post-season. Indeed, in the findings of fact, the ALJ acknowledges Claimant returned to competitive play and played for the remainder of the 2011 season. See CO at page 3.

We cannot reconcile the above analysis with the findings of fact. It is uncontested by the parties and acknowledged by the ALJ that Claimant did return to his pre-injury employment during the 2011 season. Moreover, Claimant neither sought temporarily total disability benefits nor argued he was temporarily and totally disabled after January of 2012. Until such time as the ALJ properly applies D.C. Code § 32-1508(3)(V)(ii)(II), we cannot determine if the CO is supported by the substantial evidence or in accordance with the law.

CONCLUSION AND ORDER

The CO is VACATED and REMANDED for analysis consistent with D.C. Code § 32-1508(3)(V)(ii)(II) and further findings of fact and conclusions of law.

*So ordered.*