

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**CRB No. 15-042**

**WILLIAM LOPEZ,  
Claimant-Respondent,**

v.

**DIVERSIFIED ENVIRONMENTAL and BERKLEY MID-ATLANTIC GROUP,  
Employer/Insurer-Petitioner.**

Appeal from a February 24, 2015 Compensation Order By  
Administrative Law Judge Joan E. Knight  
AHD No. 13-157A, OWC No. 676567

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 JUL 24 AM 11 02

(Decided July 24, 2015)

Michael J. Kitzman for Claimant  
Ashlee K. Turmelle for Employer

Before MELISSA LIN JONES and LINDA F. JORY *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Law Judge*.

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND REMAND ORDER**

FACTS OF RECORD AND PROCEDURAL HISTORY

In 2010, Mr. William Lopez was employed simultaneously as a food service cook at the Old Glory restaurant and as a laborer for Diversified Environmental (“Diversified.”) On October 22, 2010, he fractured his wrist when an unsecured wall struck him while working for Diversified.

Mr. Lopez’s wrist injury required surgery with placement of hardware and instrumentation. Following post-operative recovery and physical therapy Mr. Lopez began treating with Dr. Henry Paul.

Dr. Paul opined Mr. Lopez has reached maximum medical improvement. Per Dr. Paul, Mr. Lopez has restrictions of light-duty, no weight-bearing or repetitive activities using his left hand, and no operating heavy equipment. A functional capacity evaluation confirmed Mr. Lopez’s light-duty capacity.

Dr. Louis E. Levitt examined Mr. Lopez on Diversified's behalf. Dr. Levitt opined Mr. Lopez has limited motion of the left wrist and is likely to have difficulty performing repetitive activities with the left wrist over prolonged periods of time.

In a Compensation Order dated February 24, 2015, an administrative law judge ("ALJ") granted Mr. Lopez ongoing permanent total disability benefits from January 10, 2014, *Lopez v. Diversified Environmental*, AHD No. 13-157A, OWC No. 676567 (February 24, 2015), and Diversified appeals that Compensation Order on the grounds that the ALJ improperly rejected Dr. Levitt's opinions:

The Compensation Order rejects the opinions and testimony provided by Dr. Levitt because they were obtained for litigation purposes. *See* Compensation Order at p. 6. The Order does not state any other basis – factual or otherwise – for rejecting Dr. Levitt's opinions. Instead, the Compensation Order accepted the opinions of Dr. Paul, the Claimant's treating doctor who had not examined the Claimant for a year and half [*sic*] prior to the hearing. [Footnote omitted.]

Memorandum of Law in Support of Employer/Insurer's Application for Review, p. 4. Diversified also argues the ALJ inaccurately stated it conceded Mr. Lopez cannot return to his pre-injury position and did not properly apply the burden-shifting requirements in *Logan v. DOES*, 805 A.2d 237 (D.C. 2002). Finally, Diversified argues the ALJ did not address Mr. Lopez's failure to perform an independent job search in light of Diversified's inability to provide vocational rehabilitation services to an undocumented worker. Diversified requests the Compensation Review Board ("CRB") reverse the Compensation Order.

In response, Mr. Lopez argues the jobs listed in the labor market survey are not suitable. He also asserts there is no reason to disregard the opinions of his treating physician in favor of those of Dr. Levitt. For these reasons, Mr. Lopez requests the CRB affirm the Compensation Order.

#### ISSUES ON APPEAL

1. Did the ALJ err by rejecting Dr. Levitt's opinion in favor of the opinion of Dr. Paul, Mr. Lopez's treating physician?
2. Did the ALJ commit reversible error by stating that Diversified conceded Mr. Lopez cannot return to his pre-injury employment?
3. Did the ALJ properly apply the *Logan* burden-shifting requirements?
4. Did the ALJ properly analyze Diversified's argument that Mr. Lopez failed to perform an independent job search?

## ANALYSIS<sup>1</sup>

In reaching her conclusion that

[a]s a result of his work injury, Claimant is unable to perform his pre-injury duties as an asbestos abatement worker or in his second job as a line cook. No suitable, alternative employment has been secured on his behalf and therefore Claimant has been unable to earn any wages following his work injury.

*Lopez, supra*, at p. 3, the ALJ relied upon Dr. Paul's opinion regarding Mr. Lopez's work capacity:

Claimant testified credibly his work injury has rendered him presently unable to resume his pre-injury employment or other similar employment which is supported by the medical opinions of his treating physician Dr. Paul. The medical records presented by Claimant establish he has attained MMI with regard to his work injury and his left wrist and forearm condition is permanent. Dr. Paul, the treating orthopedic opined Claimant has a loss of left wrist mobility, supination and pronation with chronic regional arm pain to the extent he has restricted Claimant from engaging in any weight bearing left hand or repetitive activities. Dr. Paul opined Claimant is unable to return to his pre-injuries duties in asbestos abatement or otherwise engage in heavy labor activities and certain repetitive tasks using his left wrist and would have difficulty keeping pace using both hands. Claimant has met his burden and shown by a preponderance of the evidence and has established a *prima facie* [*sic*] case of permanent total disability pursuant to § 32-1508(1) under the Act.

*Id.* at p. 6.

Diversified does not argue Dr. Paul is not Mr. Lopez's treating physician. Diversified argues "[g]iven the substantial difference in time between the two doctors' examination of the Claimant, it was reversible error for the Compensation Order to reject Dr. Levitt's opinions solely because he examined the Claimant at the request of the Employer." Memorandum of Law in Support of Employer/Insurer's Application for Review, p. 5. Diversified's argument is misplaced.

Because Dr. Levitt is not Mr. Lopez's treating physician, the ALJ was not obligated to explain why she favored Dr. Paul's opinion over that of Dr. Levitt. *See Metropolitan Poultry v. DOES*, 706 A.2d 33, 35 (D.C. 1998). It is only with respect to treating physicians that an ALJ must give reasons for rejecting that medical testimony. *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003). There is no error in the ALJ's favoring Dr. Paul's opinions over those of Dr.

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<sup>1</sup> The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code § 32-1501 to 32-1545 ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

Levitt; however, while we agree with Employer that an opinion from an independent medical examination physician should not be rejected solely because it was obtained for litigation purposes, when we read the ALJ's statement in the context that it was presented we find that it is harmless error because the ALJ fully explained her reasons for her finding Claimant cannot perform his pre-injury work, namely Claimant's credible testimony and Dr. Paul's medical analysis, which the ALJ found convincing.

The ALJ went on to write

Employer acknowledges Claimant is unable to resume his pre-injury employment as a certified asbestos worker. However, Employer contends Claimant is not permanently totally disabled relying on Dr. Levitt's IME opinion and deposition testimony that Claimant has limited motion of the non-dominant left wrist and is likely to have difficulty doing repetitive activities with the left wrist over prolonged periods but, has the capacity to work light-medium duty as a cook and/or in the construction industry. The independent medical opinion and deposition testimony of Dr. Levitt obtained for litigation purposes is rejected.

*Lopez, supra*, at p. 6. Diversified contends it did not concede Mr. Lopez cannot return to his pre-injury employment; however, the basis for this argument is Diversified's reliance upon Dr. Levitt's opinion:

At the hearing the Employer vigorously opposed the Claimant's contention that he is unable to return to his pre-injury employment. In support of this position the Employer relied upon the testimony of Dr. Louis Levitt who specifically opined that the Claimant is able to return to his pre-injury employment as a cook and in the construction field. Dr. Levitt testified that he considered the Functional Capacity Evaluation ("FCE") performed in this case, which indicated the Claimant could perform "light duty," but that in his opinion the FCE was an "under estimation" of the Claimant's abilities as he can actually work at medium duty. In support of this opinion Dr. Levitt noted that the FCE indicated that the Claimant did not put forth his full effort. He explained that he uses FCE reports as a guide because they generally reflect a patient's efforts, but that as an orthopedic surgeon he is more qualified to assess a [*sic*] individual's actual abilities and limitations.

In terms of restrictions, Dr. Levitt opined that the Claimant should avoid lifting items that exceed 35-50 lbs. He further acknowledged that the Claimant may have issues with repetitive activities with his wrist over long periods of time, but stated that the Claimant could perform those activities if given an opportunity to rest. He testified that these restrictions in his opinion would not preclude the Claimant from returning to his pre-injury employment.

Thus, the Compensation Order's contention that the Employer agreed that a *prima facie* case for total disability had been established is not accurate. This inaccuracy may explain, however, the lack of analysis in the Order regarding whether the Claimant was able to return to his pre-injury employment. The Order

must be vacated and remanded so that the issue can be addressed without reliance on the Employer's alleged agreement.

Memorandum of Law in Support of Employer/Insurer's Application for Review, pp. 7-8. (Footnotes omitted.) Because the ALJ committed no error in rejecting Dr. Levitt's opinion regarding Mr. Lopez's ability to perform his pre-injury work, the ALJ's error in stating, "Employer acknowledges Claimant is unable to resume his pre-injury employment as a certified asbestos worker" *Lopez, supra*, at p. 6, is harmless error.

Finally, Employer takes issue with the ALJ's lack of analysis of the application of *Logan* to Mr. Lopez's situation. After acknowledging Diversified's argument that there is suitable, alternative employment available, the ALJ failed to explain why the jobs in the labor market survey were rejected, apart from Mr. Lopez's status as an undocumented worker, and in order to conform to the requirements of the D.C. Administrative Procedures Act, D.C. Code § 2-501 *et seq.* (DCAPA), (1) the agency's decision must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings. *Perkins v. DOES*, 482 A.2d 401, 402 (D.C. 1984). Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate court is not permitted to make its own finding on the issue; it must remand the case for the proper factual findings. *King v. DOES*, 742 A.2d. 460, 465 (Basic findings of fact on all material issues are required; only then can the appellate court "determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law.")

The CRB is no less constrained in its review of Compensation Orders. *See Washington Metropolitan Area Transit Authority v. DOES*, 926 A.2d 140 (D.C. 2007). Moreover, whether an ALJ's decision complies with the DCAPA requirements is a determination limited in scope to the four corners of the Compensation Order under review, and when, as here, an ALJ fails to make express findings on all contested issues of material fact, the CRB can no more "fill the gap" by making its own findings from the record than can the Court of Appeals but must remand the case to permit the ALJ to make the necessary findings. Thus, the law requires the CRB remand this matter for the ALJ to further consider the labor market survey's impact, if any, on the burden-shifting requirements of *Logan*.

Similarly, the ALJ did not address Mr. Lopez's alleged failure to perform an independent job search. The Court of Appeals has held that

under the Act, "the fact that an employee may be unable to work for reasons beyond his injury does not affect his entitlement to benefits, as long as the injury independently causes that disability." To be sure, Claimant's termination prevented him from working for the Employer and his undocumented status prevented other employers in the United States from lawfully employing him. But it was the work-related injury to Claimant's eye, and the time required for Claimant to recover from that injury and to adjust to his impaired vision, that made him physically unable to return to comparable wage-earning *anywhere*, thereby rendering him "disabled" within the meaning of the Act. [Footnote omitted.]

*Asylum Company v. D.C. Department of Employment Services*, 10 A.3d 619, 630 (D.C. 2010). In this case, however, there is conflicting evidence in the record regarding whether Mr. Lopez has attempted to search for a job since reaching maximum medical improvement and whether his injury caused or contributed to his disability. The CRB cannot reconcile the evidence on its own and must remand this matter for the ALJ to further consider this issue as well.

#### CONCLUSION AND ORDER

The ALJ did not err by rejecting Dr. Levitt's opinion in favor of the opinion of Dr. Paul, Mr. Lopez's treating physician. Although the ALJ erred by stating Diversified conceded Mr. Lopez cannot return to his pre-injury employment, because Diversified relied on Dr. Paul's opinion and the basis for its position that Mr. Lopez could return to his pre-injury employment and because the ALJ rejected Dr. Levitt's opinion regarding Mr. Lopez's work capacity, this error is harmless; however, without sufficient analysis of the impact of the labor market survey on the *Logan* burden-shifting requirements or of Mr. Lopez's alleged failure to perform an independent job search, the law requires this matter be REMANDED for further consideration of those two issues.

*So ordered.*