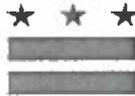


**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 16-012**

**WILLIAM LOPEZ,  
Claimant- Respondent,**

**v.**

**DIVERSIFIED ENVIRONMENTAL AND BERKLEY MID-ATLANTIC GROUP,  
Employer/Third Party Administrator- Petitioner.**

Appeal from a December 31, 2015 Compensation Order on Remand by  
Administrative Law Judge Joan E. Knight  
AHD No. 13-157A, OWC No. 676567

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 JUN 23 PM 12:32

(Decided June 23, 2016)

David M. Snyder<sup>1</sup> for Claimant  
Ashlsee S. Turmelle for Employer

Before: LINDA F. JORY, HEATHER C. LESLIE, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

LINDA F. JORY, for the Compensation Review Board:

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

The parties do not dispute the following facts of record as outlined in *William Lopez v. Diversified Environmental*, CRB No. 16-012, AHD No. 13-157A, OWC No. 676567 (December 31, 2015)(DRO).

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.

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<sup>1</sup> Michael Kitzman represented Claimant at the Formal Hearing.

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.

The Compensation Review Board (CRB) issued a Decision and Remand Order (DRO) on July 24, 2015 which affirmed the CO in part and remanded the matter for further consideration of two specific issues. The CRB concluded:

. . . 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.

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.

DRO at 6.

On December 31, 2015, AHD issued a Compensation Order on Remand (COR) which concluded that Claimant has proven entitlement by a preponderance of the evidence and that he has a permanent total disability in spite of his undocumented work status. Claimant's claim for permanent total disability was granted again.

Employer filed a timely Application for Review (AFR) asserting that the COR is not supported by substantial evidence. Claimant filed a timely response opposing Employer's AFR.

## ANALYSIS<sup>2</sup>

With regard to the CRB's direction to analyze the impact of the labor market survey on the *Logan* burden-shifting requirements, the ALJ stated:

Likewise, the labor market survey, performed by Mr. Severt, the vocational counselor (Counselor) is also rejected. Although the Counselor indicated that he found 12 to 14 jobs in the restaurant industry that Claimant qualified for, there is no evidence that Claimant could reasonably be hired for one of those positions. In addition, the Counselor stated that he only used Dr. Levitt's medical report in determining the physical abilities that Claimant could be expected to perform on a new job. The counselor stated that he read Dr. Paul's deposition after the labor market survey was completed. HT at 74. It appears that the treatment records of Dr. Paul and other physicians were not evaluated when the Counselor gave his assessment of Claimant and his ability to become employed. Even though the construction industry was named as a possible location for Claimant to become employed, the Counselor's research only involved temporary agencies and did not produce any full-time employment leads. HT at 69. Although the Counselor indicated that Claimant has skills and residual capabilities that he could put to use, such skills, and residual capabilities were not listed. As discussed previously, an employer has the burden to locate alternative employment for an injured employee. However, Employer did not establish that it was reasonable to believe that Claimant could be hired in an alternative position where restrictions would be allowed. *Joyner v. District of Columbia Department of Employment Services*, 502 A.2d 1027, 1031 (DC 1986). For all of these reasons, the Counselor's labor market surgery is given no weight. Based on the factors just discussed, Employer's attempt at rebuttal of a prima facie case of total disability, in this case, fails.

CO at 7, 8.

Employer asserts:

The initial Compensation Order found that the Claimant was permanently totally disabled due to the barriers he faces in obtaining new employment, namely, his lack of education and inability to speak English fluently – two factors that did not prevent the Claimant from obtaining and working two jobs prior to the accident.

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<sup>2</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.

The Compensation Order on Remand follows the same theme and again fails to actually analyze the alternative employment positions identified by Mr. Severt in the Labor Market Survey other than to reach the global conclusions that the Claimant cannot return to his pre-injury work in construction or the restaurant industry.

For example, Mr. Severt identified several jobs in the Labor Market Survey that the Claimant could perform that involved driving, such as valet attendant, car shuttler, and lot monitor. These employment options for the Claimant are not discussed in the Compensation Order on Remand even though they complied with the Claimant's physical restrictions. Specifically, his treating doctor did not place any restrictions on the claimant's ability to drive. Despite Dr. Paul's testimony that the Claimant "should have no problems" operating an automobile, the ALJ failed to address the entire category of driving-related available jobs prior to determining that the Claimant is completely disabled.

The Order on Remand also appears to reject the Labor Market Survey based on incorrect information. For example, the ALJ criticizes Mr. Severt's Labor Market Survey and opinions because "it appears that the treatment records of Dr. Paul and other physicians were not evaluated when the Counselor gave his assessment of Claimant and his ability to become employed". [COR at p. 7]. This statement is simply not accurate. Mr. Severt testified that he read all of the Claimant's medical records and the Functional Capacity Evaluation prior to developing the Labor Market Survey in March and April 2014.

\* \* \*

The ALJ further criticized Mr. Severt's Labor Market Survey because it was developed prior to reading Dr. Paul's deposition transcript. The weight given to this is puzzling considering that Dr. Paul had not seen the Claimant since January 2014<sup>3</sup> which meant his opinions were not based on any "new" evidence that Mr. Severt had not already reviewed. Further, the ALJ ignores Mr. Severt's testimony that his review of Dr. Paul's deposition did not cause him to question the criteria he used when developing the Labor Market Survey for the Claimant:

Q. Okay. Did the deposition of Dr. Paul cause you any reason to discount the restrictions that you were using when you performed the labor market survey?

A. Not at all. [Dr. Paul] basically said don't put all of his weight on his wrist and not to do heavy repetitive lifting.

Hearing Transcript at p. 66.

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<sup>3</sup> Claimant's last treatment with Dr. Paul was in January 2013.

Finally, the ALJ discounts Mr. Severt's opinions because he did not state the Claimant's skills and abilities while testifying, at the hearing. The ALJ did not account, however, for the list of transferable skills contained in Mr. Severt's report, which fills an entire page. Further, the ALJ does not address the list of employment barriers and assets set forth by Mr. Severt in his report. In addition to the Claimant's host of transferrable skills, Mr. Severt testified that the Claimant is quite intelligent despite only having a third grade education as shown by his ability to learn basic English without any formal education. Mr. Severt also recognized that the Claimant has a good work history, an understanding of basic spoken English, a valid driver's license, a clean driving history, a clean criminal record, reliable transportation to work, and the support of his family members who are fluent in English. These positive aspects of the Claimant's employment picture or his ability to perform non-restaurant related work were ignored by the ALJ when concluding that the Claimant was permanently totally disabled.

The Compensation Order on Remand must be reversed given its failure to address the driving jobs contained in the Labor Market Survey.

Employer's Brief at 9, 10.

Claimant argues:

The Employer relied on a labor market survey as evidence that there were jobs reasonably available in the community for which Mr. Lopez could realistically compete and secure, in line with *Joyner* and *Asylum Co.* Substantial evidence indicates that the Labor Market Survey did not meet the standard announced in *Joyner*. The person who performed [the] Labor Market Survey was given both the functional capacity evaluation and Dr. Levitt's reports and only used Dr. Levitt's medical reports when determining that the jobs selected were within Mr. Lopez's residual physical capabilities. However, the Compensation Order and Compensation Order on Remand determined that Dr. Levitt's medical reports did not reflect Mr. Lopez's residual physical capabilities, and thus the Compensation Order on Remand findings on that point should be affirmed. The Compensation Order on Remand also noted that Mr. Lopez attempted work as a cook (the majority of the positions identified by the survey) and was unable to do them, and that [sic] Mr. Lopez did not possess the communication abilities to perform the guest services identified by the labor market survey. Substantial evidence in the record thus supports the Compensation Order on Remand's rejection of the labor market survey because it was inconsistent with and not based upon the other substantial evidence of record. Because Dr. Levitt's opinions with regard to Mr. Lopez's capabilities were rejected by the Compensation Order and the Compensation Order on Remand, the labor market survey could not use his findings as a credible basis for its ultimate conclusions.

We disagree with Claimant's assertion that the COR noted Claimant did not possess the communication abilities to perform the guest positions identified by the labor market survey as

the COR did not address any of the jobs identified by the survey. However, we find the ALJ did not commit error by rejecting the labor market survey in its entirety because the counsel based the survey on the restrictions placed on Claimant by the IME physician, Dr. Levitt. The CRB previously found the ALJ did not err by rejecting Dr. Levitt's opinion in favor of the opinion of Dr. Paul and this determination is the law of the case. See DRO at 5, 6. While this Panel might have reached another result, the ALJ's conclusion that Employer did not establish Claimant could be hired in an alternative position where restrictions would be allowed, had Claimant not been undocumented, is supported by substantial evidence and is in accordance with the law.

With regard to Claimant's alleged failure to perform an independent job search, the ALJ concluded:

Based on his skills, Claimant did perform a job search, but it was limited in scope. He testified that since the accident, he had tried to find other types of work. HT at 37. He indicated that when he inquired about jobs from persons in his community, he was told there was no work. For two (2) days, he tried to go back to restaurant work. He said he could not do it because it was painful when he lifted the plates with food on them.

COR at 8.

With regards to Claimant's independent job search Employer asserts:

In order to evaluate whether the job search of an undocumented worker was adequate for purposes of compliance with the Act, the tribunal must hold an undocumented worker to a standard that is substantially similar, if not identical, to the standard that is applied to documented workers. Under the burden-shifting analysis required by *Logan*, claimants that are legally permitted to work must demonstrate a **diligent** search for suitable alternative employment. See *Logan*, 805 A.2d at 243. Likewise, undocumented aliens must also demonstrate that they have conducted a **diligent** search for work.

Employer's Brief at 14. (Emphasis in original). See *Logan v. DOES*, 805 A.2d 237, 242-243 (D.C. 2002).

We must remind Employer that under *Logan*, a Claimant is required to demonstrate a diligent job search only after Employer has shown that there are other suitable alternative jobs available in the employment marketplace to persons such as the Claimant for which the Claimant could compete in light of claimant's age, education work experience, and physical capacity. Notwithstanding the limitation imposed by Claimant's alien status, this prong is met before the burden shifts back to the claimant to demonstrate that employer's evidence is faulty or inadequate, by, for example, demonstrating that the claimant has actively and diligently sought employment but failed to obtain work. See *Gonzales v. Asylum Company*, CRB No. 08-077 (August 22, 2008).

As the ALJ has concluded and we have affirmed the ALJ's conclusion the Employer has not met the second prong of *Logan*, the ALJ was not compelled to determine if Claimant made a "diligent" job search. Thus, we agree with Claimant:

The Employer's argument is that Mr. Lopez did not testify credibly because he had previously testified in his deposition that he had not sought additional work within his community. The Compensation Order on Remand evaluated Mr. Lopez's credibility based on his demeanor and how it hung together with the medical evidence, and determined that he was also credible when he said he asked around in his community for positions. The Employer is thus asking the CRB to re-weigh the evidence in its favor and to make a different determination on the credibility of a witness, which the CRB cannot do. Thus the CRB should defer to the Compensation Order on Remand's credibility finding and affirm the Compensation Order on Remand. *See WMATA [v. DOES]* 683 A. 2d. [470] at 477.

Claimant's Brief at 11.

We agree that an ALJ's decision which is based on credibility findings deserves special weight, because the ALJ has the opportunity to observe the appearance and demeanor of the witness. *See WMATA v. DOES*, 683 A.2d 470, 477 (D.C. 1996); *Ogden v. Bon Appetit Mang. Co.*, CRB No. 09-031(D.C. March 2, 2009). We find no evidentiary or legal basis to disturb the ALJ's determination with regard to the two issues remanded for AHD to address.

#### CONCLUSION AND ORDER

The ALJ's conclusion that Claimant has met his burden to establish entitlement to permanent total disability as a result of the October 22, 2010 work injury is supported by substantial evidence and in accordance with the law and is therefore AFFIRMED.

*So ordered.*