GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-151

TAURUS ALEXANDER,
Claimant–Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer -Petitioner

Appeal from a August 31, 2012 Compensation Order on Remand by
Administrative Law Judge Karen R. Calmeise
AHD No. 11-252, OWC No. 678308

William B. Newton, Esquire, for the Claimant/Respondent
Mark H. Dho, Esquire, for the Self-Insured Employer/Petitioner

Before: HEATHER C. LESLIE, JEFFREY RUSSELL, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*,

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 Employer - Petitioner (Employer) of the August 31, 2012, Compensation Order on Remand (COR) 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, Claimant's request for temporary total disability wage loss benefits from February 25, 2011 to the present and continuing and causally related medical expenses was granted. We AFFIRM.

FACTS OF RECORD AND PROCEDURAL HISTORY

On October 30, 2010, Claimant was working as a bus driver for Employer when a passenger sprayed him with a fire extinguisher. Claimant immediately moved to stick his head out of the driver's side window but slammed his head into the closed window. Claimant developed head, neck, and shoulder pain and sought initial medical treatment from Dr. Michael Williams on November 2,

2010. Further facts of record are restated in our prior Decision and Remand Order, *Alexander v. WMATA*, CRB No. 12-022, AHD No. 11-252 (August 8, 2012).

On January 19, 2012, after a formal hearing, a Compensation Order (CO) was issued where it was determined that as a result of the October 30, 2010 work injury, the Claimant continued to experience disabling neck pain that rendered him incapable of performing his pre-injury duties as a bus driver.[1] The CO further determined that as the Employer had not provided evidence of suitable alternative employment, the Claimant established by a preponderance of the evidence his entitlement to the requested ongoing wage loss benefits. Employer timely appealed to the CRB.

In a Decision and Remand Order (DRO), the CRB found the ALJ's findings were not supported by substantial evidence in the record.[2] Specifically, the CRB held,

- After noting Dr. Selya's diagnosis of a disc herniation, the ALJ did "not explain how Dr. Selya's interpretation of the MRI results, which appears to be inherently flawed, is more persuasive than Employer's IME physicians' interpretations diagnosing cervical strain/sprain superimposed on preexisting degenerative disc disease; especially where all of the IME physicians appear to be equally credentialed. "

- The ALJ's assessment that the Employer's IME physicians did not take into account the Claimant suffered no cervical spine symptoms until after the work accident to be flawed.

- The ALJ's reliance on Dr. Selya's opinion that the Claimant suffered from sequelae from the injury is not supported by the substantial evidence in the record as it is not in line with the lack of abnormal test results.

- The ALJ, upon remand, should identify what evidence in the record allows for a reasonable inference that Claimant has proven an ongoing disability and explain how that inference rationally flows from that evidence.

A COR was issued on August 31, 2012 which again granted the Claimant's claim for relief.[3] The Employer timely appealed.

On appeal, the Employer argues the COR is not supported by the substantial evidence in the record and that the COR did not address any of the issues raised in the prior DRO. The Claimant, in opposition, argues that the COR made further findings of fact and conclusions of law as required by the DRO and that as such, the COR should be affirmed as being supported by the substantial evidence in the record.

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[1] *Alexander v. WMATA*, AHD No. 11-252, OWC No. 675308 (January 19, 2012).

[2] *Alexander v. WMATA*, CRB No. 12-022, AHD No. 11-252 (August 8, 2012)

[3] *Alexander v. WMATA*, AHD No. 11-252, OWC No. 675308 (August 31, 2012).

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.[4] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (the "Act"), 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.

ANALYSIS

The Employer's first argument is that "on remand the ALJ did not address the mistaken reading of the MRI by Dr. Selya." Employer's argument at 2. We disagree.

The CRB stated in the prior DRO,

> The ALJ particularly noted that Dr. Selya diagnosed herniated discs at C5-C6 and C6-C7. However, the December 28, 2010 MRI found "mild-to-moderate multilevel cervical spondyloarthropathy[5] most pronounced at the C5-C6 and C6-C7 levels." As spondyloarthropathy is a disease of the spinal joints, the ALJ does not explain how Dr. Selya's interpretation of the MRI results, which appears to be inherently flawed, is more persuasive than Employer's IME physicians' interpretations diagnosing cervical strain/sprain superimposed on preexisting degenerative disc disease; especially where all of the IME physicians appear to be equally credentialed.

A review of the COR reveals more findings of fact and discussion added since the original CO. While the prior panel found a possibility that Dr. Selya's opinion of the MRI had the potential of being inherently flawed, this panel does recognize that Dr. Selya did have the MRI available for his review and after this review, he came to a different conclusion. We recognize that different physicians may have different opinions reading an MRI and that and ALJ cannot ascertain which doctor may be "mistaken" as that calls for a medical opinion beyond the scope of the expertise of an ALJ. We find that the ALJ properly relied upon the physician's opinions regarding the MRI and weighed these opinions, specifically the physicians' opinions regarding the results of the MRI, accordingly and found persuasive the opinion of Dr. Selya. We find no error in this.

The Employer next argues "the ALJ failed to reconsider and give some added weight to the opinion of Dr. Spence and Dr. Conant for giving a detailed history of claimant's past complaints." Employer's argument at 3. A review of the COR reveals that the language wherein the ALJ faulted

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[4] "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).

[5] Spondyloarthropathy: disease of the joints of the spine. *Dorland's Illustrated Medical Dictionary*, 29th Ed., p. 1684.

the Employer's IME opinions for not having a history of the Claimant's complaints before the injury, which the CRB found to be in error in the prior CO, has been omitted from the COR. By this omission, we assume the ALJ recognized this analytical error and thus, we find no merit in the Employer's argument. In the COR, the ALJ took note of the CRB's concern and corrected the error.

The Employer further argues the ALJ failed to explain or clarify why Dr. Selya's opinion was given more weigh in light of some inconsistencies in his opinion.

On this point, the CRB's prior DRO stated,

> The ALJ also found Dr. Selya's opinion more persuasive as his findings more closely mirrored Claimant's credible testimony of his neck and upper extremity complaints. Dr. Selya noted that Claimant presented himself for examination with chief complaints of progressively increasing pain in the low back associated with radiating pain to the left upper extremity down to the fourth and fifth digits of the left hand. Claimant also complained of tingling in both hands and weakness of the right arm all referable to the October 30, 2010 work accident.
>
> In the tests Dr. Selya performed during the physical examination of Claimant, the only notable findings are tenderness to palpation of the paracervical area on the right and "Lhermitte is positive to extension." All other tests are negative, normal, or within the accepted range. While Dr. Selya opines that Claimant "suffers with sequelae of injury at work", it is unclear what "sequelae" is being referenced given the lack of abnormal test results and the ALJ does provide any clarification. This can be corrected on remand.

We find the ALJ properly re-weighed the evidence and enunciated reasons why not only Dr. Selya's opinion was given more weight, in light of the Claimant's credible testimony, but also gave valid reasons to reject the opinions of the other IME's. Moreover, the ALJ noted in the COR that the Claimant continued to suffer from symptoms, or sequelae, from her injury.

> Since May 2011 Claimant continues to have pain in the back of his neck when he inclines his head back while sitting, he does [sic] as much discomfort when he turns his head left or right or when he looks down. Claimant continues to take the muscle relaxing and pain medication prescribed by the treating physician which limits his ability to perform the requisite duties as a bus driver.

COR at 5.

We reject the Employer's argument.

As to the Employer's last argument, that the Claimant failed to sustain his burden of proving by a preponderance of the evidence that he was entitled to ongoing disability benefits as the "medical records fall silent on the continuing nature and extent of any disability." We reject this argument.

First, as we stated in *Fuentes v. Willard Intercontinental Hotel,* [6]

> There is no requirement under the Act or in the case law that mandates that 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. 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. However where, as here, the ALJ finds as facts that the work injury is causing a claimant to be unable to work to the same degree that was being worked prior to the injury, and that the claimant is earning less post-injury because of that inability, the claimant is entitled to a partial disability award based upon that ongoing wage loss, until such time as the claimant becomes eligible for an award under the schedule.

Thus, the Employer's assertion that the Claimant cannot sustain his burden of a preponderance of the evidence, based on the lack of medical documentation alone is erroneous. A review of the COR reveals the ALJ took into consideration the three IME opinions and found persuasive that of Dr. Selya, who opined in April of 2011 that the Claimant was disabled from work. The ALJ also took "note that the Claimant was never released to return to full duty bus driving work by the treating physicians." COR at 6. Taking into account the Claimant's continued complaints, the opinion of Dr. Selya, and the lack of a full duty release from the treating physician, the ALJ concluded that the Claimant made a prima facie case of total disability which then placed upon the Employer the burden to rebut this showing by establishing the available of other jobs the Claimant could do. The ALJ determined that they Employer had not. We do not find this to be in error.

We also take this time to point out what may be perceived as an erroneous statement of law in the prior DRO which seems to allude to the *Logan*[7] analysis as being inapplicable to cases involving temporary as opposed to permanent disability claims. Under the Court's interpretation of the statute in *Logan*, once a claimant has met the burden under *Dunston*[8] on the question of inability to return to the pre-injury job, the law presumes that claimant cannot perform any other job as well. Under the Court's ruling, there is no distinction to be made between the burdens borne by the parties with respect to the extent (e.g., partial vs. total) of disability, regardless of its nature (e.g., temporary vs. permanent). The Court continued in its practice of expressing a strong affinity for interpreting the Act in a fashion consistent with the Longshore and Harbor Workers' Compensation Act[9], in this instance, even where the language of the two acts differ. Presumably, the Court would therefore countenance, indeed, require, application of the analysis that it commands with respect to assessing the extent of disability, using the standards established in assessing earning capacity in *Washington Post v. DOES*,[10] and in *Joyner v. DOES*,[11] in cases of temporary as well as total disability**.**

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

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

[8] *Dunston v. DOES,* 509 A.2d 109 (D.C. 1986).

[9] 33 USC §§ 901 *et. seq*.

[10] 675 A.2d 37 (D.C. 1996).

CONCLUSION AND ORDER

The findings of fact and the conclusions of law in the August 31, 2012 Compensation Order on Remand are supported by substantial evidence in the record and in accordance with the law.

The Compensation Order on Remand is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

March 27, 2013
DATE

[11] 502 A.2d 1027, at footnote 4. (D.C. 1986).