GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB NO. 07-120 (R)

JASON DOIG
Claimant–Petitioner

v.

LINCOLN HOCKEY, LLC d/b/a THE WASHINGTON CAPITALS
and CHUBB GROUP INSURANCE COMPANIES
Employer and Carrier- Respondent

Stewart S. Manela, Esquire, for the Respondents
Benjamin T. Boscolo, Esquire for the Petitioner

Before: LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, and JEFFREY P. RUSSELL, HEATHER C. LESLIE and MELISSA LIN JONES, *Administrative Appeals Judges* with LINDA F. JORY, *Administrative Law Judge*.[1]

DECISION AND ORDER UPON EN BANC RECONSIDERATION

This case is before the Compensation Review Board (CRB) on the April 7, 2008 remand order from the District of Columbia Court of Appeals (DCCA) directing the CRB to determine the standard of proof applicable to claims by professional athletes for disability benefits during their off-seasons and to state how this standard is consistent with the statutory definition of compensable disability.

As will be discussed, the CRB determines that the standard of proof for claims by professional athletes for temporary total work disability benefits is no different from claims by other workers; the burdens and allocations of proof must be consistent with those enunciated by the DCCA in its *Logan* decision. This standard is consistent with the statutory definition of compensable injury in that proof of compensable wage loss is required.

[1] Administrative Law Judge Linda F. Jory is sitting by designation. Administrative Appeals Judge Henry W. McCoy issued the Compensation Order in 2007 that is before the CRB when he was an administrative law judge. Judge McCoy did not participate in the *en banc* decision.

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

In 2004, Jason Doig (the "claimant" or "Doig"), was a professional ice hockey player in the National Hockey League (NHL) employed by Lincoln Hockey, LLC **(**the "Washington Capitals," "Capitals" or "employer"). On March 5, 2004, he injured his right wrist while playing in a regular season game against the New York Rangers in New York City.

The medical care that the claimant received after his accident has been described in the Administrative Law Judge's (ALJ) Compensation Order and the CRB's previous decision. It is sufficient for the purposes of this decision to state that the claimant received medical care from the Washington Capital's team trainer during the game and then from the team physician after the Capitals returned to Washington. Thereafter, the claimant was treated by a hand specialist, Dr. Richard Barth, referred to another hand specialist, Dr. Charles Melone, who surgically repaired the claimant's wrist in April 2004. The claimant then came under the care of Dr. Edward Harvey. On August 9, 2005, the Office of Workers' Compensation issued a Final Order that authorized Dr. Harvey to be the claimant's treating physician.

In August 2004, Dr. Melone discharged the claimant and cleared him to play, subject to the approval of the team's physician. On September 2, 2005, Dr. Harvey released the claimant to play professional hockey without restriction. We should note here that the ALJ found the claimant was not released to full duty without restriction until September 2, 2005, and that the employer did not appeal that decision.

The NHL's regular season begins sometime in October, after pre-season games, and ends the following April, before playoff games. Players receive their salary only during the regular season.

The Capitals paid the claimant his regular salary after his March 5, 2004 injury through April 2004, which was the end of the 2003-2004 season. All professional hockey players, both those with and those without restricted work capacity receive their full salary during the regular season and do not receive any salary during the off-season. Accordingly, Doig received no pay from the Capitals during the 2003-2004 off-season.

During the 2004-2005 season, the next regular season after Doig was injured, the NHL and its players had a labor dispute that caused the league to cancel the entire season. Pursuant to an agreement with the NHL and the union representing the players, players who were disabled from work-related injuries were paid while they were disabled during the canceled 2004-2005 regular season. Uninjured players received no pay during the canceled season.

Because he was injured during a game, Doig received his regular pay until October 27, 2004, (The date the Capitals believed Doig was cleared to play without restriction). Doig, and all other players, were not paid any salary during the off season after the canceled 2004-2005 regular season ended on April 18, 2005.

Doig filed a workers' compensation claim with the Department of Employment Services (DOES) seeking temporary total disability benefits for from April 19, 2005 through September 2, 2005, (i.e. from the end of the canceled 2004-2005 regular season until Dr. Harvey cleared him to play), and for reimbursement of certain expenses incurred during his rehabilitation after the accident. He did not claim benefits from when the employer stopped paying him on October 28, 2004 through the end of the regular season on April 18, 2005.[2]

On May 15, 2007, an ALJ at Department of Employment Services (DOES) issued a Compensation Order in which he denied the claim. The ALJ found that the claimant's injuries prevented him from working as a professional hockey player from October 28, 2004 until September 2, 2005. However, the ALJ determined that the claimant was not eligible for disability benefits because he had not sustained any wage loss during that time. *Doig v. Lincoln Hockey LLC d/b/a Washington Capitals,* AHD No. 06-012, OWC No. 599381 (May 15, 2007) ("CO").[3]

The claimant appealed the ALJ's decision denying him benefits. The CRB reversed. Relying on *Logan v. DOES,* 805 A. 2d 237(D.C. 2002), the CRB held the claimant was entitled to an award for temporary total benefits because the employer had failed to prove there was suitable alternative employment that Doig could do. *Doig v. Lincoln Hockey LLC d/b/a Washington Capitals*, CRB 07-120, AHD No. 06-012, OWC No. 599381 (August 23, 2007).

The employer appealed the CRB's decision to the DCCA. During the pendency of the appeal, the Senior Assistant Attorney General, representing the Department of Employment Services,[4] filed a motion to remand the case. In pertinent part, the motion stated:

> Remand is appropriate here to permit the CRB to undertake *en banc* reconsideration of the standard of proof applicable to claims of injured professional athletes for disability benefits during their off-seasons and to address how that standard is consistent with the statutory provision defining compensable disability.

On April 7, 2008, the DCCA entered an Order that remanded the case for further administrative proceedings "consistent with respondent's motion." The CRB issued a Notice of Remand that gave the parties the opportunity to submit legal memoranda. Only the employer filed a position statement.

---

[2] At the time of the January 26, 2006, formal hearing, the claimant had a pending grievance against his employer for wages from October 28, 2004 through April 18, 2005. According to the employer's brief submitted to the DCCA, the claimant's grievance was denied.

[3] The ALJ further held that the claim for reimbursement of rehabilitation expenses could not be decided because it had not been submitted for utilization review. This determination is not before us now.

[4] In cases appealed to the DCCA, the Department of Employment Services is the party respondent and is represented by the Attorney General's office.

DISCUSSION AND ANALYSIS

The issue raised by the remand is whether a professional athlete with restricted capacity is entitled to an award for temporary total disability benefits during the off-season; the period when all employees, both those athletes with and without restricted capacity, do not receive wages.

The CRB concludes that *Logan* controls and, as we did in our previous decision, holds that a professional athlete with restricted capacity is entitled to benefits during the time that he, and other athletes, does not receive wages from the employer unless the employer proves there are other available jobs which the claimant could perform. In this respect we find professional athletes are treated no differently under District of Columbia Workers' Compensation Act ("Act") than other workers.

The Act states that "In case of disability total in character but temporary in quality, 66 2/3% of the employee's average weekly wages shall be paid to the employee during the continuance thereof." D.C. Code §32-1508(2). Disability is defined in the Act as "physical or mental incapacity because of injury which results in the loss of wages." D.C. Code §32-1501(8).

Moreover, it is settled law in our jurisdiction that under the Act disability is an economic concept and not a medical concept:

> Even a relatively minor injury must lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified
>
> … A continuing injury that does not result in any loss of wage-earning capacity cannot be the foundation for a finding of disability.

Washington Post v. DOES and Mukhtar,intervenor, 675 A. 2d 37, 40-41 (D.C. 1996) citing *American Mutual Insurance Company,* 138 U.S. App. D.C. at 271-72 & n.9, 426 F.2d at 1265-66 & n.9.

Thus, entitlement to benefits is contingent on proof that the claimant sustained loss of wage-earning capacity.

In the present case, the claimant was not able to perform his regular work as a professional hockey player from October 28, 2004 until September 2, 2005.[5] The ALJ found that the claimant did not present evidence of any wage loss during this period. The employer argues that these facts compel dismissing the claim for benefits without an award. However, such a result would be inconstant with the Court's *Logan* decision.

[5] As noted earlier, the employer did not appeal the finding that the claimant was not released to regular work until September 2, 2005.

While the law requires a wage-loss, the law also requires that when there is no dispute that the claimant was not able to do his regular work, as in this case, the burden is on the employer to show there are other available jobs that the claimant could perform:

> Thus, "once the claimant demonstrates inability to perform his or her usual job, a *prima facie* case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform." *Id*. This scheme is consistent with this court's holding that "the burden is on the employer to prove that work for which the claimant was qualified was in fact available." *Washington Post*, 675 A.2d at 41 (quoting *Joyner v. DOES*, 502 A.2d 1027, 1031 n.4 (D.C. 1986)). We went on to explain in *Washington Post* "that the employer can meet this burden 'by proof short of offering the claimant a specific job or proving that some employer specifically offered claimant a job.'" *Id.* (quoting *Joyner*, 502 A.2d at 1031 n.4). Rather, as we had said in *Joyner*, quoting with approval decisions interpreting the federal act, see note 4, *infra*, "job availability should incorporate the answer to two [substantive] questions":
>
> > (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.
>
> 502 A.2d at 1031 n.4 (citations omitted).

Logan, supra at 242-243.

The employer did not present any evidence to overcome the *prima facie* case. Certainly, the employer could have met its burden through the claimant's testimony but the ALJ found Doig's testimony did not establish a wage loss:

> For the off-season in question, there was no testimony of any oral or written offers to play hockey for another team nor did Claimant identify any hockey clinics or camps that he was committed to that he would be unable to accept due to his injury. As such, there is nothing upon which to base any finding of a wage loss resulting from Claimant's injury during the period of April 19, 2005 to September 2, 2005. Accordingly, as Claimant has not demonstrated a loss of wages during the off-season, he is not entitled to wage-loss benefits.

CO at 7-8.

Although the final sentence of this passage improperly placed the burden of proof on the claimant, the factual finding that the claimant's testimony did not establish availability of suitable alternative work is supported by substantial evidence. Therefore, in accordance with *Logan*, the employer did not overcome the claimant's *prima facie* showing of total disability.

The employer places great reliance on the DCCA's decision in *Mills v. DOES*, 838 A. 2d 325 (D.C. 2003). In *Mills,* a basketball player injured her hand and wrist on May 17, 2000, while practicing during the WNBA's Washington Mystic training camp. She continued playing for the Mystics until she had surgery in late August 2000. At some unspecified time, Ms. Mills received an oral offer from a Turkish basketball club to play but declined that offer because of her injury.

In 2000, the WNBA's regular season began in May and ended on September 15. The Mystics paid the claimant her regular salary for the entire season but declined to pay her temporary total benefits during the basketball off-season, September 16, 2000 to May 14, 2001.

Ms. Mills filed a claim for those benefits. An ALJ, without referring to the offer from the Turkish basketball club, denied her claim, finding that there was no ascertainable wage loss. The DOES Director, who at that time had appellate authority for workers' compensation matters, affirmed the ALJ's decision, finding that the offer from the Turkish team did not prove wage loss because the offer was not a guarantee of employment.

The DCCA reversed. The Court held that the ALJ erred by failing to consider the Turkish offer of employment and the Director erred by requiring certainty of employment with respect to the Turkish team. The Court further held

> In this case, Ms. Mills presented substantial evidence which, if credited by the trier of fact, could form the basis for a finding of a wage loss resulting from Ms. Mills' "on the job" injury. Urla's payment of $ 50,000 to Ms. Mills for her play during the ensuing off- season suggests that the claimed loss was no mirage, nor was it necessarily insubstantial. Moreover, as a No. 2 draft pick, Ms. Mills plainly had much to offer to the Turkish club. Whether there was in fact a compensable wage loss - an issue which we do not decide - may turn on a number of factors, including whether there was other work that Ms. Mills, a college graduate, could have performed during the off-season and, if so, whether the expected remuneration for such work was equal or comparable to her potential salary in Turkey. In any event, on remand, the agency must make appropriate findings regarding the oral offer from Urla, any loss suffered by Ms. Mills as a result of her inability to accept the offer, and other related issues.

Id. at 329-330. (Citations and footnote omitted).

Thus, the *Mills* decision is consistent with our decision that an employee working under a time-limited contract, such as a professional athlete, is able to receive workers' compensation benefits if there is proof of a compensable wage loss.

The fact that Doig was a seasonal, limited-term contract employee does not disqualify him from disability benefits. As we noted in our previous decision:

> In discussing the subject of the calculation of average weekly wages for compensation rate purposes, it is noted in *Larson's Workers' Compensation Law* that "the seasonal character of employment affects only the wage basis, not the duration of benefits period; thus, the fact that claimant's work year normally amounted to only six months did not mean that her temporary total disability benefits would be limited to six months", citing *Gregory v. Michael Bailey & Sons Logging,* 255 Mont. 190, 841 P2d 525 (1992). 5-93 LARSON'S WORKERS' COMPENSATION LAW, Matthew Bender & Co., (2006), § 93.02 [3] [b], *Seasonal Employment.*

Doig, CRB 07-120, *supra,* at 5.

The employer's "Statement of the Issue Presented" at page 1 of its brief to the DCCA asserts "the CRB erred in reversing the finding of the Compensation Order that Claimant was not entitled to wage-loss benefits because Claimant failed to prove that he sustained a wage loss during the off-season period for which he sought disability benefits."

This argument is inconsistent with *Logan.* Doig's work-related injury placed him in a different position from the other, uninjured, players. Doig's inability to do his regular work established a *prima facie* case of disability and entitlement to benefits and the employer, not the claimant, had the burden of proving the claimant did not have a compensable wage loss.

The employer also asserted in its Statement that our previous decision was wrong because we failed "to consider the realities of the marketplace in determining the existence of a disability and a professional athlete's entitlement to benefits" because "there is no alternative work available during the off-season at full duty or light duty in which the athlete could earn wages commensurate with his capabilities as an athlete." Statement at 11.

The employer's argument would have merit if under *Logan* an employer was restricted to the industry in which the claimant was injured to establish the availability of other jobs which the claimant could perform with his physical limitations. An employer is not so limited.

Further, in the CRB's previous Decision and Remand Order, the panel noted that the Council of the District of Columbia seems to have taken into account the "realities of the marketplace for professional athletes" that it deemed relevant to the Act because it passed legislation mandating that permanent partial disability awards for sports career ending injuries be subject to limits not applicable to any other form of employment. D.C. Code § 32-1508 (3) (W). The Council could

have made a distinction for other categories of disability benefits relating to professional athletes, but did not.

On remand the employer argues that our previous decision requiring an employer to offer light duty "is illusory. Realistically, there is no light duty work that would compensate a professional athlete at a level that would have any bearing on the collection of workers' compensation benefits." Employer's Position Statement at 6-7.

No doubt Doig's salary would make finding light-duty employment that would reduce the employer' financial liability difficult. However, we are aware of no statute or judicial decision that makes this a legitimate reason for denying Doig benefits.[6]

We also find no support for the employer's argument that the Attorney General's Motion for Remand "reflected his conclusion that the Decision and Order was contrary to the Act and controlling precedent." It is unnecessary to speculate. The DCCA directed the CRB to clarify, not reverse, its previous decision.

CONCLUSION

In accordance with the remand order, the CRB finds that the standard of proof for claims by professional athletes for temporary total work disability benefits is no different from claims by other workers and that the burdens and allocations of proof enunciated by the DCCA in its *Logan* decision control. If an injured worker establishes he or she is unable to return to regular employment, the worker is entitled to disability benefits unless the employer establishes the availability of other jobs which the claimant could perform. This standard is consistent with the statutory definition of compensable injury in that proof of compensable wage loss is required.

FOR THE COMPENSATION REVIEW BOARD:

_____
LAWRENCE D. TARR
Chief Administrative Appeals Judge

June 19, 2013
Date

[6] Although not a factor in our decision, it should be pointed out that the employer received the benefit of Doig's high salary with respect to the calculation of Doig's compensation rate. Because of his salary, Doig would only receive the maximum compensation rate of $1.055.96 each week, not two-thirds of his salary.