**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**Department of Employment Services**

**VINCENT C. GRAY**
**MAYOR**

**LISA M. MALLORY**
**DIRECTOR**

# Compensation Review Board

**CRB No. 12-021**

**JOHN E. BENGOUGH,**
**Claimant–Petitioner,**

**v.**

**AMERICAN CONVENTION EXHIBITORS AND ACE PROPERTY & CASUALTY,**
**Employer/Carrier-Respondent**

Appeal from a Compensation Order by
The Honorable Linda F. Jory
AHD No. 08-370D, OWC No. 641521

Matthew Peffer, Esquire, for the Claimant/Petitioner
Mary G. Weidner, Esquire, for the Employer-Carrier/Respondent

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL,[1] AND LAWRENCE D. TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

## DECISION AND REMAND ORDER

### JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, et seq., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

[1] Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-03 (October 5, 2011).

## OVERVIEW AND FACTS OF RECORD

This appeal follows the issuance on January 23, 2012 of a Compensation Order (CO) from the Hearings and Adjudication Section, Office of Hearings and Adjudication in the District of Columbia Department of Employment Services (DOES). In that CO, Claimant's request for temporary total disability from March 26, 2011 through June 30, 2011 was denied.[2]

Claimant worked as an exhibit technician/installer and he and his company, Chesapeake Expositions Inc., were hired by Employer to install an exhibit at the Newseum. On July 2, 2007, while in the course of installing steel showcases, Claimant sustained injury to his neck and right shoulder when the structure shifted causing Claimant to fall to the ground on his right side with the weight of the structure on top of him.

The presiding Administrative Law Judge (ALJ) found that Claimant did not receive a paycheck from Employer.[3] Rather, Claimant's company, Chesapeake Expositions, submitted invoices to Employer and other businesses for setting up exhibits at various locations. Claimant was found to be the president, vice-president, chairman of the board, and chief financial officer of Chesapeake Expositions and that he controlled the invoices, payments, and other banking activities of the company.

The ALJ also found that Employer stipulated that Claimant was unable to return to his pre-injury duties. In a prior claim for medical treatment, it was found that the physical demands required for Claimant to perform his work duties including standing for long periods of time, bending, stooping, and heavy lifting.[4]

For the period temporary total disability (TTD) benefits were requested, the ALJ found that, starting March 24, 2011 through June 2011, Chesapeake Expositions invoiced various businesses for setting up exhibits. It was found that Claimant was physically present at every job performed by Chesapeake Exposition except for a May 19, 2011 job at St. Agnes Hospital. It was also found that Claimant supervised the activities of setting up the expositions with his daughter and nephew performing the actual physical labor of setting up and taking down the displays.

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[2] *Bengough v. American Convention Exhibitors*, AHD No. 08-370D, OWC No. 641521 (January 23, 2012) (*Bengough II*).

[3] This finding appears to conflict with a prior finding and stipulation by the parties in a prior proceeding for medical benefits, which the ALJ in this matter has adopted. In that prior proceeding, the parties had stipulated to an employer/employee relationship and that Claimant sustained an accidental injury on July 2, 2007 that arose out of and in the course of his employment with Employer. In that prior proceeding, ALJ Calmeise found that "Claimant worked for Employer as an exhibit technician/installer.) *Bengough v. American Convention Exhibitors*, AHD No. 08-370B, OWC No. 641521 (April 11, 2011) (*Bengough I*). It is also important to note that ALJ Jory in the instant matter stated that the April 11, 2011 CO was not appealed. This is not correct as the matter was appealed to and the decision affirmed by the CRB. *Bengough v. American Convention Exhibitors*, CRB No. 11-044, AHD No. 08-370B, OWC No. 641521 (July 25, 2011). The CRB Decision and Order was affirmed on appeal by the D.C. Court of Appeals. *Bengough v. DOES, No. 11-AA-1008* (D.C. 2012).

[4] *Bengough II, supra*.

On August 17, 2011, Claimant filed an Application for Formal Hearing seeking TTD benefits from March 26, 2011 through June 30, 2011. Following a formal hearing, the ALJ determined that while the record evidence did not support Claimant's claim for disability benefits, it did support Employer's claim that Claimant was able to work in some capacity and had "earned income that should reduce his entitlement to his current compensation rate."[5] Claimant timely appealed with Employer filing in opposition.

On appeal, Claimant argues that he was temporarily and totally disabled for the period in question and that the ALJ committed errors of both law and fact in that contrary to the ALJ's determination he met the criteria under the Act for being totally disabled and Employer failed to establish the availability of suitable alternative employment. In addition, Claimant argues the ALJ's inference that he received wages from Chesapeake Expositions is not supported by the record. Employer argues to the contrary that the ALJ's decision is supported by substantial evidence in the record.

## 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.[6] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), 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

In the course of reviewing Claimant's arguments on appeal as applied to the CO, we are compelled to note that the ALJ has applied the wrong standard of proof as to the nature and extent of Claimant's disability. In initiating discussion and analysis of the nature and extent of Claimant's disability, the ALJ stated:

> Claimant has the burden of proving by substantial credible evidence that he is entitled to the requested level of benefits.[7]

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[5] *Bengough II, supra* at p. 2.

[6] "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. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

[7] *Bengough II, supra* at p. 6.

The CRB has consistently held that it cannot affirm a Compensation Order that reflects a misconception of the relevant law or a faulty application of the law.[8] In workers' compensation cases where, as here, there is no presumption of compensability, the burden of proof falls on the claimant to show by a preponderance of the evidence that he is entitled to the requested benefits.[9]

Here the ALJ commenced her analysis of Claimant's claim by stating that he had the burden of proving his entitlement to those benefits by substantial credible evidence. Because the ALJ used the wrong standard of proof and analysis, this matter must be returned so the ALJ can analyze the evidence in accordance with the preponderance of the evidence standard of proof.

Since the ALJ will issue a new CO, we will also discuss Claimant's argument that insofar as it was stipulated that he was unable to returned to his pre-injury job, and thus totally disabled, Employer failed to establish the availability of suitable alternative employment.[10] Employer argued that for the claimed period of disability, Claimant was operating his own company, Chesapeake Expositions, and earning wages from the operation and management of that company. In essence, Employer argued that because of wages paid to him by the company, Claimant had no wage loss, and therefore it had no responsibility to pay Claimant wage loss benefits.

In her findings of fact specific to Claimant's instant claim for TTD benefits, the ALJ enumerated the various invoices Chesapeake Expositions submitted to various companies to set up exhibitions for those companies and the banking activity for Chesapeake Exposition including deposits, withdrawals, and checks written on the account to pay utilities and to Claimant's wife. The ALJ found that this activity was executed by Claimant and that insofar as he held all the principal positions in the company, he was in control of all the company's activity and through the payment of his utility bills and the checks made payable to his wife, who did not work for the company, that this constituted wages to Claimant which were the direct result of his personal management and endeavor.

The ALJ accepted Employer's argument and evidence and determined that

> Employer has overwhelmingly established that claimant's activities and profits specifically for the period of relief claimed are the result of his own personal management and endeavor, thus his claim for relief must be denied.[11]

The ALJ then concluded as a matter of law that

> Claimant's activities and profits specifically for the period of March 26, 2011 through June 30, 2011 are the result of his own personal

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[8] *Holley v. Freestate Electrical Construction Co*., CRB No. 11-063, AHD No. 07-266D, OWC No. 630732 (January 23, 2012) (quoting *WMATA v. DOES*, 992 A.2d 1276, 1280 (D.C. 2010)).

[9] *McCamey v. DOES*, 947 A.2d 1191, 1199 (D.C. 2008).

[10] See *Logan v. DOES*, 805 A.2d 237, 242-43 (D.C. 2002).

[11] *Bengough II, supra* at p. 9.

> management and endeavor, thus his profits are deemed to be earnings and his claim for relief must be denied.[12]

The parties stipulated that Claimant had an average weekly wage (AWW) of $1,500.00. However, in concluding that Claimant had earnings that negated any wage loss due to his work injury, the ALJ neglected to make any specific findings as to the total wages earned by Claimant during the contested period and compared that to his AWW to show that he did not have a wage loss.[13] In this posture, the conclusion made does not flow rationally from the findings and thus cannot stand. On remand, the ALJ shall correct this deficiency.

In the burden shifting device under *Logan*, once Claimant has made a *prima facie* showing of total disability, which was accomplished here by the parties stipulating that Claimant was unable to return to his pre-injury duties, the burden shifted to Employer to show the availability of suitable alternative employment. In the instant matter, Employer endeavored to make this showing by asserting that Claimant was physically running his own business and earning wages during the period he is claiming a wage loss. On remand, the ALJ shall place the burden on Employer to show the extent of Claimant's wage earning capacity.[14]

## CONCLUSION AND ORDER

The findings of fact and the conclusions of law in the January 23, 2012 Compensation Order are not supported by substantial evidence, nor are they in accordance with the applicable law. Therefore, the Compensation Order is VACATED and this matter is REMANDED for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

June 14, 2012
DATE

[12] *Id.*

[13] By making the summary disposition that Claimant "has earned income that should *reduce* his entitlement to his current compensation rate", the ALJ appears to allude to a possible entitlement to temporary partial disability. *Id*. at p. 2. (Emphasis added.) This is a determination that can be made on remand when the ALJ weighs the evidence presented by Claimant under the preponderance of the evidence standard of proof.

[14] We note that the ALJ has voiced her concerns that the compromise about AWW renders assessing the extent of any wage loss difficult, if not, on this record, impossible. However, if this record contains sufficient evidence for the ALJ to calculate an accurate AWW and an accurate post-injury wage, she should do so, and if it does not, she is free to re-open the record to receive additional evidence on the subject. She is not bound by the AWW stipulation where, as here, the method of properly calculating the AWW is an integral part of determining post-injury wage loss.