

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA MARÍA MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 13-040**

**MARK BOPP,  
Claimant–Petitioner,**

**v.**

**CLARK CONCRETE CONTRACTORS and ZURICH AMERICAN INS. CO.,  
Employer/Carrier - Respondent**

Appeal from a February 28, 2013 Compensation Order by  
Administrative Law Judge Amelia G. Govan  
AHD No. 12-527, OWC No. 692370

Michael J. Kitzman, Esquire, for the Claimant/Petitioner  
Alan D. Sundburg, Esquire, for the Employer-Carrier/Respondent

Before: HENRY W. MCCOY, HEATHER C. LESLIE, and JEFFREY P. RUSSELL *Administrative Appeals Judges*.

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

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Claimant worked for Employer as a concrete finisher with duties that required lifting, bending, extensive kneeling, stooping, and squatting. Sometime near the end of 2010, Claimant injured his right knee while riding a dirt bike. Claimant did not have the injury evaluated and it improved over a period of time. No finding was made that this injury interfered with Claimant's work duties or that he missed any work due to the injury.

In and around January 2012, Claimant began to experience bilateral knee pain, with the pain worse in the right knee. When observed limping by a supervisor in April 2012 and asked whether he injured himself on the job, Claimant responded that it was due to a dirt bike injury.

Claimant was allowed to leave work early and for the next few days was assigned less demanding work tasks.

Claimant first sought medical treatment for his right knee on May 2, 2012 with orthopedic specialist Dr. Robert Verklin, who noted that Claimant thought he had injured his knee riding a dirt bike. An MRI showed no meniscus tearing or patellofemoral injury. Dr. Verklin opined that surgery was not indicated, fitted Claimant for a knee brace, and ordered other palliative measures including exercises and medicinal supplements, with corticosteroid injections to be considered if symptoms persisted. Dr. Verklin at no time took Claimant off work but did recommend that he avoid kneeling, squatting and lunging.

It was found that Claimant lost no time from work related to his right knee condition and continued working while seeing Dr. Verklin. It was also found that as Claimant was not seen at work the week before Memorial Day 2012, his employment with Employer was terminated on or about May 21, 2012.

Claimant was seen by Dr. Harvey Mininberg, an orthopedic specialist, for an independent medical evaluation (IME) on August 17, 2012. With a specific notation that Claimant had no history of injury to this right knee, Dr. Mininberg diagnosed right knee contusion that was secondary to a work injury on May 3, 2012.

Employer had Claimant examined by Dr. John O'Donnell, also an orthopedic specialist, on December 13, 2012. Dr. O'Donnell diagnosed minimal chondromalacia patella that was not related to Claimant's work as a concrete finisher, but was more likely related to the dirt bike accident.

Claimant filed a claim for temporary total disability benefits from June 1, 2012 to the present and continuing and causally related medical expenses. Following a formal hearing, a February 28, 2013 Compensation Order (CO) issued denying Claimant's request for disability benefits but granting his claim for causally related medical expenses related to the right knee. Claimant timely appealed with Employer filing in opposition.<sup>1</sup>

On appeal, Claimant argues the Administrative Law Judge (ALJ) erred in her determination as to the nature and extent of disability insofar as his testimony and the medical report from Dr. Mininberg establish that he is unable to perform his pre-injury job and Employer did not offer suitable alternative employment. Employer counters that the CO should be affirmed as Claimant failed to establish that he is disabled as a result of his work injury. After reviewing the record and the competing arguments, we VACATE the denial of temporary total disability benefits and REMAND for further consideration.

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<sup>1</sup> *Bopp v. Clark Concrete Contractors*, AHD No. 12-527, OWC No. 692370 (February 28, 2013).

## 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.<sup>2</sup> See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005) (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 (CO) 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.

In appealing the denial of his request for wage loss benefits, Claimant argues the ALJ erred in determining that he failed to establish that he was unable to perform his pre-injury job for the period requested. Claimant asserts that the recommendations from Dr. Mininberg limiting his activities combined with his own testimony regarding the job duties that he is unable to perform prove the nature and extent of his disability. Claimant further argues that insofar as Employer failed to make suitable alternative employment available, he is entitled to the disability benefits requested. We find merit in Claimant's arguments.

It is now well established that the Act does not provide Claimant with a presumption regarding the nature and extent of his disability.<sup>3</sup> Rather, Claimant has the burden of proving by a preponderance of the evidence that he is entitled to the requested relief.<sup>4</sup> And, as now commonly applied, under *Logan*<sup>5</sup>, once a claimant has demonstrated the inability to perform his/her job, a *prima facie* case of total disability is established, which the employer can rebut by establishing the availability of suitable alternative employment.<sup>6</sup> If employer meets this evidentiary burden, the claimant, in order to prevail, must either successfully challenge the legitimacy of employer's evidence of suitable available employment, or demonstrate diligence, but lack of success, in obtaining other employment.<sup>7</sup>

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<sup>2</sup> "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).

<sup>3</sup> See *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986).

<sup>4</sup> See *Holley v. Freestate Electrical Construction Co.*, CRB No. 10-089, AHD No. 07-266B, OWC No. 630732 (February 26, 2010), *D.C. Dept. of Mental Health v. DOES*, 15 A.3d 692 (D.C. 2011).

<sup>5</sup> *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

<sup>6</sup> *Id.* at 240.

<sup>7</sup> *Id.* at 243.

After noting the burden-shifting device espoused by the Court in *Logan*, the ALJ reasoned

Claimant, through his testimony and the medical evidence presented, has not established total disability, i.e., inability to perform his usual job, during the periods at issue. Accordingly, Claimant has failed to present sufficient evidence that he is entitled to wage loss benefits. However, in that his right knee symptoms are medically causally related to his work activities, he is entitled to medical treatment for his causally related right knee symptoms.<sup>8</sup>

This determination by the ALJ does not rationally follow from her findings that:

[Claimant's] work duties required lifting and bending, extensive kneeling, stooping, and squatting.<sup>9</sup>

\* \* \*

Claimant currently ambulates with a distinctly antalgic gait. He uses the brace prescribed by Dr. Verklin, which improves stability in the right knee, on a daily basis. He now has problems with right knee pain and throbbing which prevent his performance of activities which require kneeling. HT 23-24.<sup>10</sup>

With findings that Claimant's work duties required extensive kneeling and that his right knee pain prevented him from performing activities that required kneeling, the ALJ's apparent determination that Claimant did not make the initial *prima facie* showing under *Logan* does not withstand scrutiny. While the evidence does show that neither Dr. Verklin nor Dr. Mininberg took Claimant off work, they both recommended that he avoid kneeling, squatting and lunging; all activities integral to the performance of his pre-injury job as concrete finisher.

The ALJ also found that Claimant lost no time from work up until the week before Memorial Day 2012 when he stopped reporting and was subsequently fired. Claimant testified that this was due to the lack of light duty work.<sup>11</sup> This comports with the ALJ's finding Claimant's supervisor had assigned him to do "patch work, which was less uncomfortable. HT 40-51."<sup>12</sup> This lends further credence to Claimant's arguments on appeal that the evidence supports that he was unable to do his regular job and for a period of time Employer made an

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<sup>8</sup> *Bopp, supra*, p. 8.

<sup>9</sup> *Id.*, p. 2.

<sup>10</sup> *Id.*, p. 4.

<sup>11</sup> Hearing Transcript (HT) at 22.

<sup>12</sup> *Bopp, supra*, p.3.

accommodation of light duty. We also note that in addressing the issue of causal relationship, the ALJ appears to acknowledge that Claimant experience a period of wage loss.

In the course of determining that Claimant had invoked the presumption of compensability that his current condition was causally related to his work injury, the ALJ stated:

Despite the omissions and discrepancies in the testimony and physicians' reports, which contradict Claimant's version of the origin and onset of is debilitating right knee symptoms, the record evidence is sufficient to invoke the presumption. There is no significant break in the chain of causation linking Claimant's original bike injury, aggravation of the condition by his work activities, the right knee symptoms which worsened after January of 2012 and became acutely symptomatic by May of 2012, his subsequent medical testing, diagnosis and treatment, and his period of wage loss.<sup>13</sup>

The ALJ specifically found that Claimant right knee symptoms are sufficiently painful that they prevent him from kneeling, a critical aspect of his work duties as a concrete finisher. If Claimant is not able to perform this function and his doctor's have recommended he avoid this type of activity, it would appear that Claimant has made the initial showing under *Logan* that he is unable to perform his usual job. The ALJ's conclusion is not supported by her own evidentiary findings and this matter must be returned.

#### CONCLUSION AND ORDER

The denial of temporary total disability benefits in the Compensation Order of February 28, 2013 is not supported by substantial evidence and is not in accordance with the law. The CO is REVERSED and REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY  
Administrative Appeals Judge

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May 30, 2013  
DATE

<sup>13</sup> *Id.*, p. 6.