

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-097**

**CHRISTOPHER CROLEY,  
Claimant-Petitioner,**

v.

**LIFESTAR RESPONSE OF MARYLAND  
and ARGONAUT INSURANCE COMPANY,  
Employer/Carrier-Respondent.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 NOV 3 PM 11 24

Appeal from a May 20, 2015 Compensation Order by  
Administrative Law Judge Amelia G. Govan  
AHD No. 06-438D, OWC No. 623161

(Decided November 3, 2015)

Michael J. Kitzman for Claimant  
Todd S. Sapiro for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

A Compensation Order was issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services on May 20, 2015 in which Claimant's claim for permanent partial workers' compensation benefits based upon ongoing diminution of earnings was denied. The denial was premised upon the ALJ's determination that Claimant failed to meet his burden of proof under *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986) (*Dunston*), *Smith v. DOES*, 926, A.2d 95 (D.C. 1988) (*Smith*) and *Logan v. DOES*, 805 A.2d 237 (D.C. 2002) (*Logan*) that Claimant's disability was "permanent", because there was no medical opinion in the record from any physician that Claimant had achieved permanency or reached maximum medical improvement (MMI).

Claimant filed an Application for Review and memorandum of points and authorities in support thereof arguing that the Compensation Order was not supported by substantial evidence or in accordance with the law, and seeking reversal and a remand to further consider the compensation rate to which Claimant is entitled.

Employer filed an opposition to Claimant's appeal and a memorandum of points and authorities in support thereof arguing that the Compensation Order correctly determined that, in the absence of a medical opinion regarding permanency, a claim for permanent disability benefits must be denied inasmuch as Claimant has failed to establish a necessary element of proof of the permanent nature of the disabling condition.

Because Claimant presented evidence which, if credited, could establish that his disability is permanent as that term is generally used in the District of Columbia Workers' Compensation Act, D.C. Code § 32-1501, *et seq.*, (the Act) the determination that the lack of a medical opinion in the record concerning whether Claimant's condition is permanent precludes a permanency award based on wage loss is not in accordance with the law, and is vacated. We remand for further consideration.

#### STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed compensation order are based upon substantial evidence in the record and whether the legal conclusions drawn flow rationally from those facts and are in accordance with applicable law. The CRB must affirm a compensation order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have drawn a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

#### DISCUSSION

As the parties all agree and the ALJ noted, the Act provides no presumptions to claimants on the issue of the nature and extent of disability, and places upon the claimant the burden of establishing the nature and extent of a claimed disability by a preponderance of the evidence. *See Dunston, supra; Upchurch v. DOES*, 783 A.2d 623 (D.C. 2001).

"Preponderance of the evidence" means "The greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden in a civil trial, in which a jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be." *Black's Law Dictionary*, page 1201 (7<sup>th</sup> ed. 1999). *See also Ramirez v. Securitas Security*, CRB No. 12-178, AHD No. 10-608A, OWC No. 672756 (December 17, 2012).

The following is the discussion of the issue as it appears in the Compensation Order:

A disability is permanent if it has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery

merely awaits a normal healing period. *Smith [supra]*, n. 7. However, to date no physician who has examined or treated Claimant's [sic] has indicated that his condition has reached [MMI].

Neither party has submitted any medical evidence more recent than the October 21, 2011 report of Dr. Fechter, which does not include an opinion regarding permanency.

In order to prove entitlement to permanency benefits, a claimant must present credible evidence that his condition has reached maximum medical improvement. *Logan [supra]*. No sufficient evidence has been adduced to support Claimant's entitlement to the benefits sought in this case. Having so decided, neither statutory section related to the average weekly wage issue is applicable.

Compensation Order, p. 4.<sup>1</sup>

It is clear from this discussion that the ALJ denied the claim solely and exclusively upon the lack of a medical opinion concerning permanency. This is error.

As the CRB stated in *Damegreene v. American Red Cross*, CRB No. 13-050(R), AHD No. 97-411F, OWC No. 532792 (August 6, 2014):

Our analysis in this instance is similar to the analysis that we have adopted in cases involving claimants who have been determined to be permanently and totally disabled. Thus, we have held:

It must be understood that "permanent total disability" is a statutory construct, and in many senses, it is a term of art which has the meaning that the legislature and the D.C. Court of Appeals have ascribed to it; as such, the meaning may be somewhat at odds with the meaning the phrase would have if the words were understood in their vernacular sense. Thus, a person is permanently and totally disabled if (1) he or she has reached permanency in connection with the medical condition caused by the work injury, (2) he or she is unable to return to the pre-injury job because of the effects of that medical condition, and (3) there is no suitable alternative employment available in the relevant labor market.

While a permanently and totally disabled person remains under an obligation to cooperate with an employer's efforts to return that person to the labor market and while that person's entitlement to ongoing permanent total disability benefits is contingent upon that cooperation, that person is nonetheless permanently and totally disabled until such time as that person is employable. Then, the person's condition may be said to have changed, rendering him or her either only partially disabled

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<sup>1</sup> It is worth noting that the court in *Logan* took some minor issue with the ALJ's employing the term "maximum medical improvement" as being the standard to be met in connection with the nature of a claimant's medical condition when assessing whether it is permanent. See *Logan* at 241.

or not disabled at all, depending upon the level of wage earning capacity that has been recovered.

*Braswell v. Greyhound Lines*, CRB No. 12-120, AHD No. 09-519A, OWC No. 603794 (November 13, 2012). *See also Kostalas v. PEPCO*, CRB No. 14-014, AHD No. 10-062B, OWC No. 618413 (May 29, 2014); *Renwick v. WMATA*, CRB No. 13-159, AHD No. 07-108D, OWC No. 587264 (April 9, 2014).

*Damegreene, supra*, pp. 4 – 5.

It appears to be undisputed that (1) Claimant has received no active medical care for nearly five years as of the time of the formal hearing; (2) Claimant testified that his condition has remained unchanged since that date; and (3) Claimant testified that he has declined since 2011 to undergo what he views as the only medical option with which he has been presented, a repeat surgical procedure on his back.

While, like a claim of disability generally, a medical opinion concerning the permanency claim would certainly be a helpful addition to this record, nothing in the Act or in any case that we have seen or to which our attention has been directed states that there must be a medical opinion as part of that burden. For whatever reason, neither party chose to submit any medical opinion evidence on this issue.

However, although not compelled, a reasonable person could consider the evidence described above and conclude that Claimant’s “condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period”, which, as the parties all agree and the ALJ states in the Compensation Order, is the test enunciated by the District of Columbia Court of Appeals in *Logan* and elsewhere. It is undisputed, as the ALJ states, that there are no record medical reports more recent than the October 2011 report of Dr. Fechter which indicates Claimant’s low back difficulties had increased, however an increase in Claimant’s low back difficulties is not the measurement Claimant needs to meet to have a permanent disability. To the contrary, there are no medical reports in the record that establishes Claimant’s L5-S1 disc herniation has disappeared or that Claimant is able to return to his pre-injury duties.

Although Claimant’s evidence is not as strong as it might have been, it is unopposed, and it is more than “a mere scintilla”. While Employer makes several arguments concerning additional considerations that the ALJ could have used to bolster the denial of the claim, the ALJ did not rely upon or cite any of them, on the apparent assumption that the absence of a medical opinion was determinative and fatal to the claim.

Accordingly, we must vacate the denial, and remand the matter for further consideration of whether Claimant’s evidence of permanency preponderates over other evidence in the record supporting another conclusion, and if it does, for further consideration of the claim.

In that regard, we note Employer’s second argument, that being that the record does not contain sufficient evidence to establish a compensation rate under D.C. Code § 32-1508 (3)(V)(i)(I) or (II), and thus no award is possible.

We do not consider that matter as being properly before us, because the ALJ must first make a determination on that point, should it be found that Claimant has attained permanency under the Act.

#### CONCLUSION AND ORDER

The denial of Claimant's claim for permanency is vacated and the matter is remanded for further consideration in a manner consistent with the foregoing Decision and Remand Order. If upon further consideration it is determined that Claimant's disability is permanent, the ALJ shall proceed to consider the remaining issues relating to the appropriate compensation rate to which Claimant is entitled.

*So ordered.*