GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-003

TEWODROS DEMTEW,
Claimant–Respondent,

v.

UNITEK GLOBAL SERVICES,
Self-Insured Employer–Petitioner.

Appeal from a December 13, 2012 Compensation Order of
Administrative Law Judge Linda F. Jory
AHD No. 12-401, OWC No. 681441

Ju Y. Oh, Esquire, for the Petitioner
Matthew J. Peffer, Esquire, for the Respondent

Before JEFFREY P. RUSSELL and HENRY W. MCCOY, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge,* for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND

On June 17, 2011, Tewodros Demtew injured his low back while working for Unitek Global Services (Unitek) as a service technician and cable installer. It is undisputed in this case that the work injury has resulted in Mr. Demtew being unable to perform the duties of that job, which require him to carry equipment up and down ladders, and to carry the ladder themselves, which are usually 32 feet long, but are sometimes longer.

Unitek provided causally related medical care and paid Mr. Demtew temporary total disability benefits for a period of time on a voluntary basis. During this period, Mr. Demtew underwent MRI testing which revealed a central disc herniation at L5-S1, and an annular fissure disc bulge at L3-L4. X-rays demonstrated lumbar spondylosis at L5-S1 as well.

Unitek had Mr. Demtew evaluated by Dr. David Johnson for the purpose of an independent medical evaluation (IME) on November 10, 2011. Dr. Johnson opined that, while Mr. Demtew was unable to return to his pre-injury job, he was capable of performing light duty work which did not require him to lift in excess of 20 pounds.

Mr. Demtew's treating physician, Dr. Phillip Omohundro, continued in his opinion that Mr. Demtew could not return to work. Nonetheless, Unitek advised Mr. Demtew that it would make a sedentary job available to him. Mr. Demtew reported for duty in the job[1] on January 16, 2012, and continued to report for work. On February 2, 2012, he advised his supervisor that he was experiencing severe ongoing low back pain which prevented him from working, and that he needed to seek medical care. Mr. Demtew was seen at Howard University Hospital's emergency room on February 6, 2012, and by Dr. Omohundro's colleague, Dr. Barry Thompson. Dr. Thompson placed Mr. Demtew on an off-work status, and stated in his report that he was awaiting authorization for pain management. On March 5, 2012, Dr. Thompson also recommended referral to a neurosurgeon for further evaluation of the low back and radiating leg pain. Dr. Thompson's May 2, 2012 note reiterated that approval for this care, as well as for injections, was still awaiting authorization from Unitek.

Mr. Demtew sought an award of wage loss benefits and ongoing medical care at a formal hearing before an Administrative Law Judge (ALJ) in the Department of Employment Services. In a Compensation Order issued December 13, 2012, the ALJ granted Mr. Demtew's claims for relief. Unitek filed a timely Application for Review (AFR) appealing the Compensation Order to the Compensation Review Board (CRB) which Mr. Demtew opposes.

STANDARD OF REVIEW

The scope of review by the CRB is generally 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. *See*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

We note initially that Unitek takes no issue in this appeal with the award of medical care, and in fact did not contest the claim for ongoing medical care, including pain management and further neurosurgical evaluation, at the formal hearing. Thus, it appears, Unitek conceded at the formal hearing and concedes in this appeal that Mr. Demtew's work injury continues to cause him pain and discomfort.

Further, as the ALJ notes in the Compensation Order, Unitek concedes that this pain and discomfort is so severe that it prevents Mr. Demtew from returning to his pre-injury employment. There is no question that the ALJ was correct in determining that Mr. Demtew has made a *prima facie* showing

[1] At the time of the formal hearing there were a number of disputes concerning various details surrounding the timing of the offer to return to work and whether Mr. Demtew was to be paid the same wage to perform it as he was paid in the pre-injury job. None of these details or disputes are relevant to any issue on appeal, and hence will not be addressed in detail.

of total disability under *Logan v. DOES*, 805 A.2d 237 (D.C. 2002), thereby shifting to Unitek the burden of establishing that it offered Mr. Demtew a modified position that is within his physical capacity, or that there exist other jobs in the relevant labor market that are suitable alternative employment in light of his age, education, training, experience, and physical capacity.

As the ALJ noted, Unitek attempted to meet that burden by adducing evidence that it offered Mr. Demtew a sedentary position in its Beltsville office which, in Unitek's view, was within Mr. Demtew's physical capacity.

It is undisputed that such an offer was made, and that Mr. Demtew attempted to perform that job. However, the ALJ found that Mr. Demtew's ongoing pain was sufficiently severe that even the sedentary job was beyond his physical capacity to perform. Thus, under *Logan*, the ALJ found that Mr. Demtew's testimony that he attempted to perform the modified job but was incapable of doing so overcame Unitek's evidence concerning the availability of suitable alternative employment (in the nature of a modified job with Unitek). It is this finding and conclusion that Unitek disputes in this appeal.

Unitek's sole argument appears to be that the modified position is in fact within Mr. Demtew's current physical capacity, and that it continues to be willing to make further modifications to accommodate the physical limitations caused by the continuing effects of the work injury. In other words, Unitek maintains that the ALJ's determination that Mr. Demtew's level of pain disables him from performing even the most sedentary of jobs is erroneous as a matter of law.

We reject Unitek's argument. What it seeks in this appeal is that we substitute our judgment for that of the ALJ concerning what effect the admitted ongoing injury-related pain has upon Mr. Demtew's ability to perform the modified job. The ALJ found:

> [C]laimant's attempt to return to employer's modified position failed because he was in too much pain. The record is replete with physician's opinions that claimant needs additional forms of treatment i.e., injections, pain management, neurosurgical consultation and employer has prevented him from getting anything that has been recommended for him by his treating physicians and even the IME physician.

Compensation Order, page 7.

Unitek would have us re-characterize the ALJ's finding of a failed attempt to return to work as a voluntary limitation of income. This we are neither inclined nor empowered to do. It is for the fact finder to assess the veracity and validity of a claimant's complaints of pain and their effect upon the claimant's ability to perform work.

CONCLUSION AND ORDER

The ALJ's determination that Mr. Demtew's concededly injury-related pain was in need of ongoing additional medical care and was severe enough that he could not perform the modified job offered by Unitek is supported by substantial evidence, and the conclusion that he is therefore totally disabled is in accordance with the law. The Compensation Order of December 13, 2012 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

_____
JEFFREY P. RUSSELL
Administrative Appeals Judge

April 12, 2013
DATE