GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-139

MICHAEL DREW
Claimant-Respondent / Cross-Petitioner,

v.

SEVERN CONSTRUCTION COMPANY AND CHARTIS INSURANCE COMPANY,
Employer and Carrier-Petitioners / Cross-Respondents.

Appeal from a October 25, 2013 Compensation Order by
Administrative Law Judge Amelia G. Govan
AHD No. 11-373A, OWC No. 677581

Joel E. Ogden, for the Petitioners / Cross Respondents
Richard W. Galiher, Jr., for the Respondent / Cross-Petitioner

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

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) and the Claimant – Respondent's cross–application for review of the October 25, 2013, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted in part and denied in part the Claimant's claim for relief. The CO awarded temporary partial disability benefits from January 14, 2011 to the present and continuing but denied the request for penalties. The CO also ordered the Employer to provide Claimant with vocational rehabilitation services pursuant to the Act. We VACATE and REMAND.

FACTS OF RECORD AND PROCEDURAL HISTORY

On January 13, 2011, the Claimant was employed by the Employer as a Maintenance of Traffic Technician (hereinafter "MOT"). The Claimant's duties included driving a truck, flagging, climbing, and throwing cones weighing approximately 15.84 pounds. On that day, the Claimant was injured when the truck he was driving was rear-ended, suffering injuries to his neck and back.

The Claimant came under the care and treatment of Dr. Eric Dawson. Dr. Dawson diagnosed the Claimant with a lumbar disc injury and opined the Claimant could not work. Dr. Dawson prescribed injections, pain medication, muscle relaxants and physical therapy. On February 3, 2012, Dr. Dawson released the Claimant to work driving with a 50-pound intermittent lifting restriction. Dr. Dawson reiterated these restrictions on September 14, 2012.

The Employer sent the Claimant for an independent medical evaluation (IME) with Dr. Robert Gordon, who examined the Claimant several times. At the last IME on July 17, 2012, Dr. Gordon opined that the Claimant had recovered from his injuries and did not impose any restrictions on the Claimant's ability to work. Dr. Gordon opined the Claimant needed no further care.

In March of 2011, the Claimant was laid off from the Employer. At the Formal Hearing, Mr. Rick Rapolla, the Claimant's supervisor, testified the Claimant and others were laid off as a contract had ended. The Claimant was offered another job with a start date of March 12, 2012 with another employer. That offer was rescinded as the job was given to another individual.

The Employer voluntarily paid temporary total disability benefits from January 14, 2011 through March 12, 2012. From May 7, 2011, the Claimant received unemployment benefits in the amount of $359.00 on a weekly basis. The Employer filed a Notice of Final Payment of Compensation Benefits on March 15, 2012.

A Formal Hearing was held on November 15, 2012. The Claimant sought an award of temporary partial disability from January 14, 2011 to the present and continuing. The Employer sought a dollar for dollar credit for unemployment benefits received. The issues raised were the nature and extent of the Claimant's disability, if any, the appropriate calculation of weekly benefits due to the Claimant, whether or not the Employer timely controverted the claim for benefits pursuant to D.C. Code § 32-1515, and whether the Claimant is entitled to vocational rehabilitation under the Act. A Compensation Order was issued on October 25, 2013 which granted the Claimant's claim for relief, in part, granting the Claimant's request for temporary partial disability benefits and vocational rehabilitation services. The ALJ further stated that the award of disability benefits was to be based "upon the difference between his average weekly wage of $685.33, at the compensation rate of $456.89, and the dollar amount of unemployment benefits he has received." CO at 11. The ALJ denied the Claimant' request for penalties.

The Employer timely appealed the CO to the CRB on November 22, 2013. The Employer argues the award of disability benefits was in error as the Claimant was released to perform his pre-injury job and further that the award of temporary partial disability was in error as it is not

consistent with the facts of the case. In other words, the Employer urges that the correct disability benefits that should have been pursued, and ultimately denied, are temporary total disability benefits.[1]

The Claimant opposed the Employer's Application for Review and cross appealed.[2] The Claimant argues in opposition to the Employer's Application for Review that the ALJ's finding of temporary partial disability benefits is supported by the substantial evidence in the record and should be affirmed. In his cross appeal, the Claimant argues that the unemployment credit should take into consideration taxes that the Claimant pays out of unemployment.[3] The Employer opposes the cross appeal, arguing that as the Claimant did not raise this theory below, it is improper for the CRB to consider this argument.

THE STANDARD OF REVIEW

The scope of review by the CRB 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. S*ee* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES,* 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id*. at 885.

DISCUSSION AND ANALYSIS

The Employer first argues that the CO erred when finding the Claimant was temporarily and totally disabled. The Employer argues that the Claimant "did not present a *prima facie* case that he lacked the physical ability to engage in his pre-job duties." Employer's argument at 9. The Employer argues that as the Claimant's restrictions and his job duties are compatible and that his current wage loss is not due to his injury, but due to his lay off. The Claimant, in response, argues that the ALJ found the Claimant to be under more restrictions than simply heavy lifting and that finding is supported by the facts in the record.

When it comes to determining the nature and extent of disability, it is well accepted in this jurisdiction that the claimant bears the burden of proving entitlement to the level of disability benefits sought under the Act, as there is no presumption as to the nature and extent of

[1] The Employer did not appeal the award of vocational rehabilitation.

[2] The Claimant filed a motion to extend time within which to file a cross application for review and opposition to the Employer's Application for Review. This motion was granted by Chief Administrative Appeal Judge Lawrence Tarr on December 3, 2013. The Claimant was directed to file its response and any cross claim by December 17, 2013. The Employer was then allowed five days from the date of receipt of the Claimant's filing to file a memorandum in opposition thereto. The Employer filed its opposition to the Claimant's cross-application for review on December 26, 2013, ten days after the Claimant's filing. While the Employer's response was untimely, the Claimant has not opposed the late filing and we can ascertain no prejudice to the Claimant. The Employer's opposition to the Claimant's cross appeal will be considered.

[3] The Claimant did not appeal the denial of penalties.

a claimant's disability. *Dunston v. DOES,* 509 A.2d 109 (D.C. 1986). Thus, a claimant must establish both the nature of his or her disability, *i.e.* whether it is temporary or permanent, and the extent thereof, and whether the disability is partial or total. Concerning the extent of disability, the District of Columbia Court of Appeals (DCCA) noted in *Logan v. DOES,* 805 A.2d 237 (D.C. 2002) that "[A] claimant suffers from total disability if his injuries prevent him from engaging in the only type of gainful employment for which he is qualified." *Logan* at 241, citing *Washington Post v. DOES,* 675 A.2d 37, 41 (D.C. 1996). Total disability does not mean absolute helplessness and the claimant need not show that he is unable to do any work at all. However, if he is so injured that the only services he can perform are of such limited quality, dependability, or quantity that a reasonably stable market for those services does not exist, he may be classified as totally disabled. *Id.*

In *Logan*, the DCCA had laid out a burden shifting analysis to be followed when considering the issue of nature and extend of disability within the context of a claim for wage loss benefits. Specifically,

> 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. District of Columbia Dep't of Employment Servs.*, 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":
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> (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.
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> 502 A.2d at 1031 n.4 (footnote omitted).

Logan, supra at 242-243.

Keeping the burden shifting scheme outlined in *Logan,* we turn to the Employer's argument. Relevant to the Employer's argument, the CO made several findings of fact:

> Claimant, whose date of birth is October 26, 1968, worked for Employer as a construction laborer in the "Maintenance of Traffic [MOT] Technician" position

> for three years before his work accident. His usual work duties included driving a "crash" truck, flagging, climbing, and throwing cones. Claimant's usual work duties required driving and standing for most of his work shift, as well as climbing up and down on trucks, bending, reaching and heavy lifting. On a regular basis, he dispersed cones weighing 15.84 lbs. On January 13, 2011, Claimant was injured at work when the company truck he was driving was rear-ended by another vehicle.
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> By February 3, 2012, Dr. Dawson cleared Claimant for driving capacity with 50-pound lift intermittently. CX 6. Claimant did not see Dr. Dawson between February 3, 2012 and September 14, 2012.
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> Claimant is medically restricted from performing the full duties of his usual employment, and has not returned to his pre-injury duties with Employer. No suitable alternative employment has been made available to Claimant. (Footnote omitted.)
>
> Claimant was laid off by Employer in March of 2011; his employment contract of hire, with Employer, ended by March 4, 2011. HT 37-38, 50. Claimant attempted to return to light duty work when he was medically released to do so, but Employer did not offer him any suitable alternative employment. HT 26.
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> Claimant was offered a job with a company called MCI, with a start date of March 12, 2012. The job entailed cleaning buses, with prospective duties as a driver. Employer terminated Claimant's wage loss benefits effective March 12, 2012; however, MCI hired someone else and Claimant was not given the job. HT 39-41.

CO at 3-4.

Furthermore, the CO found that,

> The record, including the testimony of Claimant as well as medical and physical therapy notes and reports from his treating medical providers, shows findings of significant physical impairment, related to the 2011 work injury, which affected Claimant's ability to perform his usual work duties.

CO at 6.

We cannot reconcile the several contradictory statements above. The findings of fact acknowledge that the Claimant was released to work to drive with the only restriction being no lifting over 50 pounds. According to the job duties outlined in the findings of fact, the limitations do not inhibit the Claimant from performing this job. We are also uncertain as to what "significant physical impairments" the ALJ is referring to above and beyond the restrictions outlined by the treating physician, Dr. Dawson.[4]

[4] For instance, a review of the deposition transcript reveals the following testimony from Dr. Dawson, regarding his most recent evaluation of the Claimant:

> Well, the patient has been improving. He still had the findings of the spasm or stiffness, lower lumbar levels. But power, much better through the back on extension. And he had no major

We are forced to remand the case for the ALJ to reconcile the above findings of fact and apply the burden shifting scheme outlined in *Logan*, taking into consideration the Claimant's job duties and physical requirements, the physical restrictions as outlined by the treating physician, the job offer, and the Claimant's testimony. Until such time, we cannot determine whether or not the award of disability benefits is supported by the substantial evidence in the record or in accordance with the law.

We also agree with the Employer's argument that the award for disability benefits needs to be clarified. The Claimant was seeking temporary partial disability, arguing that unemployment benefits constitute wages and as such, the Claimant's disability was only partial. As discussed below, we reject this argument and the Claimant's opposition that the award of temporary partial disability is supported by the substantial evidence in the record. The ALJ concluded the Claimant is temporarily and partially disabled and then seemingly awards benefits based on a formula that reflects a conclusion that the Claimant is temporarily and totally disabled. This is in error. As we are remanding for a correct determination of the nature and extent of the Claimant's disability under *Logan*, as discussed above, the ALJ is directed to clarify the award, if any, after further consideration of the nature and extent of the Claimant's disability.

This leads us to the Claimant's cross appeal. The Claimant argues that the unemployment credit should take into consideration the Claimant's tax liability. The Employer opposes, stating that pursuant to *Capital Hilton Hotel v. DOES*, 565 A.2d 981, (1989), the Claimant cannot bring forth a new argument not presented at the Formal Hearing.

First, we must note that the CO correctly relies upon the CRB's decision in *Beckwith v. Providence Hospital*, CRB No. 07-138, AHD No. 06-139 (September 7, 2007) when determining that the Employer is entitled to a dollar for dollar credit for unemployment benefits paid. In *Young v. J.J Maintenance*, CRB No. 08-225, AHD No. 08-253 (January 29, 2010), the CRB stated,

> In *Beckwith***,** the CRB acknowledged that while unemployment benefits are not advance payments of compensation within the meaning of D.C. Official Code § 32-1515(j), the Director has held, and the CRB has affirmed, that an employer is nevertheless entitled to a credit for an employee's receipt of unemployment benefits. *Id.* citing *Stanford v. Cary International, Inc.,* Dir. Dkt. No. 99-68, OHA No. 99-144, OWC No. 533475 (April 30, 2002), and *Flanagan v. Auger Enterprises,* Dir. Dkt. No. 94-65, H&AS No. 92-714, OWC No. 198453 (May 11, 1995). The CRB then clarified the employer was entitled to the credit, not because unemployment benefits qualify as advance payments of compensation but to prevent an employee from receiving a double recovery of monies form an employer. *Watts v. Guardian Service Group,* CRB No. 07-55, AHD No. 05-053 (May 18, 2007).

> motor findings to the lower extremities. I felt that he was showing improvement. And he's taking the medication we suggested on his own, regular bicycle exercise program, which I recommended, written out for him. He's followed that. And I think he's been getting some benefit from that.

Claimant's exhibit 1 at 43-44.

The CRB in *Beckwith* concluded by holding:

> "Thus, not only is an employer's entitlement to a credit for an employee's receipt of unemployment benefits during the disability period well settled in this jurisdiction as a result of prior Agency holdings, such a credit supports the policy against a double recovery and the impropriety of duplicative benefits, while ensuring that an injured employee does not receive more money under wage-loss legislation while not working than that employee earned before he or she was injured."

Beckwith at 4.

We reiterate our rationale quoted above. The Claimant's argument seems to stem from the CO's discussion of the dissent in *Young*.[5] However, as we quoted with approval in *Beckwith*, Professor Larson explained:

> Wage-loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now, if a worker undergoes a period of wage loss due to all three conditions, it does not follow that he or she should receive three sets of benefits simultaneously and thereby recover more than his or her actual wage. The worker is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit. This conclusion is inevitable, once it is recognized that workers' compensation, unemployment compensation, nonoccupational sickness and disability insurance, and old age and survivors' insurance are all parts of a system based upon a common principle.

Larson's Workers' Compensation Law, § 9-157.01.

Under the Act, the Claimant is entitled to two thirds of his or her pre-injury average weekly wage while disabled. The Claimant, when receiving both unemployment benefits and workers compensation benefits receives more than two thirds of his average weekly wage. The receipt of unemployment compensation offsets the wage loss the Claimant suffers as a result of a work related injury. With the receipt of workers' compensation benefits and unemployment benefits simultaneously, the workers' wage loss is reduced. As the Director before us and several CRB panels have reasoned, "such a credit supports the policy against a double recovery and the impropriety of duplicative benefits, while ensuring that an injured employee does not receive more money under wage loss legislation while not working than that employee earned before he or she was injured." *Beckwith, supra* at 5. Thus, the Employer is entitled to a dollar for dollar credit for unemployment benefits received to be deducted from the Claimant's temporary total disability benefits.

[5] The CO erroneously identifies this dissent as part of the *Beckwith* decision. We must point out there was not a dissent in *Beckwith*.

CONCLUSION AND ORDER

The October 25, 2013 Compensation Order is not supported by the substantial evidence in the record and is not in accordance with the law. It is VACATED and REMANDED for further findings of fact and consideration of the Claimant's disability under the burden shifting scheme enunciated in *Logan* and award any benefits the Claimant is entitled to after further consideration.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

March 13, 2014
DATE