

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-120

EARL JONES,

Claimant- Respondent,

v.

WASHINGTON METROPOLITAN TRANSIT AUTHORITY,

and

CAMBRIDGE INTEGRATED SERVICES.

Employer/Carrier - Petitioner.

Appeal from a Compensation Order of
Administrative Law Joan E. Knight
OHA No. 09-318, OWC No. 648010

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2011 DEC 12 PM 10 45

Benjamin T. Boscolo, Esquire, for the Claimant
Donna Henderson, Esquire, for the Employer

Before HEATHER C. LESLIE,¹ MELISSA LIN JONES, and HENRY 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) of the October 20, 2011, Compensation Order on Remand² (COR) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication section³ of the District of Columbia Department of Employment Services (DOES). In that COR, the ALJ granted the Claimant's request for temporary total disability benefits from April 15, 2008 to December 16, 2008 and from March 10, 2009 through the present and continuing, causally related medicals and interest. We VACATE IN PART and REMAND.

¹ Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

² *Jones v. WMATA*, AHD No. 09-318, OWC No. 648010 (October 20, 2011).

³ Formerly known as the Administrative Hearings Division.

BACKGROUND AND FACTS OF RECORD

On February 26, 2008, Mr. Earl Jones injured his right knee when it was struck by a fare-box keypad. Conservative treatment was unsuccessful, and on December 12, 2008, Mr. Jones underwent arthroscopic surgery.

The Employer voluntarily paid Mr. Jones temporary total disability benefits from February 27, 2008 to April 13, 2008 and from December 18, 2008 to March 8, 2009. Mr. Jones applied for a Formal Hearing to request additional temporary total disability benefits from April 15, 2008 to December 16, 2008 and from March 10, 2009 to the date of the formal hearing and continuing.

Following the Formal Hearing, ALJ issued a Compensation Order (CO). The ALJ found the right knee injury to be causally related to the accident at work until March 10, 2009. The CO granted Mr. Jones' request for temporary total disability benefits but only for the closed period of April 15, 2008 to December 16, 2008. Temporary total disability benefits thereafter, from March 10, 2009 to the present and continuing were denied.

The Claimant timely appealed to the CRB. After review, the CRB upheld the ALJ's determination that the right knee injury was causally related to the work accident until March of 2009 when the ALJ found more persuasive the Employer's IME opinion that the right knee condition had resolved. The CRB found, however, that the ALJ had intermingled the presumption of compensability and nature and extent analysis. After quoting several passages of the CO, the CRB stated,

Unlike the issue of causal relationship, Mr. Jones had the affirmative duty to present credible evidence of the level of benefits sought without reference to the Presumption; the Presumption simply cannot be considered when determining the nature and extent of a claimant's injury. *Dunston v. DOES*, 509 A.2d 109, 111 (D.C. 1986). Because we are unable to disentangle the ties between the Presumption and the nature and extent of Mr. Jones' injury, the law requires we remand this case.

Jones v. WMATA, CRB No. 10-032, AHD No. 09-318, OWC No. 648010 (March 10, 2011).

A COR was issued on October 20, 2011. In that COR, the ALJ re-analyzed the nature and extent of the Claimant's disability as well as the causal relationship of the right knee injury after March 10, 2009 and awarded the Claimant the entire claim of temporary total disability sought.

The Employer timely appealed.⁴ On appeal, the Employer argues that the law of the case, as affirmed by the CRB, is that after March of 2009 any issues the Claimant has with his right knee

⁴ On November 14, 2011 the Employer submitted a Motion to Remand the case back to OHA prior to issuance of a decision from the CRB. Much of the argument of the Employer centers around dates the Claimant was out of work after March 10, 2009 and post hearing evidence to prove the Claimant was out for reasons unrelated to his injury. We question whether or not this is actually a "Motion to Remand" or whether the Employer is in actuality trying to

are not related to the work injury and thus it was in error in awarding continuing benefits from March 10, 2009 to the present and continuing. The Employer also argues that the ALJ applied the wrong burden of proof when analyzing the nature and extent of the Claimant's disability.

The Claimant argues that the COR is supported by the substantial evidence in the record and should be affirmed.

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. See 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 law of the case doctrine applies with respect to the issue of the Claimant's right knee causation after March 10, 2009. The Employer argues that the CRB affirmed the CO finding that the right knee condition was not causally related to the work injury after March 10, 2009 and thus the ALJ was in error in awarding benefits after this date. We agree.

A review of the original CO, discussed in greater detail in our prior Decision and Order, reveals the ALJ specifically accepted the Employer's IME opinion that after March 10, 2009 that the Claimant's right knee condition was not causally related. The CRB affirmed this ruling, stating, the "ALJ provided specific reasons for rejecting Dr. Meyer's opinion, and we will not disturb her ruling as to causal relationship." *Jones, supra* at 4. This determination is the law of the case. The law of the case doctrine recognizes that "once the court has decided a point in a case, that point becomes and remains settled unless it is reversed or modified by a higher court." *Kritsidimas v. Sheskin*, 411 A.2d 370, 371 (D.C. 1980). The ALJ did not have authority to revisit the causal relationship of the right knee after March of 2009 as it has been affirmed by the CRB in the prior order. As such, that portion of the COR awarding temporary total disability benefits after March 10, 2009 is vacated.

Turning to the Employer's next argument, the Employer argues that the ALJ's ultimate conclusion is in error as the wrong standard of proof was utilized when analyzing the nature and extent of the Claimants disability. We agree.

In the CO, the ALJ described the Claimant's legal burden as to produce "substantial, credible evidence of the disability entitling him to the level of benefits sought (a preponderance of the

introduce new evidence below not previously submitted but which was available. However, in light of our decision, the Employer's Motion is moot.

evidence/more likely than not).” COR at 3. The ALJ recites two different standards of proof for the same issue, the substantial evidence standard and the preponderance of the evidence standard. This is in error. As the District of Columbia Court of Appeals (DCCA) wrote in *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services and Juni Browne, Intervenor*, 926 A.2d 149 (D.C. 2007) (*Browne*):

On the question of the nature and extent of Mr. Browne's disability, the ALJ properly acknowledged that the claimant is not entitled to any presumptions. [citation omitted]; *Dunston v. District of Columbia Dep't of Employment Servs.*, 509 A.2d 109 (D.C. 1986). The worker's compensation act defines disability as a "physical or mental incapacity, because of injury which results in the loss of wages." D.C. Code § 32-1501 (8) [footnote omitted]. Despite the statement by the ALJ in this, and many other cases, that the claimant's burden of proving the extent of a disability is "substantial credible evidence," the correct burden of proof is a preponderance of the evidence [footnote omitted]. *Burge v. District of Columbia Dep't of Employment Servs.*, 842 A.2d 661, 666 (D.C. 2004); *Upchurch v. District of Columbia Dep't of Employment Servs.*, 783 A.2d 623, 628 (D.C. 2001).

Browne, supra, at 149.

Adding to the confusion, as the Employer correctly notes, the COR concludes with the statement,

Claimant has provided sufficient evidence to establish he had residuals precluding a return to his pre-injury employment. Accordingly, it is concluded claimant has made a *prima facie* showing of his continued wage loss.

COR at 6.

We are unclear what the ALJ ultimately means to conclude in the above paragraph. We do note that the DCCA has established a “burden shifting” scheme in which a claimant has the initial burden of demonstrating an injury-related inability to perform the duties of the pre-injury job. After that demonstration is made, or stated another way a *prima facie* case is made, the burden shifts to the employer to either rebut that showing (i.e., demonstrate through medical evidence or otherwise that the claimant is capable of performing that job), or to demonstrate the availability of suitable alternative employment (either through an offer of modified employment with the employer, or the availability of other jobs in the marketplace for which the claimant could compete and likely obtain). Upon making such a showing, the burden reverts to the claimant to rebut employer’s evidence of job availability, which can be done by demonstrating that despite diligence in searching for work, that search has not met with success. *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

We do recognize that the ALJ does seem to begin this burden shifting analysis with regards to the nature and extent of the contested period of April 15, 2008 to December 18, 2008. Specifically, the ALJ found,

Based upon the medical reports presented, it is determined, under the principals of Dunston, Claimant has made a *prima facie* case that he was unable to perform his pre-injury employment duties as a transit bus driver and was temporarily and totally disabled from April 15, 2008 to December 18, 2008.

COR at 5.

It is clear in the preceding paragraphs to this quote that the ALJ did consider the Employer's evidence. However, we cannot tell whether or not the ALJ found the Employer had rebutted the Claimant's *prima facie* case, thus shifting the burden back to the Claimant and are unclear what ultimately the ALJ concludes after engaging in this burden shifting scheme, especially as it relates to the Claimant's physical work capacity. After making the above quoted statement, the ALJ begins to address the period after March 10, 2009 which, as stated above, is in error.

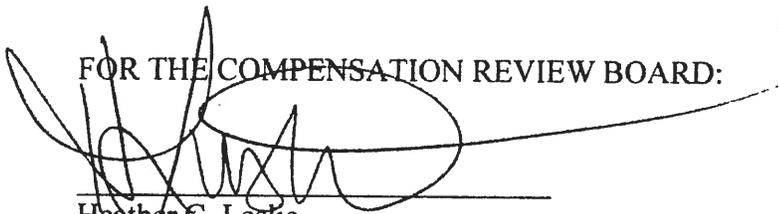
The Employer's final argument is that the rejection of the IME opinions of specific doctors was in error for the closed period of disability benefits. The Employer argues that "the rejection of the opinions of WMATA's doctors because the ALJ found them to be insufficient to rebut the presumption is an error of law." Employer's argument at 5. However, as discussed above and in the prior CRB Decision and Order, the ALJ's determination that the right knee condition was causally related up until March 10, 2009 was affirmed. This included the ALJ's rejection of the opinions of Drs. Draper and Conant as insufficient to rebut the presumption of causality. As the Employer argued, this is the law of the case and we decline to revisit this argument.

We are quick to note however that rejection of the IME opinions on the issue of causation does not necessarily mean that the IME doctor's opinions regarding the nature and extent are rejected also. Upon remand, the ALJ is free to consider all evidence, including the IME opinions, to determine whether or not the Claimant has proven, by a preponderance of the evidence, the level of benefits sought.

Thus, on remand, the ALJ shall address the only contested issue before her, the nature and extent of the Claimant's disability from April 15, 2008 to December 18, 2008. When assessing the nature and extent of the Claimant's disability during this time frame, the ALJ shall utilize the burden shifting scheme as outlined in *Logan, supra*, and determine whether or not the Claimant has proven, by a preponderance of the evidence, he is entitled to the claim for relief sought.

CONCLUSION AND ORDER

The COR of October 20, 2011 is **VACATED IN PART**, and the matter is **REMANDED** to the Office of Hearings and Adjudications for further proceedings consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:


Heather C. Leslie
Administrative Appeals Judge

December 12, 2011

DATE