GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-140

GREGORY PRYOR,

Claimant–Petitioner,

v.

PROVIDENCE HOSPITAL,

Self-Insured Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
AHD No. 11-020, OWC No. 673440

David J. Kapson, Esquire, for the Petitioner

Lisa A. Zelnak, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[1] LAWRENCE D. TARR, AND MELISSA LIN JONES, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

Gregory T. Pryor was employed by Providence Hospital (Providence) as an emergency room Registered Nurse (RN). Mr. Pryor was also employed periodically as an RN by a nursing services placement service, Innovative Staffing Solutions (ISS).

On June 23, 2010, Mr. Pryor injured his neck and left shoulder while trying to lift and move a deceased patient weighing approximately 400 pounds. Mr. Pryor sought treatment in Providence's Occupational Health Services clinic (OHS). He advised the nurse from who he received medical care that he was scheduled to be off work commencing the following day, and was scheduled to

[1] Judge Russell is appointed by the Director of DOES as a Compensation Review Board member pursuant to DOES Administrative Policy Issuances No. 12-01 (June 20, 2012).

return to work June 29, 2010. The OHS nurse noted in his chart that he was to return to work full duty on his next regularly scheduled shift, June 29, 2010. In one of two documents authored by that nurse on that visit, the nurse wrote that the full duty return should be with "caution" when handling patients.

Mr. Pryor did return to work on June 29, 2010, and continued to work until he was terminated on July 20, 2010. The termination was the culmination of a series of disciplinary actions taken in response to four separate incidents involving errors made by Mr. Pryor in administering medications to patients.

Following his termination, Mr. Pryor commenced treatment with Dr. Easton Manderson, who, on August 20, 2010, restricted Mr. Pryor from engaging in "heavy lifting".

Mr. Pryor sought temporary total disability benefits from Providence for wages he claims to have lost from his work at Providence as well as wages he claims to have lost from ISS. Providence declined to pay the claimed disability benefits, and the dispute was presented for resolution to an Administrative Law Judge (ALJ) in the District of Columbia Department of Employment Services (DOES) on May 12, 2011. The ALJ issued a Compensation Order denying the claims on November 8, 2011. The denial of the Providence benefits was premised upon the ALJ's determination that the work injury did not result in a loss of wages, in light of Mr. Pryor's termination for unrelated reasons consisting of misfeasance in performing his work duties. The denial of the ISS claim was premised upon the ALJ's determination that Mr. Pryor had failed to establish the availability of any work that would have been offered to him in the absence of the injury.

Mr. Pryor filed a timely appeal of the Compensation Order with the Compensation Review Board (CRB), to which appeal Providence filed a timely opposition. We affirm.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, 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

Mr. Pryor's claim is premised upon his asserting that he lost wages from two different jobs, being his full time position with Providence, and a part time position with a nurse staffing agency, ISS, as a result of his work injury.

Regarding the claim for lost wages from the Providence position, Mr. Pryor asserts that, under *Logan v. DOES,* 805 A.2d 237 (D.C. 2002), he has made a *prima facie* case of temporary total disability status by his own testimony and by the reference contained in the Progress Note of June 30, 2010, to exercise "caution with patient handling" on returning to work and that the ALJ thus erred in failing to shift the burden to Providence to establish some lesser degree of disability.

The ALJ's denial of the claim for lost wages from Providence is premised upon the ALJ's finding that Mr. Pryor had returned to work from the June 23, 2010 injury on June 29, 2010, and was working full duty and earning his full wages until he was terminated on July 16, 2010, for reasons unrelated to his work injury. The ALJ specifically noted that the termination related to "errors in the administration of medications and patient care" (FF 17) following a "progressive disciplinary process that it applied to all its employees that included a verbal warning, written warning, suspension, and then termination" (FF 16).

The findings concerning the termination are supported by substantial evidence in the form of the testimony of Michaele[2] Johnson, Providence's Senior Director of Nursing as cited by the ALJ, as well as the disciplinary warnings and notices which the ALJ identified (EE 2). Further, the finding that Mr. Pryor was terminated for misfeasance in the performance of his duties, which misfeasance was unrelated to any effect from the work injury, is unchallenged in this appeal.[3]

Assessing whether the findings concerning Mr. Pryor having returned to work on full duty status are supported by substantial evidence presents a slightly more difficult problem. The evidence cited by the ALJ supporting that status is recounted at HT 57. That transcript page is where Ms. Johnson testified that she had never received any word from Providence's Occupational Health Services (OHS) that Mr. Pryor's return to work authorization was restricted, or that it included a "with caution" proviso on patient lifting. Thus, the record does support the proposition that at least as far as Providence was concerned, Mr. Pryor's return to work was without restriction.

Further, there are two medical documents either authorizing or noting the fact of Mr. Pryor's returning to work without any caveat or limitation. The "Employee Health Status Report" authored by the nurse practitioner from whom Mr. Pryor received care at OHS dated June 24, 2010 has the box "Able to return to work" checked, with handwritten language added such that it reads "Able to return to Full Work Duty on (date) next sched[uled] shift – June 29th". The Progress Notes of June 24, 2010 concerning Mr. Pryor's return to work instructions contains as part of the plan, that Mr. Pryor "R[eturn]T[o]W[ork] full duty next sched[uled] shift 6/29/10", and the Progress Note on July 16, 2010 contains reference to Mr. Pryor having in fact done so, reading "RTW full duty (as of 6/29/10)". These medical records are contained within CE 3, which the ALJ cites as supporting his

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[2] Although spelled "Michelle" in the transcript and Compensation Order, the record exhibits contain multiple documents prepared by Ms. Johnson, and in each of them she spells her name the same: "Michaele". We adopt the spelling that she herself uses.

[3] Contrary to the erroneous assertion by Mr. Pryor in his Memorandum to the effect that the most recent medication error had occurred in May 2010, the record demonstrates that the most recent incident occurred June 15, 2010, when Mr. Pryor "signed off that Medication Methadone was given to a patient [...] on June 15, 2010 when medication was not given", and that the June 15 incident was fourth such incident in the record, the previous having occurred September 18, 2009, February 25, 2010, and May 13, 2010 (EE 2).

finding that "The Claimant returned to work on full duty on June 29, 2010, in his usual occupation as an RN", which is Finding of Fact 5 on page 3 of the Compensation Order.

The June 30, 2010 Progress Note, under the plan section, reads slightly differently. After noting that Mr. Pryor complained of "continued soreness and difficult neck range of motion, though improved" since his last visit, it states that Mr. Pryor should (or already has) "RTW full duty; caution with p[atien]t handling".

In this appeal, Mr. Pryor argues that this single reference to exercising "caution" while handling patients constitutes a work restriction, rendering the ALJ's characterization of Mr. Pryor's work status as being "full duty" at the time of his termination erroneous.

The ALJ was clearly aware of this "caution" notation. See, Compensation Order, page 5, first full paragraph, final sentence. The reminder to exercise "caution", when used in conjunction with the phrase "full duty", does not necessarily imply that there are any duties in the normal job that Mr. Pryor could not perform. It is also noteworthy that neither of the other two medical documents referencing the "full duty" return to work contains any such language.

Clearly, the ALJ did not view this reference as constituting a specific medical restriction, and we cannot say that his decision in this regard is arbitrary, capricious, or *per se* irrational. In other words, a reasonable person could view the inclusion of "with caution" as insufficiently specific to constitute a restriction or limitation. Looked at in the light most favorable to Mr. Pryor, the question of whether this notation constitutes a work restriction is at best treacherously vague and highly ambiguous. Given that it is a claimant's burden to establish entitlement to the level of benefits sought, it was Mr. Pryor's obligation to obtain clarification of the meaning of the notation if it was upon the meaning of that phrase that his claim rested.

Thus, we disagree with Mr. Pryor's argument on this. The ALJ's determination that Mr. Pryor had returned to work, full duty, and was so employed when he was then terminated for a series of patient care errors involving the administration of medication is supported by substantial evidence.

Regarding the denial of the ISS claim, the following is found at page 6 of the Compensation Order:

> In this case, as in *Robinson v. DOES,* 824 A.2d 962 (D.C. 2003), Providence has rebutted the presumption of compensability to show that the Claimant's partial wage loss related to his second job, which he did not return to following his June 23, 2010, work injury, was not caused by his work injury. The evidence in the record does not reflect that any disability slip was issued to the Claimant formally placing any work restrictions upon him until he came under the care of Dr. Manderson in August 2010. Therefore, there is no evidence to support the Claimant's testimony that he did not return to work in his second job due to his work injury and medical restrictions that were placed upon him.

The concluding sentence in the above-quoted passage suggests that the ALJ may have misapprehended Mr. Pryor's argument concerning the effect of the injury upon his second job. Mr. Pryor claims that both he and ISS view the "with caution" phraseology in the Progress Note of June

30, 2010 as a work restriction. It is the existence of that supposed restriction that he argues prevented him from working at ISS. See, CE 5, Letter from ISS.

Even if there was some misapprehension, the ALJ ultimately denied this aspect of the claim not on medical grounds. The ALJ ultimately denied the claim on the grounds that Mr. Pryor had failed to demonstrate the availability of any work from ISS post injury, and decided that, in light of the fact that Mr. Pryor hadn't obtained any work from ISS since June 1, 2010, three weeks prior to the injury, and in the five months prior to that he had only worked five days a month for ISS, and given further that the letter from ISS did not assert the availability of any work during the period claimed, Mr. Pryor had failed to demonstrate entitlement to any specific level of lost wages from the second job, regardless of their cause. Compensation Order, page 6 – 7.

It is a claimant's burden to demonstrate entitlement to the specific level of benefits sought, by the preponderance of the evidence and without the benefit of any presumptions. *Washington Metropolitan Area Transit Authority v. DOES. and Juni Browne, Intervenor*, 926 A.2d 149 (D.C. 2007) (*Browne*). The ALJ's determination that Mr. Pryor had failed to adduce evidence of the level of lost wages from ISS, if any, is in accordance with the law.

CONCLUSION

The ALJ's determination that Mr. Pryor had no wage loss from his Providence job because he was terminated for misfeasance unrelated to his work injury is supported by substantial evidence.

The ALJ's determination that Mr. Pryor had failed to demonstrate the existence of a specific level of alleged lost earnings from ISS is supported by substantial evidence.

ORDER

The Compensation Order of November 8, 2011 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

September 17, 2012
DATE