

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
DIRECTOR

COMPENSATION REVIEW BOARD

CRB 14-091

HENRY GLOVER,  
Claimant-Cross-Petitioner/Cross-Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,  
Employer-Cross-Petitioner/Cross-Respondent.

Appeal from a June 24, 2014 Compensation Order by  
Administrative Law Judge Fred D. Carney, Jr.  
AHD PBL No. 12-015A DCP No. 30101082290-0001

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 DEC 16 PM 11:14

Johnnie Louis Johnson III for Claimant  
Corey P. Argust for Employer

Before: LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, MELISSA LIN JONES and  
JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

LAWRENCE D. TARR, for the Compensation Review Board. Melissa Lin Jones, *concurring*.

DECISION AND REMAND ORDER

Henry Glover (“Claimant”) and District of Columbia Public Schools (“Employer”)<sup>1</sup> have  
appealed the June 24, 2014 Compensation Order issued by an Administrative Law Judge  
 (“ALJ”) in the Administrative Hearings Division (“AHD”) of the Office of Hearings and  
Adjudication.

In the Compensation Order, the ALJ entered an award for right shoulder surgery and reinstated  
Claimant’s temporary total disability benefits from February 10, 2012 to the present and  
continuing.

Employer has appealed the awarded medical and indemnity benefits. Claimant has appealed the  
ALJ’s failure to award an attorney’s fee and costs.

<sup>1</sup> Employer’s workers’ compensation program is administered by the D.C. Public Sector Workers’ Compensation  
Program (“PSWCP”). Unless otherwise specified, we shall use “Employer” to mean the PSWCP.

As will be discussed, the CRB vacates the ALJ's decision authorizing surgery because it is not in accordance with the law since Employer has not issued a Notice of Determination denying that surgery. The CRB vacates the decision reinstating benefits because it is not supported by substantial evidence in the record. The CRB affirms the ALJ's failure to award an attorney fee.

### **Facts of Record and Procedural History**

Claimant worked for D.C. Public Schools as a bus driver. On October 7, 2010 he injured his right shoulder, neck, and back when he fell after leaning back in a chair. Claimant went home, rested, returned to work, and was able to complete his afternoon route.

The following day, October 8, 2010, Claimant received emergency room treatment at the Veteran's Administration hospital. After x-rays failed to show any fractures, Claimant was prescribed medication and advised to take fourteen days of bed rest.

Claimant came under the care of Dr. Robert Collins, an orthopedic surgeon, on October 19, 2010. Dr. Collins found Claimant disabled from all work until January 26, 2011 when he released Claimant to light duty. On February 16, 2011 Dr. Collins released Claimant to regular work, but noted Claimant might experience some discomfort that would improve over time.

Although Dr. Collins' opined Claimant could do his regular work, Claimant returned to a light duty position on February 17, 2011. Claimant stopped working on March 9, 2011 after Claimant advised his supervisor that he was in pain and was told to go home.

Claimant, with Employer's permission, changed treating physicians to another orthopedic surgeon, Dr. Sankara R. Kothakota, on February 28, 2011, although Dr. Collins examined Claimant on March 2 and March 21, 2011. Neither party submitted the report from Dr. Kothakota's first examination. The first report in evidence from that doctor is dated March 18, 2011 and noted that Claimant was experiencing pain, was scheduled for an MRI at the Veteran's Hospital, and that Claimant told Dr. Kothakota that he had been sent home from work.

Dr. Robert Gordon, orthopedic surgeon, examined Claimant at Employer's request on April 19, 2011. The last entry states "IMPRESSION: Multiple subjective complaints."

Dr. Kothakota examined Claimant again on May 4, 2011. He reported that the MRI showed a partial thickness in Claimant's rotator cuff and that Claimant only could do "sedentary type" work.

Dr. Collins examined Claimant on October 19, 2011 and October 31, 2011. He wrote an Addendum on November 21, 2011 that stated

(Claimant) does have some degenerative arthritic changes of his right shoulder which may get some irritation if he is doing overhead work. However, this would not bar him from going back to full duty. I would place no restrictions on him to full duty. He is released to full duty at this time as far as his injury of 10/07/2010 is concerned.

After receiving this report, Employer notified Claimant on November 30, 2011 that he should return to work. The letter noted that Claimant previously reported to work with his right arm in a sling, although no doctor had told him to wear a sling. The letter further stated that Claimant's supervisor, Drew Morton, was told of the full duty release and that Claimant should follow up with Mr. Morton "to address a return to work date."

Employer sent Claimant a Notice of Determination Regarding Temporary Total Disability (NOD) on January 6, 2012 that advised Claimant it was ending his temporary total disability benefits because he did not return to full duty as requested. The NOD stated:

*Your public sector workers' compensation benefits for continuing temporary total disability benefits are hereby **TERMINATED**.*

Your temporary total disability benefits have ended due to [sic] failure to return to full duty. You were advised in writing by nurse case manager Marlise Skinner that your treating physician, Dr. Robert Collins released you to return to full duty... Dr. Collins stated that you have some degenerative arthritic changes of his right shoulder which may cause some irritation if you are doing overhead work but that this would not bar you from going back to full duty. On November 30, 2011 a letter was mailed to your home along with Dr. Collins [sic] addendum report. You were asked to contact Drew Morton at OSSE to work out a return to work date. To date, you have not contacted Mr. Morton. I called your home on December 14, 2011 and again on December 21, 2011 and each time I left a voice message in which I asked that you contact me to discuss your return to work status. To date, you have not responded to my calls.

Claimant requested reconsideration of the NOD. Employer issued a Final Decision on Reconsideration ("FDOR") on February 10, 2012. The FDOR upheld the decision to end benefits. Claimant filed a request for a formal hearing with AHD and the hearing was held on November 19, 2012.

In his June 24, 2012, Compensation Order the ALJ held:

Based on the weight of the evidence, I find Claimant had [sic] continuing disability to his right shoulder as a result of the work injury. I find Claimant would benefit from the right shoulder surgery as recommended by his treating physician. D.C Code § 1-623.03.

Employer has failed to show by a preponderance of the evidence that Claimant voluntarily limited his income by not performing light duty in that Claimant reported to duty and was sent home.

IT IS HEREBY ORDERED that Claimant's claim for medical benefits for treatment related to his right shoulder is GRANTED. IT IS FURTHER

ORDERED that Claimant's claim for wage loss benefits is HEREBY GRANTED.

Employer timely appealed these determinations. Claimant timely filed an Opposition.

In his Opposition, Claimant also argued that the ALJ's award be "modified and corrected to grant Claimant Henry Glover's claim for attorney's fees and costs." The CRB has treated this request as Cross Application for Review. Employer filed an opposition to Claimant's Cross Application for Review.

#### ANALYSIS

Employer first argues that the ALJ did not have jurisdiction to consider any claim for additional medical benefits, such as right shoulder surgery. We agree. D.C. Code §1.623 (b) (1) requires that Employer make a determination with respect to a claim before an injured worker may obtain a formal hearing on that claim.

Here, Claimant did not file a claim for right shoulder surgery nor has Employer issued a determination denying right shoulder surgery. As clearly stated in the NOD, the Employer terminated Claimant's temporary total disability benefits because of Claimant's alleged "failure to return to full duty."

Moreover, at the beginning of the formal hearing the ALJ discussed the prehearing order and acknowledged that the hearing concerned temporary total disability benefits:

Now back to the prehearing order. The contested matters are the nature and extent of Claimant's disability. Claimant seeks temporary total disability from temporary total disability benefits from February 10<sup>th</sup>, 2012 to the present and continuing. Claimant list there their [sic] witnesses, exhibits, Employer's witnesses and exhibits.

And the prehearing order seems to be acceptable. So I am going to sign it. And it will govern the focus of this hearing.

HT at 9.

While there was a general discussion at the hearing about medical benefits, at no time was there any discussion about shoulder surgery and more importantly, at no time did Employer issue a NOD denying surgery.

Therefore, the ALJ did not have jurisdiction to consider the claim for shoulder surgery.<sup>2</sup>

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<sup>2</sup> We should note that in analyzing this issue at page 8 of the CO, the ALJ applied the treating physician preference. In a decision issued after the CO, the District of Columbia Court of Appeals held that when City Council amended the D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq* (Public Sector Workers' Compensation Act) in 2010, the clear and unmistakable intent on the part of Council was to accord equal weight to the testimonies of both treating and non-treating physicians in public-sector cases. *D.C. Public Schools v. DOES and Proctor, Intervenor*, 95 A.3d 1284 (D.C. 2014).

With respect to whether Employer properly terminated Claimant's temporary total disability benefits, the ALJ's held Employer did not meet its burden because

Employer failed to show by a preponderance of the evidence that Claimant voluntarily limited his income by not performing light duty in that Claimant reported to duty and was sent home" also is not supported by substantial evidence in the record.

The ALJ based this decision on his finding that Claimant returned to work in late November, 2011 and was sent home by his supervisor in early February 2012. In the Discussion section the ALJ wrote:

Claimant testified that on November 30, 2011, Cathy D. Clanton, Claims Examiner sent Claimant Dr. Collins November 21, 2011, report Ms. Clanton requested that Claimant contact Drew Morton about a date to return to work. Claimant testified that he did return work and he was provided light duty shredding documents. (HT 48). Claimant testified he sat in a chair and fed papers in the shredder using one hand. Claimant testified he worked a few days until early February 2012 when he was sent home by a superior because he was visibly ill. (HT 49).

\* \* \*

There is nothing in the record to rebut Claimant's testimony that he did return to [sic] after being released to return to work by his treating physician. Therefore it is determined that Claimant has shown that he did return work and was sent home for medical reasons by his superiors.

The ALJ's finding that Claimant was sent home in February 2012 conflicts with the ALJ's earlier finding that

Claimant returned to work light duty on February 17, 2011. He was given a sedentary job which included sitting in a chair and shredding documents using one hand.

CO at 3.

Additionally, the ALJ's finding that "there is nothing in the record to rebut Claimant's testimony" -- that Claimant returned to work and was sent home in February 2012 is inaccurate.

EE8, which are copies of Claimant's timesheets, show Claimant only returned to work from February 17, 2011 to March 9, 2011. The NOD said Claimant failed to return to work in November and December 2011. Moreover, the ALJ's finding that Claimant was sent home in February 2012 conflicts with the fact that Claimant requested reconsideration of the NOD on January 10, 2012.

Moreover, it is unclear whether the ALJ applied the proper burden shifting analysis with respect to whether Employer properly terminated Claimant's temporary total disability benefits.

At page 5 of the CO, the ALJ stated:

Having produced evidence that Claimant was released but failed to return to work, Employer met its initial burden of production to produce substantial evidence of a change in condition *i.e.* that Claimant was able to return to work.

The burden then shifted to Claimant to show by a preponderance of the evidence that he continues to suffer with an impairment of condition resulting from his employment that is causing him a wage loss, and that he did not voluntarily separate from suitable employment. Preponderance of evidence is defined as the greater weight of the evidence not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force or a superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is sufficient to incline a fair and impartial mind to one side of the issue rather than the other. *MCCAMY V. DOES*, 886 A.2d 543 (D.C. 2008).

The CRB, in its *en banc* decision *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004 (November 12, 2014) held the Employer first must produce reliable, probative and current evidence of a change prior to the date benefits were modified or terminated. If the Employer satisfies this burden, then the burden shifts to the Claimant who then must produce substantial evidence that his condition has not changed at this second step in the analysis. Contrary to the analysis in the CO, Claimant is not required to establish this by a preponderance of the evidence. Thereafter, if Claimant meets his burden, then the employer has the burden of proving by a preponderance of the evidence that claimant's benefits should be modified or terminated.

The Mahoney decision stated:

In conclusion, we find that once the government-employer has accepted and paid a claim for disability benefits, the employer has the burden of proving by a preponderance of the evidence that conditions have changed such that the claimant no longer is entitled to the benefits.

The employer first has the burden of producing current and probative evidence that claimant's condition has sufficiently changed to warrant a modification or termination of benefits. If the employer fails to present this evidence then the claim fails and the injured worker's benefits continue unmodified or terminated.

If the employer meets its initial burden, then the clamant has the burden of producing reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits. If this burden is met, then the

evidence is weighed to determine whether employer met its burden of proving by a preponderance of the evidence that claimant's benefits should be modified or terminated.

*Mahoney* at 8-9.

In addition to making all findings of fact and conclusions of law that the ALJ deems necessary on remand, in the furtherance of judicial economy, we should point out several other matters in the CO that the ALJ needs to explain, clarify, or correct in the event he relies on them in the COR.

- the CO misstated the medical opinion of Dr. Collins and conflated two medical reports. At page 5, the CO states

On November 21, 2011, Dr. Collins, stated that Claimant has a some degenerative arthritis changes of the right shoulder, which may get some irritation if Claimant is performing overhead work, but would not bar you from going back to full duty work. Dr. Collins restricted Claimant from driving a bus. (CE 1F).

The November 21, 2011 report isn't CE 1F. More importantly, contrary to the ALJs finding, Dr. Collins did not restrict Claimant from driving a bus. On November 21, 2011, Dr. Collins opined:

(Claimant) does have some degenerative arthritic changes of his right shoulder which may get some irritation if he is doing overhead work. However, this would not bar him from going back to full duty. I would place no restriction on him to full duty. He is released to full duty at this time as far as his injury of 10/07/2010 is concerned.

EE4 and CE 1.<sup>3</sup>

- The CO misstated the date of accident and the body parts injured. At page 2, the CO states

The parties have stipulated, and I accordingly so find, that an Employer/Employee relationship existed between the parties. Claimant injured his left knee on February 7, 2011, while in the performance of his work duties, notice and claim were timely, and Claimant received wage loss and medical benefits from November 3, 2010 to February 10, 2012.

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<sup>3</sup> Both parties submitted the November 21, 2011 report from Dr. Collins. By referring to CE 1F it appears the ALJ confused Dr. Collins' November 24, 2010 report with that doctor's November 21, 2011 report.

The date of accident was October 7, 2010 not February 7, 2011 and the parties never stipulated Claimant injured his left knee.<sup>4</sup>

Lastly, it is well settled in this jurisdiction that a claimant's entitlement to receive temporary total disability benefits may end when claimant is released to regular work.

Claimant was released to full duty on February 17, 2011 by then treating physician Dr. Collins. Claimant then was permitted to switch treating physicians to Dr. Kothakota who first reported on March 18, 2011 that claimant was sent home because he was in pain and then reported on May 4, 2011 that claimant only could work light duty. Similarly on November 21, 2011, Dr. Collins again reported that Claimant could do his full duty work.

On remand, the ALJ should discuss whether Dr. Collins' releases to full duty were sufficient to support Employer's decision to end temporary total disability benefits, and if not, why not.

In light of our decision, Claimant's challenge to the ALJ's failure to award an attorney's fees is moot. Additionally, Claimant has failed to follow the proper procedure. *See*, D.C. Code § 1-623.27 and 7 DCMR § 132.1.

As the CRB held in *Bonaparte v. DC Office of Tax and Revenue* CRB No. 13-152, AHD No. PBL 12-047 (February 12, 2014),

The regulations governing the [Public Sector Workers' Compensation Act], however, do provide that "Claims for representation of a claimant shall be submitted in writing to the ALJ, if a hearing has been requested, within 30 days of the issuance of a decision under subsection 130.12." 7 DCMR § 1321.

7 DCMR 130, including § 130.12, governs the hearing process before DOES ALJs. Section 130.12 provides that, following a formal hearing, "the ALJ shall then issue an order to reverse, modify, affirm or remand a determination rendered by the claims examiner". Thus, under the regulations, a claim for an attorney's fee must be filed within 30 days of the *issuance* of a Compensation Order. There is no provision either permitting or requiring the extension of that time period. There is no regulatory or statutory provision permitting or requiring that the fee petition be filed upon the expiration of the time for filing an appeal, nor is there any provision in the PSWCA or the regulations permitting or requiring that the time for filing a request for an attorney's fee be made only after the Compensation Order becomes final.

However, where a fee is sought to be assessed against the employer following the "successful prosecution of a claim" that has been denied initially by the Public

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<sup>4</sup> At page 5 of the CO the ALJ again misstated the accident date when he wrote "Claimant contends that he is temporary totally disabled as a result of the October 7, 2011 work injury."

Sector Workers' Compensation Program (PSWCP), but granted ultimately by an ALJ following a formal hearing, D.C. Code § 1-623.27 provides:

If a person utilizes the services of an attorney-at-law in the successful prosecution of his or her claim under § 1-623.24 (b) [the formal hearing process before an ALJ], or before any court for review of any action, award, order, or decision, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorneys fee, not to exceed 20% of the actual benefit secured, which shall be paid directly by the Mayor or his designee to the attorney for the claimant in a lump sum within 30 days after the date of *the compensation order*. (Italics added).

This language is somewhat ambiguous, inasmuch as it refers to not one but two "compensation orders", the first being "the award of compensation" following the formal hearing, and the second being "a compensation order" for the attorney's fee award itself. While there is no time period set forth in which a fee petition is required to be filed, it is mandated that the fee itself be paid within 30 days of "the compensation order". Despite the fact that the D.C. Code § 1-623.27 (c) makes acceptance of a fee that is not first approved as part of "an order" a criminal misdemeanor, the procedural details as to how such an order is obtained are largely left unstated. Obviously, to not run afoul of the law, a request for such an award of an attorney's fee is a necessity. Since the mandate of payment of the attorneys fee award requires that it be made "within 30 days of the compensation order", the most sensible meaning of the "the compensation order" is the separate "compensation order" awarding the fee.

Here, there has not been a successful prosecution of a claim nor has Claimant's attorney properly requested for an attorney's fee within 30 days of issuance of the CO.

#### **CONCLUSION AND ORDER**

The ALJ's failure to award an attorney's fee is **AFFIRMED**. The ALJ's decision authorizing surgery is not in accordance with the law because Employer has not issued a NOD denying that surgery. That decision is **VACATED**. The ALJ's decision reinstating Claimant's temporary total disability benefits is **VACATED** because it is not supported by substantial evidence in the record.

This matter is REMANDED to the ALJ for a new decision consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



LAWRENCE D. TARR  
*Chief Administrative Appeals Judge*

December 16, 2014

DATE

MELISSA LIN JONES *concurring*:

Based upon principles of *stare decisis*, this majority rightly relies upon *Mahoney* for the current interpretation of the burdens of production and proof in public sector workers' compensation cases; however, *Mahoney* was not without dissent:

[A]s the majority points out,

once a claim for benefits has been accepted by the District of Columbia government's administrator of the Act, and has paid benefits for that claim, the burden of proof which normally rests with a claimant to establish a causal relationship between a condition and the claimant's employment is shifted to the employer to demonstrate a change of conditions has occurred sufficient to terminate or otherwise reduce those benefits.<sup>[5]</sup>

This burden, however, is not one of proof but an "initial burden," as the majority also notes but discounts:

It is well-settled in this jurisdiction that once the DCP [footnote omitted] (the agency-employer) accepts an injured worker's claim as compensable, the DCP bears the initial burden to demonstrate a change in the injured worker's medical condition such that disability benefits need to be modified or are no longer warranted and must be terminated. [Footnote omitted.] The evidence used to modify or terminate benefits must be current and fresh in addition to being probative and persuasive of a change in medical status. [Footnote omitted.]

The DCP's burden is one of production and requires an evaluation of the DCP's evidence standing alone without resort to

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<sup>5</sup> *Williams v. D.C. Department of Parks and Recreation*, CRB 08-0262, AHD No. PBL 07-029, PBL/DCP No. 761013-0001-2005-0007 (Dec. 13, 2007), nt. 2.

evaluating or weighing the injured worker's evidence in conjunction thereto for if the DCP fails to sustain its burden, the injured worker prevails outright. [Footnote omitted.] However, if the DCP meets its burden, then the burden shifts to the injured worker to show through reliable, relevant, and substantial medical evidence that her physical condition has not changed and that benefits should continue. If the injured worker meets her burden, the medical evidence is weighed to determine the nature and extent of disability, if any.<sup>[6]</sup>

As the District of Columbia Court of Appeals echoed in *Mahoney v. DOES*, (a public sector workers' compensation case involving Mr. Otis Mahoney, not Respondent), "The CRB stated that it agreed that the District had the initial burden to 'present [] persuasive medical evidence to terminate Mahoney's benefits' after which the 'burden then shifted back to [the claimant] to provide proof of an employment related impairment following the termination of benefits.'"<sup>7</sup>

Contrary to the majority's analysis, this situation is unlike the burden requirements in a private sector modification case. Although *Washington Metropolitan Area Transit Authority v. DOES*, (a private sector case) states, "the burden is on the party asserting that a change of circumstances warrants modification to prove the change,"<sup>8</sup> it is important not to overlook that same case also states "The burden may shift once the moving party establishes his case."<sup>9</sup> That shift is paramount here where the prior caselaw says the "initial burden" is on the government. That initial burden is one of production, not proof; only if the government meets that initial burden does the burden of proof shift to the claimant to prove compensability.<sup>10</sup> Then, only once compensability has been established is the medical evidence weighed to determine the nature and extent of the claimant's disability, not entitlement or compensability but the type or amount of benefit owing.

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<sup>6</sup> *Gaston Jenkins v. D.C. Department of Motor Vehicles*, CRB No. 12-098, AHD No. PBL11-049, DCP No. 761019000120060005 (August 8, 2012) (Emphasis added.); see also *Wentworth M. Murray*, 7 ECAB 570 (1955) (Based on the medical evidence, once termination of compensation payments is warranted, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that any disability is causally related to the employment and results in a loss of wage-earning capacity).

<sup>7</sup> *Mahoney v. DOES*, 953 A.2d 739, 742 (D.C. 2008).

<sup>8</sup> *Washington Metropolitan Area Transit Authority v. DOES*, 703 A.2d 1225, 1231(D.C. 1997).

<sup>9</sup> *Id.*

<sup>10</sup> Although prior caselaw states the standard is "substantial evidence," it is clear from *McCamey v. DOES*, 947 A.2d 1191 (D.C. 2008) that where, as in public sector cases, there is no presumption of compensability, the ultimate burden falls on the claimant to prove by a preponderance of the evidence that a claim is compensable.

Instead of the majority's modification analogy, once the government has accepted a claim, the posture is analogous to a private sector case wherein the employer has voluntarily paid benefits and the presumption of compensability has been invoked. In other words, accepting the claim in essence "invokes the presumption" because the government's investigation has led to the conclusion that a claim is compensable; therefore, the initial burden to terminate or modify benefits is on the government to prove through substantial evidence that a change is warranted, and if the government is successful, the burden returns to the claimant to prove entitlement to ongoing benefits by a preponderance of the evidence:

the Employees' Compensation Appeal Board (ECAB) has consistently held that once the employer has accepted a claim for disability compensation and actually paid benefits, the employer must adduce sufficient medical evidence to support a modification or termination of benefits. See Chase, ECAB No. 82-9 (July 9, 1992); Mitchell, ECAB No. 82-28 (May 28, 1983); and Stokes, ECAB No. 82-33 (June 8, 1983). In addition, the Board has held that the medical evidence relied upon to support a modification or termination of compensation benefits, as well as being probative of a change in medical or disability status, shall be fresh and current.

Therefore, while there is no statutory presumption de jure in favor of the claimant's claimed injury being work-related, under this Act unlike the private sector workers' compensation Act, D.C. Code §36-321, the foregoing cited case precedent appears to have established a de facto presumption once a claim has been accepted and benefits paid.<sup>11</sup>

If at any point, the evidence is in equipoise, the party with the burden loses.

For these reasons, the dissent disagrees that

once the government-employer has accepted and paid a claim for disability benefits, the employer has the burden of proving by a preponderance of the evidence that conditions have changed such that the claimant no longer is entitled to the benefits.

The employer first has the burden of producing current and probative evidence that claimant's condition has sufficiently changed to warrant a modification or termination of benefits. If the

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<sup>11</sup> *Williams v. D.C. Department of Corrections*, OHA No. PBL93-077B, ODC No. 8921 (June 29, 2001). Admittedly, this quote is from a Compensation Order with no precedential value, but it is cited as an appropriate explanation of the burden, not as precedent for the burden.

employer fails to present this evidence then the claim fails and the injured worker's benefits continue unmodified or terminated.

If the employer meets its initial burden, then the claimant has the burden of producing reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits. If this burden is met, then the evidence is weighed to determine whether employer met its burden of proving by a preponderance of the evidence that claimant's benefits should be modified or terminated.

Rather, the dissent takes the position that if the government has accepted a claim for disability compensation benefits, the initial burden to terminate or modify benefits is on the government to prove through substantial evidence that a change is warranted; if the government is successful, the burden returns to the claimant to prove by a preponderance of the evidence entitlement to ongoing benefits as well as the nature and extent of any disability.<sup>[12]</sup>

As a member of the dissent in *Mahoney*, I write this concurring opinion to recognize that *Mahoney* is the law and must be applied in this case, but I still do not agree with the reasoning in *Mahoney*.

/s/ Melissa Lin Jones  
MELISSA LIN JONES  
*Administrative Appeals Judge*

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<sup>12</sup> *Mahoney v. D.C. Public Schools*, AHD No. PBL 14-004, ORM/PSWCP No. 76000500012005-008 (November 12, 2014) (dissent at pp. 11-14).