# GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

**COMPENSATION REVIEW BOARD**

## CRB No. 10-093

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2011 DEC 23 AM 11 06

**JOSHUA WINKLER,**
**Claimant–Respondent,**

**v.**

**WASHINGTON HILTON HOTEL,**
**Self-Insured Employer—Petitioner**

Appeal from a Compensation Order by
Administrative Law Judge Nata K. Brown
AHD No. 05-502D, OWC No. 600388

Mark L. Schaffer, Esquire, for the Respondent[1]
David M. Schoenfeld, Esquire, for the Petitioner

Before: HENRY W. MCCOY, MELISSA LIN JONES, and LAWRENCE D. TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

## DECISION AND REMAND ORDER

### JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

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[1] At the formal hearing, Claimant was represented by George E. Swegman, Esq., of the same firm, Ashcraft & Gerel, LLP.

## OVERVIEW

This case is before the CRB on the request for review filed by the Employer of the March 5, 2010 Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication section of the Office of Hearings and Adjudication (OHA) of the Department of Employment Services (DOES). In that CO, the ALJ granted Claimant's request for temporary total disability from May 18, 2008 to the present and continuing, with a credit for benefits paid, while determining that Claimant's non-cooperation with vocational rehabilitation was not unreasonable, but was justifiable under the circumstances.

## BACKGROUND FACTS OF RECORD

Claimant sustained an accidental injury on April 10, 2004 that arose out of and in the course of his employment as an engineer maintaining the hotel's power plant. While Claimant previously had neck pain from herniated discs at C5-6 and C6-7, he now had persistent neck pain with pain radiating down his arms.

Claimant underwent an anterior cervical discectomy and fusion at C5-6 and C6-7 to alleviate the radiculopathy on July 9, 2004. While in recovery, Claimant developed a pulmonary embolism, had a filter implanted, and then developed congestive heart failure resulting in two week hospital stay. The neck surgery provided Claimant with considerable relief before progressively worse pain at the base of his neck with radiculopathy returned in early 2005.

Claimant returned to light duty work with Employer who provided workplace accommodations including a helper for heavier tasks. Employer eventually eliminated these accommodations and demanded that Claimant perform all the tasks of his pre-injury job, which he was incapable of doing. After conferring with his primary care physician, Claimant left work in June 2006.

Between May 2006 and June 2007, Claimant worked light duty positions at Grub & Ellis, Consolidated Engineering, and UNICO. Each job ended due to Claimant's inability to stay alert and perform his duties due to chronic pain and the medications he was taking. A July 2007 referral to a neurosurgeon resulted in a recommendation for a cervical laminectomy provided his heart condition improved. Claimant had triple by-pass surgery in March 2009. The second neck surgery has been approved.

Claimant met with a vocational counselor in June 2008, who noted that Claimant had not been released to return to work by any of his physicians. Employer terminated Claimant's benefits on July 8, 2008.

Claimant underwent a Functional Capacity Evaluation (FCE) in October 2008 that indicated he could work eight hours per day at light duty. On January 9, 2009, the vocational counselor closed Claimant's case upon Claimant's representations that he had not been released to return to work and without verifying that statement.

Employer had the vocational counselor prepare a Labor Market Survey on June 3, 2009 that identified 12 positions that allegedly fit the work restrictions set in the FCE report.

In resolving the issues presented, the ALJ found and concluded that Claimant was temporarily and totally disabled and that his reluctance to cooperate with vocational rehabilitation was reasonable. Accordingly, Claimant was awarded temporary total disability benefits from May 18, 2008 to the present and continuing with a credit for benefits paid and causally related medical benefits. *Winkler v. Hilton Hotels Corporation*, AHD No. 05-502D, OWC No. 600388 (March 5, 2010). Employer timely appealed with Claimant filing in opposition.

On appeal, Employer argues that the ALJ's decision that Claimant's non-cooperation with vocational rehabilitation was reasonable, is not supported by substantial evidence in the record, that the ALJ ordered it to pay benefits when it was voluntarily doing so, and that it identified suitable alternative employment. Claimant argues to the contrary and that the Compensation Order (CO) should be affirmed.

## PRELIMINARY MATTER

With regard to the instant case, on March 31, 2011, Employer filed a Motion to Remand and Reopen with the CRB stating that it had acquired new evidence relevant to the issues adjudicated at the formal hearing. In its motion, Employer argues that insofar as the appeal is still pending as of the date of its motion, it has new evidence that goes to Claimant's credibility, his ability to operate heavy machinery, and his arrest for obtaining illegal narcotic prescriptions and subsequently selling those narcotics, all militate in favor of granting its motion.

The underlying CO in this matter was issued on March 5, 2010. Employer timely appealed on April 2, 2010. Employer, in filing the instant motion, provided information to show that Claimant was arrested for three drug offenses (obtaining prescriptions by fraud, possession with intent to manufacture, and possession) on March 3, 2011. On October 31, 2011, Employer filed an Addendum to its Motion to Remand and Reopen proffering the information and belief that Claimant had pleaded guilty on October 25, 2011 in U.S. District Court for the Eastern District of Virginia to the charge of obtaining prescription narcotic medication by fraud.

7 DCMR § 264. Submission of Additional Evidence, states:

> 264.1 Where a party requests leave to adduce additional evidence the party must establish:
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> (a) that the additional evidence is material, and
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> (b) that there existed reasonable grounds for the failure to present the evidence while the case was before the Administrative Hearings Division[2] or the Office of Workers' Compensation (depending on which authority issued the compensation order from which appeal was taken).
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> 264.2 Where a party satisfies the requirements of subsections 264.1(a) and (b), the Review Panel to which the appeal is assigned, at its sole discretion, may remand the case to Administrative Hearings Division or the Office of Workers' Compensation for such

[2] As of February 2011, the Administrative Hearings Division changed its name to Hearings and Adjudication.

further proceedings as the presiding Administrative Law Judge or claims examiner deems necessary.

This Panel recognizes that the mere fact that new evidence becomes available after the close of the record does not mandate reopening the record for its consideration. The CRB and the D.C. Court of Appeals have both required a showing that due to some unusual circumstances "the relevant, non-duplicative substance of the evidence could not been obtained prior to the formal hearing with reasonable diligence on the part of offering counsel." *Grant v. National Associates*, CRB No. 08-139, AHD No. 05-254A, OWC No. 606489 and 607735 (June 26, 2008); *see also, Young v. D.C. Dept. of Employment Services*, 681 A.2d 451, 456 (D.C. 1996).

In the instant matter, Employer argues that the newly available evidence of Claimant's arrest and possible subsequent convict speaks directly to his credibility and therefore is and would have been relevant in the ALJ's consideration when making that determination. In addition, as these events only recently transpired, this information could not have been obtained at the time of the formal hearing.

The purpose and function of the formal hearing is to present a snapshot in time of the parties' relevant positions, with particular emphasis on the condition of the injured employee. With each passing day after the formal hearing, there exists the opportunity to obtain or discover additional evidence that might have been a factor at the formal hearing had it become available at that time. It is with that in mind that the Act recognizes that as new evidence becomes available it can be used to support a request for modification of an award pursuant to D.C. Code § 32-1524.

While we acknowledge that the new evidence that Employer wishes to present to the ALJ could have a bearing on Claimant's credibility, we also note that it was only with the passage of time that it became available. In addition, to the extent that the subsequent bad acts of an injured employee could be used to attack an ALJ's determination that he was a credible witness at the time of the formal hearing, we are of the opinion that it was not contemplated under the Act that the hearing record should be available to be reopened at any time until the issuance of a decision for the consideration of that new evidence. The additional evidence that has only become available with the passage of time would be more appropriately presented and, as the Act specifically provides, in a request for a modification. Therefore, Employer's motion is denied.

## DISCUSSION AND ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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, § 32-1501 *et seq.*, at § 32-1521.01 (d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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 if the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review, we first address Employer's argument that to the extent Claimant made a *prima facie* showing of being temporarily and totally disabled from performing his pre-injury job, it rebutted that showing by identifying suitable alternative employment that was available to Claimant. Employer asserts that the Labor Market Survey completed by the vocational counselor assigned to Claimant identified 12 positions that fit within the FCE restrictions of eight hours light duty or four hours medium duty.

It is well established in this jurisdiction that once an injured employee has shown that he is not able to perform his pre-injury job, the burden shifts to the employer to identify suitable alternative employment.[3] If the employer meets that evidentiary burden, the employee can refute the suitability by challenging the availability of the employment or by demonstrating diligence, but a lack of success, in obtaining other employment.[4]

After citing *Logan*, the ALJ determined that Claimant had made the requisite showing that he was unable to perform his pre-injury job and thus was disabled. In shifting the burden to Employer, the ALJ focused primarily on the independent medical evaluation (IME) of Dr. Mark Danziger who acknowledged that if Claimant proceeded with a second neck surgery he would need up to 6 months to recovery before he could attempt light duty work. We find the ALJ's analysis under Logan to be flawed and we accordingly remand.

As noted, once Claimant has demonstrated an inability to perform his pre-injury job, it is for the Employer to demonstrate the availability of suitable alternative employment. However, rather than assess whether the jobs identified in the Labor Market Survey prepared for Employer, the ALJ retained her focus on the medical evidence showing that Claimant could not perform his pre-injury job, which is not being challenged. Rather, it needs to be determined whether in light of Claimant's restrictions, the identified positions constitute suitable alternative employment. Even with his chronic intractable pain, Claimant's treating physician on July 11, 2007 stated he "strongly encouraged" his "efforts to return to work in a light duty capacity." In light of our analysis, this matter must be returned to the ALJ for further consideration.

On remand, the ALJ shall properly determine whether Employer has rebutted Claimant's *prima facie* showing of disability and then proceed accordingly under the *Logan* analysis of the nature and extent of Claimant's disability. Not only must the ALJ determine whether the positions identified in the labor market survey constitute suitable alternative employment, she must also assess their availability.[5]

We next consider Employer's argument that the ALJ erred in deciding that Claimant's non-cooperation with vocational rehabilitation services was justifiable, that Claimant had no intention of returning to work, and, that Claimant's testimony that his medication prevents him

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[3] *Logan v. D.C. Dept. of Employment Services*, 805 A.2d 237, 243 (D.C. 2002).

[4] *Id.*

[5] *See Washington Post v. Dept. of Employment Services, 675 A.2d 37, 41 (D.C. 1996)* (quoting *Joyner v. Dept. of Employment Services, 502 A.2d 1027, 1031 n. 4 (D.C. 1986).*

from participating in vocational rehabilitation is not credible. Under the Act, an employer has an obligation to provide vocational rehabilitation services (D.C. Official Code § 32-1507(a)), and an injured employee is required to participate in those services or risk having his benefits suspended, unless the refusal to participate is justified (D.C. Official Code § 32-1507(d)).

In addressing the issue of failure to cooperate with rehabilitation services, the ALJ found the under the circumstances presented, Claimant was justified in his "reluctance to cooperate." The ALJ identified the circumstances as Claimant being under doctors' orders not to work because he was taking narcotic medication to control his pain, and that his ability to work would not be known until after his recovery from further neck surgery.

In effect, the ALJ has made a determination that because Claimant has been restricted from working due to the medication he is taking he is excused from participating in vocational rehabilitation. Thus, as to the issue of whether an injured employee's refusal to participate in vocational rehabilitation must be deemed reasonable as a matter of law where the employee has refused to participate in order to comply with his treating physician's instruction not to work, the ALJ has answered in the affirmative. We disagree.

Claimant's argument is that because he has not been released to return to work and is awaiting further surgery, he has a legitimate basis for refusing to participate in vocational rehabilitation services being offered by Employer. However, the requirement to cooperate with vocational rehabilitation and the ability to return to work as determined by a doctor's release are not mutually exclusive. Although an injured employee has not been released to return to work, this does not preclude participating in vocational rehabilitation services.[6]

As stated in § 32-1507(a) the required provision of medical and vocational rehabilitation services are to be provided "for such period as the nature of the injury or the process of recovery may require." The vocational rehabilitation pursuant to § 32-1507(c) has to be designed to return the employee to a job paying a wage close to that of his pre-injury job. As such, the regulations contemplate that at the time vocational rehabilitation is being offered, the injured employee is still in recovery and not able to work. Thus, for Claimant to not fully participate in the services being offered and for the ALJ to accept the reasons given as justifiable, is not in accordance with the law. Accordingly, this issue also must be returned to the ALJ for further consideration to give the Claimant the opportunity to cure his refusal to cooperate or suffer the suspension of his benefits.

## CONCLUSION AND ORDER

The ALJ's determination that Claimant is temporarily and totally disabled is not supported by substantial evidence and is not in accordance with the law and is there reversed and remanded for consideration of whether suitable alternative employment has been identified. The ALJ's determination that Claimant failure to cooperate with vocational rehabilitation services

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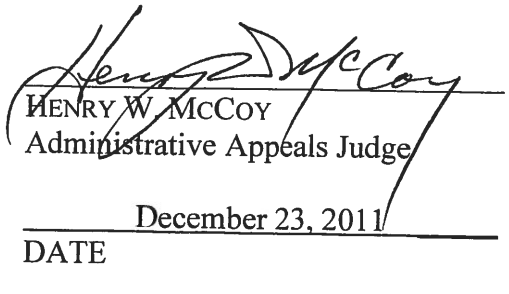
[6] *See Black v. Dept. of Employment Services*, 801 A.2d 983, 985 (D.C. 2002) (The [hearing] examiner found that Job Club did not require physicial exertion, and therefore, a physician's release was not necessary as "vocational rehabilitation is beyond the scope of medical treatment.")

was justifiable is not in accordance with the law and is likewise reversed and remanded. The Compensation Order of March 5, 2010 is REVERSED and REMANDED for further consideration in accordance with this decision.

FOR THE COMPENSATION REVIEW BOARD:



HENRY W. MCCOY
Administrative Appeals Judge

December 23, 2011
DATE