

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-047**

**LUIGI BUITRAGO,**  
**Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH,**  
**Employer/Insurer-Petitioner.**

Appeal from a February 25, 2015 Compensation Order by  
Administrative Law Judge Fred D. Carney, Jr.,  
AHD No. PBL 10-032G, DCP No. 761010-0006-2006-0001

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 JUL 10 AM 9 51

(Decided July 10, 2015)

Michael J. Kitzman for Claimant  
Eric Adam Huang for Employer

Before JEFFREY P. RUSSELL, HEATHER C. LESLIE, and LINDA F. JORY, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Claimant injured his low back on July 25, 2006 when a tent collapsed and struck him. His claim for benefits was accepted by Employer. He received temporary total disability benefits for a period time during which he obtained medical care. For a period of time he was restricted from returning to work because his treating physician proscribed any such return until such time as Employer agreed to provide Claimant with a specially designed “ergonomic” desk, and permitted Claimant flexibility throughout the workday such that Claimant could periodically get up and move about.

Once Employer instituted these accommodations, Claimant returned to work full time. Thereafter, while still under the medically prescribed work modifications, Claimant was terminated in a reduction in force.

Claimant sought to have his disability compensation benefits reinstated, but that request was denied, with Employer issuing a Notice of Determination stating that the denial was based upon a lack of medical documentation supporting a “recurrence” of his disability, and a “refusal to participate in an interview”. Claimant returned to work on February 11, 2013 at Employer’s request.

At a formal hearing conducted on March 14, 2013, Claimant sought to be paid compensation for the time he was off work due to the reduction in force, January 6, 2012 through February 26, 2013.

In a Compensation Order issued February 25, 2015, the Administrative Law Judge (ALJ) before whom the hearing was conducted issued a Compensation Order granting Claimant “Temporary Total Disability Benefits from February 11, 2012 to February 11, 2013 with a credit for any compensation as a result of wage loss, which was paid pursuant to any settlement agreement”.<sup>1</sup>

Employer appealed the Compensation Order to the Compensation Review Board by filing an Application for Review and Memorandum in Support thereof (Employer’s Brief). Employer makes five arguments:

- I. The ALJ incorrectly evaluated the claim as a request for modification and improperly evaluated it under the three-prong test enunciated in *Mahoney v. DCPS*, CRB No. 14-067 (November 12, 2014)(en banc);
- II. Because of this improper analysis as a modification request as opposed to “a denial”, the claim should be denied as timely filed under 7 DCMR § 120.1;
- III. The award is improper because Claimant failed to produce any medical evidence that he suffered a “recurrence” of his disability;
- IV. The Compensation Order ought be reversed because the ALJ improperly incorporated factual findings from a prior Compensation Order which Employer contends may yet be reversed; and
- V. The ALJ improperly applied the case of *Swanson v. D.C. Department of Corrections*, CRB No. 13-009, AHD No. PBL 11-024, DCP No. 761032000120000-005 (May 21, 2013).

For the reasons set forth below, we affirm the Compensation Order’s award of benefits.

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<sup>1</sup> We recognize that the dates in the award do not coincide precisely with the facts as found in the Compensation Order, and point out that there is nothing in the four corners of the Compensation Order that sheds any light on what is meant by the proceeds of any “settlement”. Since these lack of findings do not appear to be relevant to any issue in this appeal, we need not address them.

## 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. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a different conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

Although on the surface the facts of this case may seem complicated, the *essential* facts are not. In this case, Claimant suffered an injury which, following treatment and recuperation, resolved sufficiently to the point where he was able to and did in fact return to his pre-injury job, with Employer providing an ergonomically suitable desk and workplace to make this possible. At this point, although Claimant continued to suffer from certain physical limits on his physical capacity, they did not cause a wage loss, due to the provision of the ergonomically suitable workplace and conditions such as allowing Claimant to get up and move about as needed.

Then, Employer terminated Claimant's position in a reduction in force. There is no allegation that Claimant was terminated due to his physical limitations or that his loss of wages thereafter was due to Employer deciding not to continue to provide an ergonomically suitable workplace. Rather, it is undisputed that, but for the reduction in force, an event which on this record is totally unconnected with Claimant's physical condition, he would have suffered no loss of wages.

In cases arising under the District of Columbia Workers' Compensation Act, D.C. Code § 32-1501 *et seq.*, (DCWCA), a claimant would be entitled to reinstatement of benefits unless the employer offered the claimant suitable alternative employment or could show by other evidence that suitable alternative employment is available in the relevant labor market which the claimant could perform. *See Logan v. DOES*, 805 A.2d 237 (D.C. 2002). Although there is some authority to the contrary (*see Henderson v. D.C. Department of Corrections*, CRB No. 05-003 (March 23, 2005)), the most recent and current CRB authority on this question is subject to the interpretation that the *Logan* framework is, at least in some cases, analytically incompatible with the underlying burdens placed upon the parties under the Public Sector Workers Compensation Act, D.C. Code § 1-623.01 *et seq.*, (PSWCA). *See Swanson v. D.C. Department of Corrections*, CRB No. 13-009, AHD No. PBL 11-024, DCP No. 761032000120000-005 (May 21, 2013). The CRB made that ruling at least as it applied to the specific facts of that case, deciding that because the employer was seeking to terminate ongoing benefits, *Mahoney v. District of Columbia Public Schools*, CRB No. 14-067 (November 12, 2014)(en banc) governed.

Employer argues that the ALJ's analysis of this case under the standard established in *Mahoney* is in error, and we must agree. *Mahoney* applies to cases where Employer seeks to terminate ongoing disability benefits based upon a change in conditions, and lays out a three-prong burden

shifting approach in which the facts are analyzed. In this case, Claimant's temporary total disability benefits had ceased when he returned to work. At the time of the reduction in force, Claimant was not receiving disability compensation benefits, and it is not Employer that seeks a change or modification of Claimant's existing disability status for the period at issue.

It is undeniable that what is being sought in this case is reinstatement of previous benefits for the period Claimant was off work. As Employer points out, neither the PSWCA nor the implementing regulations make provision for reinstatement of benefits that have been terminated based upon a return to work, and the employee is then terminated in a reduction in force. While there are regulations governing seeking a resumption of benefits upon experiencing a medical "recurrence" of a previously disabling condition (*see* 7 DCMR 120, RECURRENCE OF INJURY), they apply only where there is a claim that an injury that had previously been disabling but then resolved sufficiently to permit a return to work has allegedly "recurred", rendering the employee once again disabled.

Thus, although we accept that application of *Mahoney* was erroneous, we reject Employer's argument that timeliness is an issue. Whatever the outcome of this case, Claimant is not alleging a recurrence of a previously resolved or improved prior injury; he seeks reinstatement of benefits upon the theory that he suffers a work related physical condition that effected his ability to perform his pre-injury job, and that Employer is obligated to either resume his disability benefits or provide him with work and accommodations making it possible for him to perform that job. Regardless of which party prevails on this issue, there is no question that the underlying injury is one for which a timely claim was filed by Claimant and accepted by Employer, and benefits were paid until such time as Employer provided Claimant with his medically prescribed workplace modifications.

It has been established, as the law of this case that Claimant is unable to return to his pre-injury job without modification of his workplace and working conditions. It is further undisputed that Claimant's wage loss was due to a reduction in force; however, it is equally true that under the law of this case, Claimant has lost some capacity to work due to the injury to his back, and while Employer argues that these limitations are somehow not a disability, there is no assertion by Employer that these limitations no longer applied during the disputed period.

We have determined that this case requires us to decide, therefore, whether *Logan* and its analysis apply to PSWCA. For the following reasons, we hold that, given the similarity of purpose between the DCWCA and the PSWCA, there is no legitimate reason to treat this case differently than it would be treated under the DCWCA.

We recognize that the DCWCA is in several fundamental ways a very different creature than the PSWCA. The former is an exercise of the power of the government to regulate and require certain workplace protections and disability procedures, under the general rubric of the "police",

or “regulatory” power. On the other hand, the PSWCA is an exercise in employment disability benefits for government workers.

Private sector workers’ compensation schemes are in large part premised upon two related theoretical concepts: one, that the cost of workplace injuries ought to ultimately be borne by the consumer of the goods or services produced or provided by the employer, and two, they exist to prevent injured workers who can no longer make their way in the competitive workforce due to incapacities created by workplace injuries from becoming wards of the state. *See generally*, 1-1-, Lex K. Larson, Larson's Workers' Compensation Law §§ 1.04[1], 1.04[2] (2014).

Hence, *Logan* and the DCWCA look to the realities of the effect of an injury upon a worker to earn a living, even if a particular employee in a modified work environment loses his job due to causes unrelated to the injury. If the injury limits the employee’s ability to compete in the labor market, the employer (through the consumer) must make up the difference, rather than the government.<sup>2</sup>

We have frequently pointed out that, where possible, harmonization of interpretive approaches between the two acts is a goal of practical and equitable utility. Where it is possible, this Agency has generally sought to treat similar provisions and concepts similarly. *See Hobby v. D.C. Public Schools*, CRB No. 14-093, ECAB No. 09-07, OHA No. 97-36, OBA No. 337470 (April 1, 2015), p. 8: “that act [the DCWCA] and its caselaw can be instructive on general principles of workers' compensation law, and this jurisprudence has validity and applicability under both the public and private sector statutes and schemes, especially when the statutory provisions are similar.”

The issue we are dealing with here comes under the rubric of “nature and extent of disability”. Under the DCWCA, “Disability” is defined as “physical or mental incapacity that results in loss of wages.” D.C. Code § 32-1501(8). While the PSWCA does not contain a definition for

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<sup>2</sup> Terminations for cause are a different matter, not presented by this case, and have been analyzed in the context of voluntary limitation of income stemming from knowingly and intentionally violating established work rules. *See Robinson v. DOES*, 824 A.2d 962 (D.C. 2003), where the court wrote at 964 - 965:

That conclusion is in keeping with the principle stated in 4 LARSON'S WORKERS' COMPENSATION § 84.04 [1], at 84-14 (2002) that, "if the record shows no more than that the employee, having resumed regular employment after the injury, was fired for misconduct, with the impairment playing no role in the discharge, it will not support a finding of compensable disability." <sup>4</sup> Implicit in the Director's conclusion that petitioner's noncompliance with the attendance rules was voluntary is a finding that the injury did not play a role in his failure to heed the rules and warnings. LARSON goes on to recognize the seeming harshness in a "forfeiture of all [workers'] compensation rights" for relatively low-grade misconduct resulting in discharge (he gives the example of "a moment's fighting" by an employee); but suggests that "perhaps the only" remedy for this is "legislation comparable to those Unemployment Compensation provisions which handle discharge for misconduct and voluntary quitting by a penalty of a limited number of weeks' compensation rather than complete loss of benefits." *Id.* at 84-15. That, of course, is not a change that a court may effect.

N4 By "regular employment," we assume LARSON would mean suitable light-duty employment as well.

“disability”, this Agency has generally accorded the term substantially the same meaning under both acts. *See Camp v. D.C. Department of Health*, CRB No. 13-080, AHD No. PBL 08-096A, DCP No. 761010-0001-1999-0030 (September 9, 2013), p. 15, and n.21. Further, the sections of the two acts that deal with the calculation of disability benefits are very similar in substance. *Cf.*, D.C. Code § 1-623.05(a), (b) and § 1-623.07(c)(1) through (22), *with* D.C. Code § 32-1508(2) and (3)(A) through (U). And, effective October 1, 2010, the Disability Compensation Program’s name was changed to the “Public Sector Workers’ Compensation Program”, an indication which, while not conclusive, at least implies that the Council of the District of Columbia views the PSWCA as being more akin to a common workers’ compensation scheme than a disability program. D.C. Law 18-223.

We see no reason why the same principles that apply to the circumstances of entitlement to disability compensation benefits in the private sector as governed by *Logan* should not apply to public sector cases as well.

We also hasten to note that we do not view this as a change in the law, specifically, *Swanson*. This is because the discussion of *Logan*’s inapplicability in *Swanson* dealt with the burden shifting schemes where the District of Columbia as the employer sought to terminate ongoing benefits, alleging a change of circumstances, to wit, medical recovery. It did not deal with the underlying meaning of “disability” or that it is conceptually the same under both acts, and did not arise in the context of the employer seeking to reduce or terminate ongoing benefits.

This analysis disposes of Employer’s first and second arguments; concerning argument III, since we have determined that this is not a claim by Claimant of a recurrence, the argument that a lack of medical evidence of such a recurrence is irrelevant, and the claim that the award based upon this lack of medical evidence is therefore unsupported by substantial evidence is rejected.

Concerning argument IV, Employer makes the somewhat vague and ambiguous statement that the incorporation into the instant Compensation Order of factual findings contained in an earlier Compensation Order, carrying the AHD number PBL 10-032E, renders the instant Compensation Order erroneous, because “The Employer has since challenged the findings of the PBL 10-032E CO. Therefore, it remains to be seen whether the incorporated findings will or will not be overturned by the CRB, and it is entirely premature for the ALJ in the immediate case to rely heavily on those medical findings to support his legal conclusions”. Employer’s Brief, p. 18.

The CRB has no record of an appeal having been filed in connection with the referenced AHD decision. Employer provides no CRB case number or information concerning the date of any such appeal, and we accordingly reject the argument.

Regarding argument V, Employer asserts that the ALJ misapplied *Swanson*. The argument is premised upon a distinction Employer would have us draw between an “accommodation” of a physical disability and a “disability” itself. While such a distinction may have some application

under other statutes, it has no effect upon entitlement to benefits under the Act. If a worker is unable to perform his or her regular duties without accommodations necessitated by limitations resulting from a work related injury, and if those accommodations are not made or suitable alternative employment offered or shown to be available, a claimant is disabled for the purposes of the PSWCA.

Therefore and in summary, where the issue is whether a claimant is disabled under the PSWCA, and where the claimant had been working in modified employment due to physical limits imposed by the work injury, merely being terminated from employment in a reduction in force does not sever the relationship between the injury and the wage loss. Thus, in this case it is Employer's burden to demonstrate that work within Claimant's capacity was offered or was otherwise available during the relevant period. That is, when an injured worker is terminated in a reduction in force and lacks the capacity to perform the pre-injury job because of the work related injury, the employer bears the burden of demonstrating the availability of suitable alternative employment, or it remains obligated to pay disability compensation benefits.

#### CONCLUSION AND ORDER

In applying the *Mahoney* analysis to these facts, the ALJ was in error. However, the award of benefits was proper under *Swanson* and *Logan*. Accordingly, it is affirmed.

*So Ordered.*