GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-080

LYNDON GEORGE,
Claimant-Respondent,

v.

SUPERIOR CONCRETE MATERIALS, INC., and
U.S. CONCRETE CO.,
Employer and Insurer-Petitioner.

Appeal from a May 18, 2016 Compensation Order by
Administrative Law Judge Amelia G. Govan
AHD No. 16-048, OWC No. 736169

(Decided November 10, 2016)

Jason A. Heller for Employer[1]
David J. Kapson for Claimant

Before GENNET PURCELL, LINDA F. JORY and HEATHER C. LESLIE, *Administrative Appeals Judges.*

GENNET PURCELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Lyndon George ("Claimant") was a cement mixer driver employed by Superior Concrete Materials, Inc., ("Employer"). On October 5, 2015, Claimant was injured at work when a portion of his left thumb was crushed in a concrete roller drum. Due to the severity of the injuries sustained, the tip of his left thumb was amputated.

On the day of his injury, Claimant was seen in the emergency department of Howard University Hospital where he was examined and treated by Dr. Robert Wilson. Dr. Wilson reported that Claimant had a severe injury to the thumb and recommended that Claimant undergo left thumb surgery as soon as possible to address his injuries, and placed him out of work until that time.

[1] Employer was represented by Tony D. Villeral at the formal hearing. Jason A. Heller represents Employer in this appeal.

A preoperative examination was scheduled to occur October 27, 2015, with the actual surgical procedure to follow approximately 72 hours later. Due to the short notice received, Claimant failed to attend the preoperative appointment and the surgery did not take place. As a result, Employer's insurer filed a Notice of Controversion and suspended Claimant's wage loss benefits for the period of November 3, 2015 to November 15, 2015.

On November 16, 2015, Claimant underwent the recommended left thumb surgery and his wage loss benefits were restored by Employer. On November 19, 2015, Dr. Wilson noted Claimant was unable to perform his job duties, was in need of ongoing orthopedic care and would be relocating to Louisiana.

Shortly after his left thumb surgery, Claimant relocated to Baton Rouge, Louisiana and began treating with Dr. R. David Rabalais. On December 3, 2015, Dr. Rabalais wrote a partial release for Claimant to return to sedentary work only, with only the use of his right hand; he also recommended Claimant not travel back to D.C. for any light duty work, but to stay in Louisiana, commence occupational therapy immediately.

Employer offered Claimant a District of Columbia-based light-duty assignment commencing on December 4, 2015 however Claimant could not attend, and did not accept. As a result, Employer again filed a Notice of Controversion and suspended payments of Claimant's benefits on December 6, 2015.

On or about December 8, 2015, Dr. Rabalais rescinded the partial release and issued Claimant a full work release and driving restriction due to the onset of an infection in his left thumb. On February 1, 2016, Dr. Rabalais testified that Claimant was able to return to work on or about February 1, 2016.

On February 16, 2016, Claimant traveled from Louisiana to the District of Columbia to undergo an independent medical evaluation ("IME") by Richard Barth, M.D. Dr. Barth recommended continuing therapy, discontinuation of Claimant's prescribed pain medication, agreed that Claimant should not drive, and opined that Claimant was able to return to work with a ten (10) pound weight restriction on his left hand. Dr. Barth concluded by opining that Claimant would be able to return to work, full duty, by May 2016.

The administrative law judge ("ALJ") found Claimant to be a credible witness. Claimant has not returned to work in any capacity.

A full evidentiary hearing was held before an ALJ. On May 18, 2016, the ALJ issued a Compensation Order ("CO") awarding Claimant temporary total disability benefits from November 3, 2015, to the present and continuing, (with a credit to Employer for benefits paid from November 16, 2015 to December 6, 2015), as well as payment for related medical costs and penalties for bad faith unreasonable delay, pursuant to § 32-1528 of the Act, during the period from November 3, 2015 to November 16, 2015. *George v. Superior Concrete, et al.,* AHD No. 16-048, OWC No. 736169 (May 18, 2016).

Employer timely appealed the CO to the Compensation Review Board ("CRB") by filing Employer's Application for Review and Memorandum of Points and Authorities in Support of Application for Review ("Employer's Brief"). In its appeal Employer asserts that the ALJ's

rejection of Employer's argument that Claimant voluntarily limited his income was not supported by substantial evidence in the record and should be reversed. Employer's Brief at 7.

Claimant opposed the appeal by filing Claimant's Opposition to Employer's Application for Review ("Claimant's Brief"). In its opposition, Claimant requested an affirmation of the CO.

ANALYSIS[2]

Employer's argument centers around whether, in light of the defense of voluntarily limitation of income raised, the ALJ properly applied the third step in the *Logan* analysis, *infra*. Employer asserts that in determining that Claimant was temporarily and totally disabled, the ALJ erred in concluding that Claimant did not voluntarily limit his income by refusing Employer's offer of suitable light-duty work on December 1, 2015.

Specifically, Employer contends that Claimant's refusal to return to the District of Columbia from Louisiana upon receiving the December 1, 2015, and December 4, 2015 offers of light-duty work (work scheduled to commence on December 7, 2015), coupled with his failure to demonstrate any effort to seek employment within his treating doctors' restrictions in Louisiana constituted his voluntary limitation of his income.

Claimant asserts that Employer has not offered him any employment consistent with his restrictions, that he has not achieved maximum medical improvement and that his condition renders him unable to perform the duties of his pre-injury employment. Claimant's Brief at 3.

In applying *Logan*, and analyzing job availability, once a *prima facie* claim regarding the extent of a claimant's disability has been established, the ALJ is charged with answering two substantive questions.

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonable capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure?

Logan v. DOES, 805 A.2d 237, 243 (D.C. 2002) (*Logan*). 243

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[2] The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act ("Act") and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). "Substantial evidence" as defined by the District of Columbia Court of Appeals ("DCCA"), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES*, 834 A.2d 882 (D.C. 2003) ("*Marriott*"). Consistent with this scope of review, the CRB is also bound 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 where the members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Employer cites to the governing provision of the law regarding the voluntary limitation of income and states:

> The Act provides that:
>
> > [i]f the employee voluntarily limits his income or fails to accept employment commensurate with his abilities, then his wages after becoming disabled shall be deemed to be the amount he would earn if he did not voluntarily limit his income or did accept employment commensurate with his abilities.
> >
> > D.C. Code § 32-1508(5). Where the claimant refuses the employer's light duty offer on the basis that he cannot return to the D.C. area and also fails to demonstrate any evidence that he sought out light-duty work in the area where he is now residing, he has clearly voluntarily limited his income within the meaning of the Act.

Employer's Brief, page 4.

In support of its argument, Employer also cites to the DCCA's holding in *Joyner v. DOES,* 502 A.2d 1027 (D.C. 1986) arguing:

> ...the Court of Appeals held that the employer's responsibility to provide "employment commensurate with the claimant's abilities" as used in the voluntary limitation of income context, was limited to the Washington D.C. metropolitan area. 502 A.2d at 1031. As a result, the court determined that Joyner's failure to respond to repeated notices of the availability of suitable employment in the Washington D.C. area was sufficient grounds to find voluntary limitation of income under the Act. Id at 1031.

Employer Brief at 6.

The ALJ stated that in determining whether Claimant voluntarily limited his income, she considered all the evidence including Claimant's move to Louisiana, his dire financial circumstances, his temporary homelessness and inability to obtain timely insurance approval for his left thumb surgery in the District of Columbia. *See e.g.,* CO at 6.

Affording Dr. Rabalais the treating physician standard, the ALJ considered and accepted Dr. Rabalais' testimony recommending Claimant not travel to the District of Columbia to pursue a light duty, sedentary position and Claimant remain in Louisiana to attend occupational therapy and seek work, pursuant to the restrictions in place.

The ALJ explained:

> Claimant has established a *prima facie* case of total disability, and Employer has the evidentiary burden to show available employment. Employer's contention that Claimant voluntarily limited his income is rejected. Employer was well aware that

> Claimant had to relocate for economic reasons and that his doctor in Louisiana had provided specific restrictions. I credited Claimant's credible testimony, which is not contradicted by any documentary evidence of record, regarding his conversations with Employer's representatives. Employer was aware that Claimant could not return to work on December 7, 2015, and controverted the claim for benefits even before Claimant received the "offer" letter.

CO at 6.

The ALJ's conclusion that Claimant did not voluntarily limit his income was based in large part upon the ALJ's credibility determination and acceptance of Claimant's testimony. As repeatedly recognized, an ALJ's credibility determinations are to be given great deference, due to the ALJ's opportunity to observe the nature and character of a witness's demeanor. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985); *Georgetown University v. DOES*, 830 A.2d 865, 870 (D.C. 2003). We find no reason to disturb the ALJ's credibility findings and affirm her conclusions reached regarding the Claimant's credibility.

The ALJ also found that the medical evidence from Claimant's treating physician in combination with Claimant's credible testimony supported the conclusion Claimant was unable to perform his regular work duties. Further, the ALJ concluded that the offer of light duty employment made by Employer was not consistent with the medical restrictions in place by Dr. Rabalais, including the driving restriction, which affected Claimant's ability to travel from Louisiana and rendered him unable to report to duty in Washington D.C. only days later.

The record does not establish that any subsequent job offer was made by Employer after the December 1 and December 4 letters offering a light duty work assignment that were sent to Claimant in Louisiana. Neither did Employer seek to provide Claimant with any vocational rehabilitation. Finding that the Employer knew there was no way that Claimant could report to work in D.C. on December 7, 2015, the ALJ concluded Claimant did not voluntarily limit his income.

The ALJ found that the Employer was aware that Claimant had to relocate back to Louisiana for economic reasons and the travel restrictions placed on Claimant by Dr. Rabalais.

The ALJ wrote:

> The record evidence does reflect filing of a Notice of Controversion, which was filed on the same day that Employer mailed Claimant a letter to Louisiana saying work was available in D.C.
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> * * *
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> Employer's own actions evinced its awareness of Claimant's inability to report for work and of his medical conditions. Employer did not get an IME until February 17, 2016, and its own IME restricted Claimant form return [sic] to his usual work due to the significant hypersensitivity of his damaged left thumb.

CO at 8.

As the ALJ correctly concluded however, Claimant's ability to return to work was restricted as his doctor advised him not to drive. Employer's contention that it had light-duty work within his treating doctor's restriction available as of December 1, 2015, as such did not satisfy its obligation to arrange for alternative employment pursuant to mandate set forth in *Joyner, supra.* Claimant's failure to report to the light-duty position offered on December 4, 2015 was in accordance with the medical restrictions in place at the time. We agree with the ALJ's conclusions, and determine that the CO's findings are supported by substantial evidence in the record.

CONCLUSION AND ORDER

The Administrative Law Judge's finding of fact that Claimant did not voluntarily limit his income is supported by substantial evidence and is in accordance with the law. The Compensation Order is AFFIRMED.

So ordered.