GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-117

MICHAEL GREEN,
Claimant-Respondent/Cross-Petitioner

v.

METRO FIRE PROTECTION and
ZURICH NORTH AMERICAN INSURANCE CO.,
Employer/Insurer-Petitioner/Cross Respondent.

Appeal from an August 23, 2016 Compensation Order
of Administrative Law Judge Douglas A. Seymour
AHD No. 16-117, OWC No. 734394

(Decided December 27, 2016)

David J. Kapson for Claimant
Joseph C. Tarpine for Employer

Before LINDA F. JORY, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Michael Green ("Claimant") worked as a sprinkler fitter for Metro Fire Protection ("Employer"). Claimant was working for Employer with light duty restrictions of no lifting over 20 pounds and restrictions on his bending and standing for prolonged periods. The restrictions were the result of a work injury Claimant had to his back in 2005 under the Maryland workers compensation act.

On March 6, 2015, Claimant was working for Employer at Roosevelt High School, when he slipped on ice and fell down concrete steps, injuring his back, neck and left elbow. Claimant was

taken to Concentra where he was x-rayed. His left arm was placed in a sling and he was provided muscle relaxers and physical therapy.

Two days before this incident Claimant was seen by Dr. Carey-Walter Closson, a pain management specialist with Spine and Pain Centers, after a referral from his treating physician for the 2005 work injury. Dr. Closson noted Claimant's history of 9 years of low back pain as a result of a fall at work on December 7, 2005. Dr. Closson diagnosed Claimant with lumbar degenerative disease at L4-5, L5-S1, cervical post-laminectomy pain syndrome, cervical and lumbar radiculitis, lumbar facet and SI joint arthropathy and myofascial pain. Dr. Closson prescribed an increase of Claimant's Gralise dosage to 1200 milligrams, suggested possible steroid injections and/or facet treatments, physical therapy and a surgical consult with to discuss his disc issues.

Claimant continued receiving conservative care at Concentra through August 6, 2015. His physical restrictions were increased to include no lifting over 20 pounds, no pushing or pulling objects over 30 pounds and no standing for more than one hour at a time. After the accident, Claimant returned to work for Employer where his light duty restrictions were still accommodated. However, in early April 2015, Walter Smith, the owner, retired. As a result, Metropolitan Fire Sprinkler was closed and Claimant was laid off. Claimant contacted his union and applied for unemployment benefits.

On May 18, 2015, Claimant started a new job with SS&C[1] at the same rate of pay and within his work restrictions. On June 27, 2015, Claimant was laid off because he had missed too much time from work going to physical therapy and doctor appointments. Claimant again applied for unemployment benefits and contacted his union. In October 2015, Claimant began working with National Fire Protection, at a job located at the MGM Grand Hotel. His duties include testing and inspecting fire protection systems. Also in October 2015, Claimant started treating with Dr. Joel Fechter. Dr. Fechter recommended a neurosurgical consultation and gave Claimant a light duty work release with no lifting over 10 pounds.

Claimant requested a formal hearing seeking two periods of temporary total disability ("TTD"), mileage reimbursement and authorization for a neurosurgical consultation. A formal hearing was held before an administrative law judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES") and the parties presented the following issues for adjudication:

1. Is Claimant's current low back condition and disability, if any, medically causally related to his work injury of March 6, 2015?
2. What is the nature and extent of Claimant's disability, if any?

A Compensation Order ("CO") issued on August 23, 2016 wherein the ALJ concluded Claimant's current low back condition is medically causally related to the work-related incident of March 6, 2015. The ALJ denied Claimant's request for TTD from April 10, 2015 through May 17, 2015 and granted Claimant's request for TTD from June 27, 2015 through October 19, 2015. The ALJ found Employer was entitled to a credit for unemployment benefits received by Claimant from June 27, 2015 through October 19, 2015. The ALJ further found Claimant was

[1] According to the CO, Claimant was uncertain as to the exact name of this Employer. CO at 5, n. 5.

entitled to a neurosurgical consultation and mileage reimbursement for attendance at causally related doctor and physical therapy appointments.

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"). Claimant filed Claimant's Opposition to Employer's Application for Review and Cross Application for Review ("Claimant's Brief").

ANALYSIS

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 initially asserts the ALJ erred in the exclusion of relevant evidence pertaining to the Claimant's workers compensation claim in Maryland for the same body part. Specifically Employer asserts:

> The [ALJ] first committed error in this matter by excluding and failing to consider extremely relevant evidence pertaining to the Claimant's prior workers' compensation claim in Maryland for the same body part that the claimant had injured in the subject accident. At the Formal Hearing, the [ALJ] refused to admit documents showing that the Claimant had received an award of permanent partial disability. The Employer had sought to admit the Award dated December 12, 2013, finding the Claimant to have a 47% industrial loss of use of the body as a result of the back with 45% attributable to the December 7, 2005 accident. The Employer and Insurer also sought to introduce the evidence that he had subsequently settled that workers' compensation claim for $100,000. This evidence was excluded because the [ALJ] stated he did not believe it was relevant and would have a prejudicial impact on the Claimant's case. See Formal Hearing transcript at p. 18.

Employer's Brief at 8.

We have reviewed the hearing transcript and do not agree with Employer's characterization of the ALJ's determination. The ALJ did not find that the evidence pertaining to Claimants prior back claim and settlement to be particularly relevant and he noted he was "More concerned about the prejudicial impact they could have". HT at 18. As the CRB has stated, it is generally

recognized that an ALJ has broad discretion in conducting the formal hearing, including the admission and exclusion of evidence; with the proviso that the discretion exercised must be administered fairly and not in an arbitrary or capricious fashion. *See Goodwin v. Starbucks Coffee Co.*, CRB No. 08-215, (December 11, 2008); *Speight v. George Washington University Hospital*, CRB No. 12-142, (January 18, 2013). We do not find any evidence that the ALJ acted in an arbitrary or capricious manner and as such we will not disturb the ALJ's exclusion of the evidence pertaining to the PPD determination or the settlement of his prior claim.

Employer then argues, assuming *arguendo* that should the matter not be reversed due to the exclusion of relevant evidence, the ALJ also erred in finding that the Claimant's current condition is medically causally related to the March 9, 2015 accidental injury. Specifically Employer asserts the ALJ erred in adopting the opinions of the treating physician Dr. Fechter. Employer asserts:

> Dr. Fechter's reports show that the Claimant has essentially the same complaints as those that he was having at the Maryland Workers' Compensation Commission hearing in 2013 and then still having just two days before the accident including radiating pain and pain with bending, sitting, and standing. His opinions are therefore, based on incomplete information received from the Claimant or a misunderstanding of the Claimant's condition just prior to the accident. As such, the [ALJ] erred in adopting these opinions.
>
> The [CO] is also completely devoid of any discussion of the nature of the Claimant's pre-existing problems or complaints, any mention of the Claimant's pre-existing history, and the significance of his prior problems. His analysis fails to articulate how the Claimant's pre-existing history impacted his current condition and does not mention the key components of the Claimant's prior testimony and his prior restrictions. The weight of the evidence, as outlined above, clearly shows the significance of the Claimant's prior history. This history should have been considered by the [ALJ] and the record is clear that it was not. As such, the [CO] is not supported by the substantial evidence and should be reversed.

Employer's Brief at 14, 15.

Review of the CO reveals the ALJ set forth the preponderance of evidence standard Claimant must meet after Employer has been found to have rebutted the presumption. The ALJ further stated that that the opinion of the treating physicians are ordinarily preferred as witnesses as opposed to doctors who have been retained to examine injured workers solely for purposes of litigation. *Stewart v. DOES*, 606 A.2d. 1350 (D.C. 1992). The ALJ reasoned:

> In his well-substantiated February 18, 2016 letter to Claimant's counsel, Dr. Fechter diagnosed Claimant with cervical and lumbosacral spine strain injuries, with the objective findings on MRI of cervical stenosis, lumbosacral disc extrusions, and degenerative changes. Dr. Fechter further opined that Claimant's March 6, 2015 accident caused those injuries and aggravated the pre-existing

degenerative changes as well as the pre-existent condition in Claimant's neck. CE 1.

During his deposition, Dr. Fechter opined that Claimant's March 6, 2015 fall resulted in Claimant's cervical and lumbosacral strain injuries. Dr. Fechter further opined that he had reviewed Dr. Closson's report of March 4, 2015, which was based on an examination of Claimant just two days before the March 6, 2015 accident, and that nothing in Dr. Closson's report altered Dr. Fechter's conclusions. Dr. Fechter further opined that Claimant had "honestly" told him he had been having chronic back pain before the March 6, 2015 accident, but in Dr. Fechter's opinion, the March 6, 2015 accident had made Claimant's low back worse. CE 10.

Employer relies on the opinions of its IME physician, Dr. Gordon, who, in his report of October 6, 2015, and during his deposition, opined that [C]laimant's current low back condition was not causally related to Claimant's March 6, 2015 accident. Rather, Dr. Gordon opined, Claimant's current low back condition was causally related to his pre-existing condition of significant complaints as documents in Dr. Closson's March 4, 2015 report. EE 1, 6.

Therefore, having found nothing in the opinions of Employer's IME physician which requires the undersigned to disregard the opinion of claimant's treating physician, I find the treating physician's opinions persuasive and thus entitled to the treating physician's preference. Accordingly, based on the treating physician's opinions and Claimant's credible testimony, I find that claimant has proven, by a preponderance of the evidence that his current low back condition and disability, if any, are medically causally related to the March 6, work injury.

CO at 7, 8.

Claimant asserts:

The Employer requests that this Honorable Court disregard the substantial evidence standard of review that the CRB is required to follow, and reweigh the evidence to find that Dr. Gordon's defense medical evaluation should be given greater weight. The Employer places great store in the fact that Mr. Green had significant pre-existing back problems as a result of the 2005 work injury. However, the [CO] was aware of the pre-existing back problems, as was Dr. Fechter when he treated Mr. Green. The Employer fails to identify an analytical error that Dr. Fechter or the [CO] made in finding Mr. Green suffered an aggravation to the low back, the Employer simply asks the CRB to disregard the substantial evidence in order to reweigh the evidence in the Employer's favor. As the CRB is not empowered to make [such] a finding, the [CO] must be affirmed.

Claimant's Brief at 13.

We agree that we are precluded from re-weighing the evidence, and we conclude the ALJ's determination that Claimant did meet his burden of producing by a preponderance of the evidence that his current low back problems are causally related to the March 6, 2015 work injury is supported by substantial evidence and in accordance with the law. *Marriott, supra.*

Is the ALJ's denial of TTD benefits for the period of April 10, 2015 to May 17, 2015 supported by substantial evidence and in accordance with the law?

In his cross-appeal Claimant asserts:

> Both the [CO] and the Employer and Insurer err when discussing the effects of layoff on an injured workers' entitlement to temporary total disability. The Court of Appeals has specifically held that termination does not sever the link between the work injury and disability. *See Upchurch v. DOES*, 783 A.2d 623, 627 (D.C. 2001). The CRB has noted that when an injured worker is working light duty when their position is terminated through the layoff mechanism, the injured worker is still entitled to benefits until they are released to full duty. *See Ortega v. Clark Construction*, CRB No. 14-130 (May 19, 2015.
>
> The Employer argues that because Mr. Green lost his modified duty position with the Employer because the Employer went out of business, that he is not entitled to any temporary total disability benefits. The Compensation Order found that Mr. Green was not entitled to any temporary total disability benefits from April 10, 2015 to May 18, 2015 because Mr. Green's inability to work was caused solely due to the closing of the Employer and Insurer [sic]. Both analyses are in error under D.C. Law. During the period between April 10, 2015 to May 18, 2015, the Employer did not present any evidence under *Logan v. DOES,* 805 A.2d 237 (August 22, 2002) establishing the availability of other jobs which Mr. Green could perform. *See Logan*, 805 A.2d at 242. The burden was upon the Employer to demonstrate that there was work available for which Mr. Green was qualified under his ten pound lifting restrictions. *Id* at 243. The Employer did not provide any such evidence. As the [CO] noted in *Ortega,* when the injured worker has demonstrated that a laid –off worker has medical restrictions caused by a work injury and cannot return to their pre-injury employment, the Employer must provide evidence to rebut the prima facie case of temporary total disability. See *Ortega*, supra at 17-18. The [CO] failed to apply the *Logan* analysis in light of the finding that Mr. Green was laid off for economic reasons, and thus that portion of the Compensation Order must be reversed for the entry of an Order finding Mr. Green was temporarily and total disabled from April 10, 2015 to May 18, 2015.

Claimant's Brief at 18, 19 (citations and italics added).

We find Claimant's reliance on *Upchurch* and *Ortega* is misplaced. The claimant in *Upchurch* was terminated not due to his work-related injury, but due to his decision not to comply with The Washington Post's (Upchurch's employer) policies and procedures on reporting to work and absences from work, and his desire to work at another job or to go school. Thus *Upchurch*

did not involve a lay-off or business closing situation. Moreover, the claimant in *Ortega* was not on light duty restrictions when she was injured as was the instant Claimant.

While we find the ALJ did set forth the burden shifting process set forth in *Logan, supra*, we do not agree that his application of the process was correct. Nevertheless, as we explain below, any error is harmless as the ultimate determination that Claimant did not establish entitlement to TTD from April 10, 2015 through May 17, 2015 is supported by substantial evidence.

In its analysis with regard to the extent of an injured worker's disability, the DCCA in *Logan* stated:

> Deciding the extent of disability in any case has both a procedural and a substantive component. In *Crum [v. General Adjustment Bureau, 238 U.S. App. D.C. 80, 86, 738 F.2d 474, 480 (1984))] supra*, the District of Columbia Circuit pointed out that "the [Department of Labor's Benefits Review] Board and the courts have utilized [a] burden-shifting device . . . as an aid to the evaluation of such evidence," namely:
>
> In order to be found disabled, claimant must establish an inability to return to his usual employment. Once claimant has made [this] showing, the burden shifts to the employer to establish suitable alternate employment opportunities availability of other jobs which the claimant could perform." *Id.*

Logan, supra at 244.

There is no dispute that in the instant matter Claimant's "usual employment" with the employer was a light duty restricted job that Employer clearly accommodated over the years. While the ALJ attempted to distinguish the "usual duties" of Claimant's job with an added ten pound restriction the physicians at Concentra added after the work incident, Claimant testified that he continued to work and Employer continued to accommodate all of his restrictions. HT at 53. As Claimant was still able to perform his usual duties, the burden does not shift to Employer to establish suitable alternate employment and Claimant has not established entitlement to TTD benefits after Employer went out of business.

Is the ALJ's award of TTD benefits for the period of June 27, 2015 through October 19, 2015 supported by substantial evidence and in accordance with the law?

With regard to the awarded TTD for the period of TTD from June 27, 2015 through October 19, 2015, Employer asserts only that:

> [Claimant] admitted that the next job he worked also ended because he was also laid off. While the [ALJ] states that this was because he was missing too much time for [sic] due to doctor appointments, there was no evidence to corroborate this and evidence that was presented showed the opposite. Indeed, the Claimant admitted he received unemployment benefits for the periods of time in question, that he remained a part of the union, and that he was regularly looking for employment. This shows that both periods of time in question were periods when

> the Claimant was not off work because of his restrictions from the subject accident, but simply because of economic factors.

Employer's Brief at 17, 18.

Employer does point us to any specific evidence that as Employer asserts "shows the opposite". The ALJ indicated Claimant credibly testified that he missed too much work due to his attendance at doctor's appointment and physical therapy. An ALJ's credibility determination is 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). While one or more of this panel's member may have found otherwise on this issue, we see no reason to depart from these principles in this case.

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant's current low back condition is medically causally related to the work related incident of March 6, 2015 is supported by substantial evidence and is **AFFIRMED**. The ALJ's denial of TTD benefits for the period of April 10, 2015 to May 17, 2015 is in accordance with the law and is **AFFIRMED.** The ALJ's award of TTD benefits for the period of June 27, 2015 through October 19, 2015 is in accordance with the law and is **AFFIRMED.** The remainder of the CO's award has not been challenged by either party and is **AFFIRMED**.

So ordered.