

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-006

**NERY S. ROCHA-GUZMAN,
Claimant–Petitioner,**

v.

**HARIS DESIGN & CONSTRUCTION CO. and ERIE INSURANCE,
Employer/Carrier-Respondents.**

Appeal from a December 16, 2013 Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. 11-273A, OWC No. 672886

Michael J. Kitzman, for the Petitioner
Cheryl D. Hale, for the Respondent

Before: HENRY W. MCCOY, MELISSA LIN JONES, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

HENRY W. MCCOY, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, who was hired by Employer without a legal work permit or social security number, worked as a foreman on construction projects with the primary responsibility of translating the work assignments to the members of his work crew. On August 9, 2010, while working on a roof, Claimant's legs went through the roof and he stopped himself by falling on

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 MAR 7 AM 11 58

his left side. Claimant sought initial treatment on August 18, 2010 from Dr. Jeffrey Phillips with complaints of pain in his neck, low back and pain radiating down his left leg.

Claimant was also treated by Dr. Phillips partner, Dr. Richard Meyer, for complaints of right side radiating pain and was referred to neurologist Dr. V. Sharma. Dr. Sharma diagnosed post-concussion syndrome as well as post traumatic cervical thoracic and lumbar sacral strain syndrome which were confirmed by Dr. Fredric Salter.

Claimant returned to work in November or December 2010 and was examined by Dr. Ross Meyerson on December 13, 2010 at Employer's request. Dr. Meyerson opined that Claimant could return to his pre-injury job without restrictions. In February 2011, Employer released Claimant from its employ because he did not have the proper work permit documentation.

Employer voluntarily made two lump sum payments of temporary total disability benefits. Claimant then filed a claim for an award of permanent total disability benefits from April 8, 2013 to the present and continuing. Following a formal hearing, the presiding Administrative Law Judge (ALJ) determined that Claimant had not proven his entitlement to the requested benefits by a preponderance of the evidence and denied the claim for relief.¹ Claimant has timely appealed with Employer filing in opposition.

On appeal, Claimant argues the ALJ did not properly weigh the evidence in accordance with the shifting burden established in *Logan*² and improperly found Claimant to be an incredible witness. Employer counters that as the ALJ properly applied the law to the facts and the Compensation Order should be affirmed.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the 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.³ See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (Act), at § 32-1521.01(d)(2)(A). 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 where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

¹ *Rocha-Guzman v. Haris Design & Construction Co.*, AHD No. 11-273A, OWC No. 672886 (December 16, 2013).

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

³ "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. DOES*, 834 A.2d 882 (D.C. 2003).

Claimant argues in his first assignment of error that the ALJ failed to properly weigh the evidence of disability. Specifically, Claimant asserts that the ALJ failed to address the conclusions of the treating physician or the conclusions of the vocational expert in denying the claim. In addition, Claimant contends the ALJ failed to apply properly the burden shifting device in *Logan* when determining whether an injured worker is permanently and totally disabled. We disagree.

The ALJ found that Claimant worked as foreman on construction and renovation projects with his primary duties being to translate the superintendent's assignments to the members of his work crew. After his work accident on August 9, 2010 and the injuries sustained, Claimant returned to work in November or December 2010 performing his pre-injury work duties as a foreman.

Under the burden shifting device established in *Logan*, Claimant must show an inability to return to his usual employment.⁴ Once this showing is made, a *prima facie* case of total disability is established, which Employer can rebut by establishing the availability of other jobs which Claimant could perform. The ALJ noted Claimant's contention that he was unable to return to his pre-injury duties as a foreman while also noting Employer's counter argument that Claimant had been able "to work continually since the work incident" and that Claimant's "prolonged period of unemployment is due not to the incident of August 9, 2010 but rather to claimant's inability to maintain legal work status."⁵

The ALJ proceeded to apply *Logan* to reason and conclude:

Keeping in mind that claimant was working at his foreman duties in February 2011 when employer discovered he was not legally employed and advised him he could no longer work for them, and given claimant's inconsistent testimony, claimant's reliance on the reports of the physicians of Phillips and Green cannot meet the initial burden of establishing that he is unable to work in his pre-injury duties and the burden does not shift to employer. Nevertheless, Harris [sic] Siddiqui, President of Haris Design, testified at the hearing that claimant's duties before the accident and after the accident were conveying instructions in English from the superintendent and monitoring employees and the assignments that were being carried out. Mr. Siddiqui also testified that had claimant been able to

⁴ With regard to the nature and extent of his disability and proving entitlement to the requested level of benefits, the ALJ stated that the "claimant has the burden of proving by substantial credible evidence that he is entitled to the requested level of benefits." This is incorrect as the correct burden is by a preponderance of the evidence as merely presenting substantial evidence to support a claim is not necessarily enough to carry the burden of persuading the finder of fact. See *Golding-Alleyne v. DOES*, 980 A.2d 1209, 1216 (D.C. 2009). However, the ALJ's apparent application of this lesser standard is deemed harmless as Claimant would not have been able to meet this higher standard given his inability to meet the lesser one.

⁵ CO, p. 4.

provide proper documentation claimant would still be employed by employer. HT at 84, 85.⁶

Contrary to Claimant's argument, the ALJ did weigh the evidence of record to reach the conclusion that Claimant failed to make the initial showing under *Logan* of an inability to perform his pre-injury job duties. The ALJ found that Claimant's primary job duty was as a foreman who translated the work assignments given by the superintendent to his work crew. After he was injured on August 9, 2010 and after being off work for a few months, Claimant was released to return to light duty work with restrictions effective November 19, 2010 (CE 1, p. 38) and that release remained in effect on the February 23, 2011 office visit.

The ALJ also found that it was in February 2011 that Claimant was let go from employment by Employer when it was discovered that he was an undocumented worker and therefore it was not legal for Employer to keep him in its employ. The ALJ gave credence to Employer's testimony that Claimant's duties were as an English to Spanish interpreter and if Claimant had been able to provide proper documentation, he would have remained in Employer's employ. Insofar as Claimant had returned to work and would have continued working but for his undocumented status, the ALJ properly concluded that Claimant failed to make a *prima facie* showing of total disability so as to shift the burden under *Logan* to Employer. We find no basis to disturb the ALJ's ruling.

We likewise find no merit in Claimant's argument that the ALJ erred in finding him to be an incredible witness. As Claimant correctly notes, an ALJ's credibility determinations are entitled to great weight, when properly supported.⁷ Here the ALJ based her determination not only on Claimant's questionable need for a translator at the hearing when he worked as a translator himself, but also upon findings that "[C]laimant was not consistent when advising the physicians of Phillips and Green about his complaints of pain." The evidentiary record supports the ALJ's determination as an incredible witness and that determination will not be disturbed.

⁶ *Id.*, pp. 4-5.

⁷ *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1986).

CONCLUSION AND ORDER

The ALJ's determination that Claimant has not met his burden to establish by a preponderance of the evidence that he is permanently and totally disabled is supported by substantial evidence and in accordance with the law. The December 16, 2013 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

May 7, 2014
DATE