GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-164

RANDALL MARK MCMASTERS,
Claimant-Respondent

v.

WILLWORK, INC., and
HARTFORD INSURANCE CO.,
Employer/Carrier-Petitioner.

Appeal from an November 22, 2016 Compensation Order
by Administrative Law Judge Donna J. Henderson
AHD No. 10-578E, OWC No. 674704

(Decided March 22, 2017)

Benjamin T. Boscolo for Claimant
Zachary L. Erwin for Employer

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

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The following facts and procedural background material are taken from the Compensation Order issued on November 22, 2016 ("CO") which is under review herein. Only those facts that are not in dispute are contained in this recitation.

> The parties stipulated, and I so find: there is jurisdiction pursuant to the Act; an employer-employee relationship existed; Claimant suffered an injury on September 30, 2010, which arose out of and in the course of his employment; Claimant's disability is medically causally related to the injury on September 30, 2010; and Claimant gave timely notice and made a timely claim.

Claimant was employed by Employer as a tradeshow carpenter when he slipped and injured his back on September 30, 2010. As a tradeshow carpenter, Claimant built and dismantled tradeshow displays. The job of a tradeshow carpenter requires less skill than a general carpenter and is a "light and sedentary" job, with the possibility of medium duty tasks.

Claimant received regular medical treatment between September 30, 2010 and April 22, 2011. On April 11, 2011, Claimant's neurosurgeon, Dr. Matthew Ammerman, opined that Claimant would need additional diagnostic studies to determine if his pain was discogenic. Claimant's orthopedist Dr. Neil A. Green discharged Claimant on April 22, 2011. Dr. Green opined that Claimant could not return to his pre-injury employment as a tradeshow carpenter. Dr. Green instructed Claimant to follow-up with Dr. Ammerman.

In May 2011, Claimant moved to Florida to assist his father, whose health was declining. Claimant received no more medical treatment until he returned to the Washington, D.C. area in 2012.

On April 17, 2012, Claimant returned to Dr. Ammerman complaining of increasing pain in his low back and left leg. Dr. Ammerman reported that Claimant informed him that he had fallen as a result of the increasing pain in his left leg. Dr. Ammerman read a lumbar MRI, performed on May 18, 2012, as showing no compression of the S1 nerve root and recommended against surgery.

Claimant is unable to resume his employment as a tradeshow carpenter. Dr. Ammerman opined that Claimant reached maximum medical improvement on June 9, 2012. Claimant was released to light to moderate job duties by his treating pain management specialist, Dr. Stuart Krost, on April 27, 2015. After a Functional Capacity Evaluation (FCE), Sheila Mongeon, PT, determined that Claimant is capable of light duty. However, she also reported that Claimant's testing and her "clinical observation suggested sub-maximum effort." After Ms. Mongeon's FCE, Claimant entered a work-hardening program in which he progressed to medium duty work status on April 5, 2013.

Claimant has been assigned four different vocational rehabilitation counselors (VRC): Terri Brown; James Sullivan; James Edleston; and Anne Wheeley. Pursuant to an agreement between the parties, Claimant returned to the Washington area for the purpose of receiving 90 days of vocational rehabilitation services (VR) from Terri Brown. However, I find that Ms. Brown's efforts did not include job search referrals while he lived in the Washington, D.C. area. During the first 90 days, from approximately January 2013 through March 2013, Ms. Brown worked with Claimant on his resume. On May 1, 2013, Ms. Brown sought to contact Claimant and called his lawyer, who in turn told her that Claimant had returned to Florida. On May 1, 2013, Ms. Brown prepared a "Labor Market Survey/Vocational Rehabilitation Report #5." I find that only two of the nineteen positions, which Ms. Brown identified in her Labor Market Survey (LMS), were within Claimant's physical capacity and skill level.

James Sullivan met with Claimant three or four times commencing on June 4, 2015, before Mr. Sullivan moved from Florida and Claimant's VR ended. After Mr. Sullivan moved, he wrote a VR assessment and a LMS report on October 30, 2015. I find that the seven jobs Mr. Sullivan identified in his LMS, given Claimant's physical limitations and skill level, are not suitable alternative employment.

James Edleston offered job leads to Claimant and provided brief vocational rehabilitation services to Claimant before Claimant returned to the Washington, D.C. area. Mr. Edleston opined that there is a job market in the Ft. Lauderdale area for Claimant. Mr. Edleston focused on assembly jobs because claimant had some computer skills and knew the construction field. However, Mr. Sullivan did not identify specific employers. I find that Claimant cooperated with Mr. Edleston's VR efforts.

Since July 7, 2016, Anne Wheeley of Restore Rehabilitation has been providing VR to Claimant and he is cooperating with VR. He is actively seeking employment in the Washington area. Ms. Wheeley is attempting to locate light to moderate duty positions for Claimant to apply to. She found 18 potential job postings which she believed were within his physical capacity. Ms. Wheeley also performed a LMS; however, many of the positions she identified were not suitable alternative employment.

Based upon my observation of Claimant's demeanor, the tenor of his voice, and his movements in the court room, I find Claimant's testimony, concerning his level of pain and his efforts to follow the instructions of his VRCs, to be credible. Based upon his demeanor and the tenor of his voice during his testimony about his return to Florida I find Claimant's reason for moving to Florida on both occasions was reasonable and consistent with that of someone who then viewed Florida as his home state, as opposed to one who was moving to avoid VR efforts or to make himself difficult to employ.

McMasters v. WillWork Inc., AHD No. 10-578E, OWC No. 674704 (November 22, 2016) at 2-10 (citations and footnotes omitted).

Claimant requested a formal hearing seeking permanent total disability ("PTD") benefits, from June 9, 2012 to the present and continuing. A formal hearing was held before an administrative law judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES").

On November 22, 2016, the ALJ issued the CO. The ALJ's Conclusions of Law consisted of the following:

Claimant's inability to return to his former employment was stipulated. Thus, Claimant established a *prima facie* case of permanent total disability. Claimant has been unemployed for a lengthy period of time. Employer has not provided consistent VR-job search services. Thus, Employer failed to prove that it had identified suitable alternative employment as required under *Logan*. Accordingly,

> I conclude that Claimant has proven, by the preponderance of the evidence, that he is permanently and totally disabled.
>
> Claimant's claim that both prongs of maximum medical improvement were reached on June 9, 2012, the date of Dr. Ammerman's conclusion that Claimant had reached maximum medical improvement is rejected. Claimant's economic loss must also be permanent. Employer is afforded a reasonable amount of time in which to provide vocational rehabilitation services. After weighing the totality of the evidence, the undersigned concludes that the evidence demonstrates that Employer's delay in job placement services was unreasonable on and after March 1, 2013, when Employer failed to immediately commence job placement services despite receipt of the FCE, Claimant was permanently and totally disabled. Accordingly, I conclude that Claimant has been permanently and totally disabled since March 1, 2013 through to the present and continuing.

CO at 17, 18.

Employer timely appealed the CO to the Compensation Review Board ("CRB") by filing Employer and Insurer's Application for and Memorandum of Points and Authorities in Support of Application for Review ("Employer's Brief"). Claimant filed Mr. McMaster's Opposition to the 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 asserts the ALJ's finding that Employer did not meet their burden of proving that suitable gainful employment existed for Claimant was not supported by substantial evidence or in accordance with applicable law. In support of its position, Employer argues:

> Claimant's vocational counselors identified 45 reasonably available jobs that they believed Claimant was physically and mentally capable of performing and for which he was able to compete and which he could likely secure. ALJ Henderson stated, with regard to the jobs selected by Ms. Brown, "two, out of 19 positions (10.5%) identified, might be suitable alternative employment." CO at 12. Inexplicably, in the next sentence of her decision, ALJ Henderson states, "Thus, I

> find the positions identified by Ms. Brown do not constitute suitable alternative employment for Claimant and her LMS is accorded no weight." *Id.* She provides no explanation or rationale for her contradiction. Therefore, ALJ Henderson's ultimate decision with regard to Ms. Brown's vocational efforts is arbitrary, capricious and unsupported by substantial evidence.

Employer's Brief at 8.

We disagree. The Labor Market Survey ("LMS") was prepared after Claimant left the job market area, and is therefore not sufficient evidence of what suitable employment was *available.* Moreover, contrary to Employer's assertions, the ALJ not only identified every job classification listed in Ms. Brown's LMS, the ALJ listed every specific job opening listed in the LMS and she provided her rationale, i.e., lack of skills or experience, for not finding 17 of the 19 jobs listed suitable alternative employment. *See* CO at 2-6, footnote 2. Employer next asserts:

> ALJ Henderson was similarly incongruous when addressing Mr. Edelston's job placement services. Initially ALJ Henderson explained that Mr. Edelston "offered job leads to Claimant and provided brief vocational rehabilitation services to Claimant." CO at 7. Additionally, she recognized that Mr. Edelston opined that there was a job market for Claimant to obtain a position within his skills, abilities, and limitations. *Id* at 7, 13. However, ALJ Henderson ultimately disregarded Mr. Edelston's contribution because "he did not identify specific employers" and provided only a "vague opinion" that there was an available job market for Claimant. *Id* at 7, 13. In light of the *Joyner* case, which held that the employer can meet its burden short of identifying specific jobs available or specific job offers made, ALJ Henderson's treatment of Mr. Edelston's opinions is not in accordance with the law. Mr. Edelston identified job leads and opined regarding the potential job market available for Claimant. Certainly, his opinions satisfy the two questions asked in *Joyner v. District of Columbia Dep't of Employment Servs.*, 502 A.2d 1027 (D.C. 1986)(*Joyner*).

Employer's Brief at 8, 9 (citation added).

Claimant responds:

> The Compensation Order relied on the evidence the Employer provided to demonstrate job availability for Mr. McMasters, and concluded based on Mr. McMasters' participation in vocational rehabilitation services and lack of success with obtaining employment, when combined with the Employer's fitful attempts to return Mr. McMasters to employment, that the Employer failed to meet their burden. The Compensation Order reviewed the reports of all four vocational rehabilitation councilors, [sic] and evaluated each and every position identified by the Employer as to whether it met Mr. McMasters' physical, mental, and educational status and whether those jobs existed that Mr. McMaster could compete and secure. The Compensation Order explained why all four of them [sic] vocational rehabilitation councilor's [sic] reports and testimony were not sufficient to meet the Employer's burden: the first vocational rehabilitation councilor [sic] did not help Mr. McMasters compete and secure employment, she

only produced a labor market survey after Mr. McMasters had left the D.C. area. Furthermore, only two of those positions met Mr. McMasters' needs. Thus, the vocational reports did not demonstrate positions that Mr. McMasters would reasonably be able to obtain and secure, because they were outside his work restrictions or community restrictions. *See Joyner*, 502 A.2d at 1031 n4. Likewise, the second vocational councilor provided a labor market survey that was never presented to Mr. McMasters while he was working with Mr. Sullivan, and the Compensation Order explained why each and every position identified in the survey was outside of Mr. McMasters' vocational capacity. *See Id.* The Compensation Order's rejection of the third vocational rehabilitation councilor [sic] were similar: the positions identified did not meet Mr. McMasters' vocational capacity. *See Id.* Furthermore, Mr. McMasters attempted to seek out those positions and was unable to secure those positions. *Id.* Likewise, while the fourth vocational rehabilitation councilor [sic] was able to find positions that met Mr. McMasters' physical, mental, and educational background, the Compensation Order found that based on Mr. McMasters' applying to the positions and attending interviews, he was unable to compete and secure the positions. *See Id.* Thus, based on the medical and testimonial evidence that many of the physicians were not suitable post-injury employment, and that of the theoretical suitable post-injury employment Mr. McMasters could not obtain despite him seeking out these positions, the Compensation Order concluded that pursuant to D.C. law, Mr. McMasters was permanently and totally disabled. *See Logan*, 805 A.2d at 243.

The Employer is asking that the CRB reweigh the substantial evidence in its favor, despite the Compensation Order providing voluminous analysis in support of the in support of the conclusion that Mr. McMasters was permanently and totally disabled. Specifically, the Employer asks that the CRB reweigh the evidence without considering Mr. McMasters' attempts to compete and secure the positions identified by the vocational councilors [sic].Because the Compensation Order found that Mr. McMasters' attempts to secure the positions and his inability to do so despite his participation in the vocational rehabilitation process, and the Employer does not challenge this analysis on appeal, there are no grounds for this Honorable Board to reweigh the evidence and reverse the November 22, 2016 Compensation Order.

We agree with Claimant and disagree with Employer's characterization of the ALJ's analysis and direct Employer to the ALJ's extensive footnotes. We further note that the ALJ ultimately concluded Claimant had met his burden of establishing entitlement to permanent total disability benefits as of March 1, 2013. Neither Claimant nor Employer has contested the ALJ's selection of March 1, 2013 as the date of PTD entitlement. On March 1, 2013 only the vocational rehabilitation services of Ms. Brown had been provided. The vocational services of the remaining three counselors occurred between 2015 and 2016, well after the date Claimant was determined to be permanently and totally disabled. As the Court stated in *Logan v. DOES*, 805 A.2d 237 (D.C. 2002):

> We observe that although it is enough under *Joyner* for the employer to show "that a range of jobs exists that is reasonably available and that that the disabled employee could realistically secure and perform," *Bunge Corp. v. Carlisle*, 227 F.3d 934, 941 (7th Cir. 2000), this showing must be specific enough to show compatibility between the Claimant's actual skills and limitations and the duties of the proffered job positions. *See id* at 942. ("[A] report simply matching general statements of [the claimant's] job skills with general descriptions of jobs fitting those skills is not enough to show that suitable employment alternatives existed for [him]".

Id at 248.

Further as the CRB summarized in *Renwick v. WMATA*, CRB No. 13-159 (April 9, 2014) (citing *Braswell v. Greyhound Lines, Inc.*, CRB No. 12-120 (November 13, 2012)(*Braswell*):

> It must be understood that "permanent total disability" is a statutory construct, and in many senses, it is a term of art which has the meaning that the legislature and the D.C. Court of Appeals have ascribed to it; as such, the meaning may be somewhat at odds with the meaning the phrase would have if the words were understood in their vernacular sense. Thus, a person is permanently and totally disabled if (1) he or she has reached permanency in connection with the medical condition caused by the work injury, (2) he or she is unable to return to the pre-injury job because of the effects of that medical condition, and (3) there is no suitable alternative employment available in the relevant labor market.
>
> While a permanently and totally disabled person remains under an obligation to cooperate with an employer's efforts to return that person to the labor market and while that person's entitlement to ongoing permanent total disability benefits is contingent upon that cooperation, that person is nonetheless permanently and totally disabled until such time as that person is employable. Then, the person's condition may be said to have changed, rendering him or her either only partially disabled or not disabled at all, depending upon the level of wage earning capacity that has been recovered.

Accordingly, in a case such as this, where (1) a claimant's disabling condition has become permanent (as defined by *Logan*), (2) the claimant is unable to return to the pre-injury employment due to that condition, (3) has been found to have done all that has been requested in the vocational rehabilitation process and (4) diligently sought out employment, that person is, as a matter of law, permanently and totally disabled as that term is defined under the Act and *Logan,* "until such time as that person is employable". *Braswell, supra.*

As Claimant correctly points out, the mere finding of employment potential by a third or fourth counselor does not equate to a finding that claimant is "employable". However, Claimant remains responsible for following up on any job development provided to him regardless of a permanent total disability designation. *Braswell, supra.*

We further find Employer is requesting that we reweigh the evidence, which is an undertaking beyond our authority, because the CRB's authority is limited to determining whether a Compensation Order is supported by substantial evidence. *Marriott, supra.*

CONCLUSION AND ORDER

The ALJ's determination that Claimant has met her burden of establishing that her disability is permanent and total as of March 1, 2013 is supported by substantial evidence and in accordance with the law and is **AFFIRMED**. The remainder of the CO's conclusions have not been appealed and are accordingly **AFFIRMED.**

So ordered.