GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-043

PHYLLIS SINCLAIR,

Claimant–Petitioner,

v.

HOWARD UNIVERSITY HOSPITAL,

Self-Insured Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 07-353B, OWC No. 604720

Benjamin T. Boscolo, Esquire, for the Petitioner

William H. Schladt, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[1] MELISSA LIN JONES, AND HEATHER C. LESLIE[2], *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

On January 8, 2004, Petitioner Phyllis Sinclair, a registered nurse, sustained injuries to her low back at work and that injury was found to be compensable in a Compensation Order issued by an Administrative Law Judge on May 10, 2010.

[1] Judge Russell was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

[2] Judge Leslie was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

In August 2010, Ms. Sinclair alleged that she fell when a shooting pain from her low back into her right leg caused her knee to buckle, resulting in a fall in which she injured her right wrist. The record before us is not clear regarding when Ms. Sinclair stopped working for Howard University Hospital (HUH), nor is it clear regarding what disability benefits were paid voluntarily.

In any event, Ms. Sinclair was referred by HUH to a vocational rehabilitation (VR) service provider, Intracorp, and VR services were provided commencing in July 25, 2010 and were terminated on April 23, 2011. Laura Bentley of Intracorp prepared a labor market survey (LMS) on May 23, 2011 (EE 4) in which 12 positions were identified as being available in the relevant market for which Ms. Sinclair was qualified in light of her experience, background, education, training and physical capacities. Only two of these potential employers identified the level of compensation being offered, but according to the LMS, the jobs fell into one of five Registered Nurse job categories, with U.S. Department of Labor Statistics salary range estimates that, at the top of each category, exceeded Ms. Sinclair's pre-injury average weekly wage. As a result of that report and based upon HUH's concerns concerning the level of cooperation from Ms. Sinclair that Intracorp was reporting, HUH stopped payment of Ms. Sinclair's temporary total disability (ttd) benefits effective April 21, 2011.

The dispute over Ms. Sinclair's entitlement to disability payments and to medical care for her right hand and wrist was presented to another Administrative Law Judge (the ALJ) at a formal hearing conducted on November 10, 2011, with Ms. Sinclair seeking reinstatement of her ttd and provision of medical care for past and ongoing treatment to her right hand and wrist. HUH disputed Ms. Sinclair's entitlement to ongoing disability benefits, arguing that, based upon the independent medical evaluations (IMEs) of Dr. Louis Levitt, the knee problem causing the fall in which the wrist injury was sustained was unrelated to the 2004 back injury. HUH also asserted that (1) Ms. Sinclair was capable of returning to suitable alternative employment, but that (a) she declined to accept one position that was offered in the office of a Dr. Nolte for personal reasons unrelated to her injury and (b) the LMS established that there were numerous suitable alternative jobs in the relevant market within Ms. Sinclair's physical and professional capacity, and (2) Ms. Sinclair had unreasonably failed to cooperate with HUH's VR efforts.

Ms. Sinclair denied that she had been uncooperative, and contended that the fall resulted from her work injury.

On February 21, 2012, the ALJ issued a Compensation Order (the CO) in which he found that (1) the right wrist and hand injuries were causally related to the work injury, (2) citing *Logan v. DOES,* 805 A.2d 237 (D.C. 2002) and D.C. Code § 32-1508(5), Ms. Sinclair had "voluntarily limited her income" during the period claimed, and (3) Ms. Sinclair had not failed to cooperate with VR. He awarded her causally related medical care and denied her claim for ttd.

Ms. Sinclair appealed the denial of ttd. Employer did not appeal the findings concerning the causal relationship of the right wrist and hand injuries to the work injury or that she had not failed to cooperate with VR.

We affirm the ALJ's determinations with respect to labor market analysis, nature and extent of disability, and vocational rehabilitation, but vacate the award of medical care and remand the matter

for further consideration of the issue of medical causal relationship of the right knee injury to the work injury, applying the proper legal standard governing the burden of proof.

STANDARD OF REVIEW

The scope of review by the CRB is generally 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. *See*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

Before discussing the more complex issue presented by this appeal, we must address a clear error concerning the burden of proof regarding medical causation. In the CO, on page 5, after discussing the presumption of compensability contained in D.C. Code § 32-1521, and after concluding that (1) Ms. Sinclair's evidence was sufficient to invoke the presumption that her right knee injury (and any resultant disability) is causally related to the work injury of January 8, 2004, and (2) that HUH's evidence was sufficient to overcome that presumption, thereby dropping the presumption from the case, the ALJ wrote that "As a consequence, the presumption drops from the case and the entire evidence must be evaluated without the aid of the presumption *with the burden remaining on the Claimant to prove by substantial evidence that her right knee disability is medically causally connected to the original work injury*" (emphasis added). This is an erroneous statement concerning the burden of proof. As the District of Columbia Court of Appeals has reminded us on numerous occasions, the standard to be applied by the ALJ in the absence of a presumption is that a claimant must prove the claim by a preponderance of the evidence.

Since the ALJ asserts that he applied the lesser standard of "substantial evidence" rather than the more demanding standard of "a preponderance of the evidence", we must vacate the award of medical care and remand for further consideration and application of the appropriate standard of proof.

We turn now to the remaining issues, so that the ALJ does not reconsider them on remand.

Ms. Sinclair's argument in support of this appeal is that HUH failed to meet its burden of proof in establishing that Ms. Sinclair had a specific earning capacity, thereby making it impossible to determine whether the extent to which LMS establishes an ongoing earning capacity is partial or total, and if only partial, she is entitled to partial wage loss benefits.

We reject this argument. The evidence of record is that Ms. Sinclair voluntarily declined to accept a modified position in Dr. Nolte's office, which while temporary when offered, would have paid the same as she was making pre-injury. The fact that she had what some might consider a reasonable

basis for turning down the position[3] doesn't change the fact that it was available and she declined to accept it. As the ALJ put it, her reasons, previously made vacation plans, were "purely personal in nature" and the wage loss that resulted from her not accepting the position when it was offered "resulted from circumstances over which she had complete control", and thereby constituted a voluntary limitation of income.

The fact that it was only a temporary position is not totally without significance, and had HUH not also put on evidence that there were other suitable jobs available in the relevant labor market that had pay ranges which, on their high end[4], would have resulted in no loss of wages, the ALJ's determination that Ms. Sinclair had voluntarily limited her income first by declining the position in Dr. Nolte's office, and then by failing to diligently seek suitable alternative employment, might not withstand substantial evidence review.

However, there is substantial evidence to support the conclusion that Ms. Sinclair is not disabled, under the *Logan* framework. There does not appear to be any dispute in this appeal that Ms. Sinclair's injury renders her unable to return to her pre-injury job. Hence, under *Logan*, it was Employer's obligation to demonstrate employability, which it did with (1) the undisputed evidence that Ms. Sinclair was offered but declined to accept the job in Dr. Nolte's office, and (2) the LMS.

The LMS established that there were numerous positions available in the Washington, D.C. metropolitan area (a dozen included in the LMS report) in employment categories that are suitable for Ms. Sinclair and which categories all have pay ranges with the potential to re-employ Ms. Sinclair at or above her pre-injury average weekly wage. Under *Logan*, the burden then shifted back to Ms. Sinclair to refute the LMS, by either attacking the validity or reliability of the LMS report by its own counter LMS (or through other means), or by demonstrating a diligent, yet unsuccessful job search.

Ms. Sinclair did not offer any counter labor market evidence, and does not attack the suitability of the identified positions in this appeal.[5]

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[3] Others, however, might not accept that it is a reasonable decision to decline an offer of employment at full wages following an otherwise disabling injury in order to avoid disrupting vacation plans.

[4] Ms. Sinclair's stipulated average weekly wage of $1,270.80 equates to an annual salary of $66,081.60. The LMS noted that Ms. Sinclair was an experienced Registered Nurse of 37 years, and in the absence of evidence to the contrary it is reasonable to surmise that she would not be expected to be limited to the entry level salaries of the positions identified. Of those positions, one had a salary range of from $60,000 to $83,200, plus a signing bonus of $5,000; another had a range of $52,000 to $65,000. While none of the other 10 advertised positions referenced in the LMS contained specific compensation being offered for the particular job, the LMS also referenced the industry-wide salary ranges that the various positions pay in the marketplace, and each of them exceed the pre-injury wage at the top of the scale, being $67,000, $80,000, $88,940, $83,000, and $70,000.

[5] As Employer notes, Ms. Sinclair did not raise a claim of insufficient specificity as to the wages that would have been paid had Ms. Sinclair obtained one of the identified positions at the formal hearing. Thus, while we could dismiss this argument out of hand as not being preserved, we need not, because the evidence does in fact demonstrate that nearly all, and one might argue all of the identified positions were in employment categories that had at least the potential to pay a wage equal to or greater than the pre-injury wage.

The ALJ determined that Ms. Sinclair had failed to establish, to his satisfaction, that she had diligently applied for the positions identified in the LMS and which had been identified to her by the vocational rehabilitation consultant as they became known to the consultant. The ALJ wrote:

> The proffered evidence discloses Employer identified 12 suitable alternative jobs available in the local economy consistent with Claimant's physical restrictions. Most of the positions identified in the LMS comported with Claimant's 37 year long experience working as a registered nurse, her ability to work effectively in a multidisciplinary team, ability to monitor, analyze and appropriately evaluate a patient, as well as her ability to communicate orally and in writing with people of various cultural and ethnic backgrounds. However, there is no clear indication in the record of whether Claimant diligently pursued these opportunities by sending in her job applications, by calling and making telephone inquiries and, perhaps, by personally appearing at the job locations. Thus, absent a demonstration of Claimant's good faith effort in following up on job leads, the undersigned is not convinced that the prospects of securing one of those positions, if she reasonably and diligently pursued it, were less than promising.

CO, page 8. It is highly noteworthy that nowhere in this appeal does Ms. Sinclair contend that this finding of lack of diligence in seeking out suitable alternative employment is unsupported by substantial evidence. Equally noteworthy is the lack of argument that these identified positions were either not suitable, or unavailable.

Ms. Sinclair's complaints are centered almost completely upon her assertion that HUH's evidence was inadequate to establish that Ms. Sinclair has voluntarily limited her income (1) because the job in Dr. Nolte's office was only temporary (2) that Dr. Nolte never followed up with Ms. Sinclair to see if, after her vacation, she was still interested in the job, and (3) the LMS lacked sufficient specificity *in the wages* that the identified positions paid to support a finding that HUH had demonstrated Ms. Sinclair had voluntarily limited her income.

We do believe that the ALJ confused the analytic structure of this case by relying upon both the "voluntary limitation of income" framework as set forth in D.C Code § 32-1508 (5), and the *Logan* framework, without being more clear as to which analysis was being undertaken. *Logan*'s burden shifting approach and the code section are sometimes related analytically, and some concepts intertwine, but the code section most neatly applies to the position in Dr. Nolte's office, while the "shifting of the burden" from a claimant to an employer and back to the claimant are not what is contemplated by the code section, but are applicable to the LMS evidence. While there are some circumstances where the code section would be applicable as part of a *Logan* analysis (such as where a specific job is offered at a specific wage), there are other parts of *Logan* where the section has no overt applicability, because of a lack of a specific job offer.

However, it is clear to us that the ALJ analyzed the specific job offer that was declined under the code section, and LMS evidence under *Logan*. Thus, despite the apparent conflation of the two approaches into an undifferentiated analysis, we detect no prejudicial error, and the outcome is both supported by substantial evidence and comports with both the code section and *Logan*.

We are not unmindful that the ALJ's approach to this case, and our affirmance of it, might be viewed as something of a departure from what might be termed "the *Woodall* doctrine". In 1988, the Director of the Department of Employment Services issued a decision in the case of *Woodall v. Children's Hospital*, Dir. Dkt. 86-25, H&AS No. 86-226, OWC No. 007217 (June 10, 1988).

Woodall has been cited on occasion for the proposition that labor market analysis standing alone is insufficient evidence upon which to assess whether a claimant is employable, and for the proposition that before an ALJ can consider such evidence on the issue of whether there exist in a given labor market sufficient suitable employments such that a non-working claimant can nonetheless be found to be employable, the specific jobs listed in a LMS must be identified to a claimant so that the claimant can apply for them.

We have reviewed the case, and conclude that it does not stand for the proposition for which it has come to be known.

The only case that we have found that cites *Woodall* for this proposition and that actually quotes from the decision is *Scott v. Mushroom Trans.,* Dir Dkt 88-77 (June 5, 1990). *Scott* quotes the following paragraph:

> The fact that some of the employers contacted by employer's vocational expert indicated that they would consider claimant for employment opportunities was properly not given a great deal of weight by the Hearing Examiner. The Director notes that both federal and local laws prohibit job discrimination because of age, race, or physical handicap/disability. The Director also notes that these laws would not be necessary if a significant number of employers did not discriminate against prospective employees for the prohibited reasons. Given the prohibitions against discrimination based upon age, race, or physical handicap/disability, it is not unlikely that most employers would readily say that they would consider anyone for a job, irrespective of their actual feelings or practice.

This language, if it were the rationale behind *Woodall*'s doctrine, is, at best, weak. We do not accept the logic that the existence of laws against discrimination in employment of persons with disabilities renders LMS evidence unreliable as a matter of law. Each LMS, like any other piece of expert opinion evidence, should be judged on its own merits for quality and relevance.

Nor do we subscribe to the view that the CRB/Director's role is to lay out guidelines for how much weight an ALJ should or should not give to what is expert opinion evidence. Labor market analysis is a recognized field of professional expertise. As with all such evidence, it is an overriding principal of ours that the fact finder is in the best position to assess the quality, character and weight to be assigned the evidence.

However, more importantly, *Woodall* contains a far lengthier and more illuminating discussion, making it apparent that *Scott*'s short quote from *Woodall* does not give an accurate description of what the Director ruled.

The relevant evidentiary facts of *Woodall* are these. Ms. Woodall, a 53 year old career janitor, sustained injuries which both sides agreed prohibited a return to her pre-injury custodial/janitorial position at Children's Hospital. She sought an award of permanent total disability, which the employer opposed. There had been no efforts at vocational rehabilitation, and at the formal hearing, both sides presented competing labor market opinion evidence. Employer's expert evidence, in the form of a LMS obtained 10 days prior to the hearing, was that in Employer's witness's opinion, there were "several" jobs (not described in the decision) that existed in the local labor market which constituted suitable alternative employment. Ms. Woodall's expert concluded that no such jobs existed in light of Ms. Woodall's age and general lack of transferable skills, and that Ms. Woodall was not a suitable candidate for vocational rehabilitation.

After quoting directly and at length from *Joyner*, *ante*, the Hearing Examiner wrote:

> Applying these principles to the present case, I find that claimant is permanently and totally disabled. It is reasonable to believe based on the opinion of claimant's vocational specialist, that a 53 year old woman with chronic back pain, little education and a manual labor background, would have little chance to compete successfully for and hold a light duty or sedentary job. Employer made no attempt to place claimant in a sedentary position, and under these facts, a labor market survey is too speculative a basis on which to show that claimant is not totally disabled. Had employer provided vocational rehabilitation (which is so strongly mandated by the Act and regulations) and claimant failed to participate or cooperate fully, it might then be appropriate to present a labor market survey. However, in the instant case, employer failed to meet its burden.

Woodall, page 7, quoting from the Hearing Examiner's Compensation Order.

This language, had it been the language of the Director, might *arguably* support the existence of a *Woodall* doctrine (although such a reading would be somewhat stretched, in our view). However, this language is from the Hearing Examiner, and the Director immediately distanced herself from it. Immediately following this quote, the Director wrote:

> The Director *essentially* concurs which [sic] the Hearing Examiner's approach and *ultimate result*. However, rather than concluding that employer failed to meet its burden of proof, *the Director would have concluded that employer failed to carry its burden of persuasion.*
>
> In this case, the Hearing Examiner was faced with conflicting opinions from two vocational experts. While employer's vocational expert clearly identified several jobs for which she felt claimant could compete, claimant's vocational expert opined the contrary view that there were no reasonably available jobs for which claimant could compete, secure and retain, and that she was an unsuitable candidate for vocational rehabilitation. *While there clearly can be some instances where a simple labor market survey may be sufficient to defeat a claim of total disability*, the Director agrees that given claimant's physical condition, advanced age (only in terms of seeking new employment), limited education, work experience limited to manual

> type labor, and the opinion of claimant's vocational expert that due to her circumstances claimant would not be viewed by prospective employers as a favorable candidate for employment, *the employer's proof was not very persuasive*.

Woodall, page 8 (emphasis added).

Far from standing for the proposition that a LMS which has not been provided to a claimant is inherently insufficient to establish job availability, *Woodall* contains an explicitly contrary statement. It is evident from this language in *Woodall* that the Director was saying nothing more than that the Hearing Examiner's decision to accept Ms. Woodall's LMS in favor of the employer's LMS was a decision supported by the evidence in the case. Indeed, to the extent that the *Woodall* is notable in connection with how LMS evidence should be treated, it is notable for the fact that it distances itself from any implication that the employer's evidence was legally inadequate, stressing that the finding that it was *unpersuasive* as opposed to being a failure to meet a burden of production.

Beyond this, we point out that *Woodall* has been cited in eleven DOES appellate cases since 1988. In two cases, *Abney v. Corrections Corp. of America*, CRB No. 06-004 (December 27, 2005), and *Golding-Alleyene v. WHC,* Dir. Dkt. No. 97-68A (February 25, 1999), it is cited for propositions completely unrelated to this case (i.e., *Abney* cites *Woodall* in connection with seeking to introduce newly discovered evidence, and *Golding-Alleyene* cites it in connection with hourly rates for attorney fee awards). A third, *Smith v. Miracle Cleaning Services,* Dir. Dkt. 95-12 (September 26, 1996), cites it for the proposition that suspended vocational rehabilitation services should be resumed if a claimant evidences a willingness to cooperate after suspension for non-cooperation. None of these cases cite *Woodall* for any proposition relevant to labor market evidentiary principals.

Of the remaining eight cases, (*Dew v. The Washington Home,* Dir Dkt 87-69 (May 15, 1989), *Scott, supra*, *Bowen v. Marriott,* Dir Dkt No. 88-54 (January 2, 1992), *Eddy v. Urban Masonry*, Dir Dkt 90-75 (November 29, 1994), *Queen v. DC DHS,* ECAB No. 95-13 (August 23, 1996), *Galliene v. B&B Industrial Catering,* Dir Dkt 97-26 (September 30, 1997), *Black v. Mergentine,* Dir Dkt No. 94-19 (October 31, 1997), and *Reed v. The Washington Post,* Dir Dkt No. 01-08 (April 20, 2001)), six cite *Woodall* for the proposition that jobs identified in labor market surveys that are not communicated to a claimant are not sufficient to establish that a claimant has *failed to cooperate with vocational rehabilitation,* which is a rather unremarkable proposition, given that the question in such cases is whether a claimant's benefits should be suspended *for failure to cooperate with vocational rehabilitation*.

Putting aside the fact that *Woodall* does not stand for this proposition either (there was no issue of vocational rehabilitation in *Woodall*, Ms. Woodall's own evidence was that she was not a suitable candidate for vocational rehabilitation, employer was not seeking to suspend Ms. Woodall's benefits for non cooperation, and there is no discussion of whether or to what extent LMS evidence has any relevance to failure to cooperate defenses), the cited proposition is unremarkable. Of course one can't base a non-cooperation defense upon the existence of jobs that have never been communicated to the claimant. This is a point that is also not relevant to the question at hand, that is, whether the LMS report in this case is competent evidence such that a rational person in the ALJ's position might accept it to support the proposition that there are jobs in the Washington D.C.

metropolitan labor market that constitute suitable available alternative employment. They are irrelevant to our consideration of this case because in those cases, the LMSs were being offered *not* to determine employability, but to assess the level of cooperation with vocational rehabilitation.

There are three cases that might be viewed as citing *Woodall* for a proposition relevant to the case at hand, *Scott*, *Dew* and *Reed.*

We have already discussed *Scott*, *supra*, and will merely reiterate that the portion from *Woodall* that is quoted in *Scott* does not accurately reflect the holding in *Woodall*, and is itself a specious argument that we reject.

From *Dew*:

> It has been held that absent a showing of a claimant's failure to participate in vocational rehabilitation, a labor market survey alone is not sufficient to demonstrate the availability of jobs claimant is able to perform and thus meet employer's burden of establishing that claimant's permanent disability is partial rather than total. Woodall v. Children's Hospital, Dir. Dkt. No. 86-25, H&AS No. 86-226 and OWC No. 007217 (June 10, 1985). After a careful review of the record, the Director concludes that the Hearing Examiner's factual findings are supported by substantial evidence and are based on a proper application of the law.

This is simply a clear misstatement of the Director's holding in *Woodall*. Since *Dew* merely asserts, erroneously, that *Woodall* stands for this proposition, and does not give any independent reasons or analysis for its holding, it is of no precedential or persuasive value.

And *Reed*:

> The Hearing Examiner rejected Employer's labor market survey, noting that several of the jobs identified in the survey were not suitable for Claimant and that the survey indicated that Claimant had good oral and written skills, skills that Claimant obviously lacked when he attempted to work in the dispatch coordinator position. The Hearing Examiner specifically rejected the testimony of Employer's witness, Tonya Hubacker, on this survey, finding that her testimony was not consistent with the results of objective aptitude tests, Claimant's testimony and the overall evidence of record. Thus, the Hearing Examiner concluded that Employer failed to provide proper vocational rehabilitation services to a cooperative employee and Employer could not use the labor market survey to reduce Claimant's benefits. There is no reason to disturb the Hearing Examiner's decision to accord Employer's labor market survey little weight in determining whether Claimant voluntarily limited his income. See, *Dew*, *supra,* and *Woodall*, *supra*.

Arguably, the penultimate sentence might be read to suggest that *Dew* relied upon or in some fashion supports the proposition that if the "Employer failed to provide proper vocational rehabilitation services to a cooperative employee", it "could not use the labor market survey to reduce Claimant's benefits". However, the final sentence makes fairly clear that the Director was

not going to disturb a decision "to accord Employer's labor market survey little weight". This is a simple, straightforward instance of deferring to the fact finder's assessment of the weight of the evidence, not a ruling that a failure to provide a copy of a LMS to a claimant renders it inadequate as a matter of law for the purpose of determining the extent of a claimant's employability.

Lastly, regarding the application of what we are calling the *Woodall* doctrine as a matter of established "policy" under the Act, we note that, despite its age, it has at most been cited only three times at the Director's level for the relevant proposition, once the year following its issuance (*Dew*) and again 1990 (*Scott*) and finally in 2001 (*Reed*), more than a decade ago. Indeed, we don't view *Reed* as representing the application of the doctrine in any meaningful sense, thus leaving but two instances, *Dew* and *Scott.* Of these two, only *Scott* purports to explain or defend the *Woodall* doctrine, by quoting the portion cited above.

As we have said, this logic is far less than compelling. To the extent that the quote says anything about labor market evidence, it says that, because there are laws against discriminating against people with disabilities or because of their age, labor market surveys are subject to error.

This is specious, and misses the whole point of labor market analysis. A LMS's purpose is ascertain whether there are jobs that are within a person's capacity to perform, both physically and vocationally. They assume that employers are law abiding people, as they should. The existence of such laws can just as readily be viewed as *enhancing* the value of a LMS, since the force of the laws against discrimination presumably *enhances* the chances that an injured worker will be hired rather than diminishes those chances. It is a strange jurisprudence that views the existence of legal prohibitions on bad behavior as making the bad behavior more likely to occur.

Perhaps most significantly, *Woodall, Scott, Dew* and *Reed* all predate *Logan* (2005) and *Washington Post v DOES,* 675 A.2d 37 (D.C. 1996) (*Mukhtar*), the two DCCA cases that establish the actual, contemporary framework for assessing the question of "job availability" under the Act, and do so by referring to *Joyner v. DOES*, 502 A.2d 1027 (1986), which states in footnote 4:

> The reasonableness of the DOES position is underscored by the discussion of the issue of the burden on employer seeking to prove job availability under the federal LHWCA in *Transtate Dredging v. Benefits Review Board,* 731 F.2d 199, 201 (4th Cir. 1984) (quoting *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1043 (5th Cir. 1981)):
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> We believe some common sense standard must be adopted which allows the burden of establishing job availability to remain one which the employer can meet by proof short of offering the claimant a specific job or proving that some employer specifically offered claimant a job. Of course the standard should incorporate the specific capabilities of the claimant, that is, his age, background, employment history and experience, and intellectual and physical capacities.
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> Job availability should incorporate the answer to two 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 reasonably capable of performing, are there jobs reasonably available in the community for which claimant is able to compete and which he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

Nothing in *Logan, Joyner* or *Mukhtar*, and nothing in the Act, supports the "*Woodall* Doctrine" (regardless of whether *Woodall* actually stands for the *Woodall* Doctrine, or, as we have shown, has merely on occasion erroneously been viewed as standing for it) that LMS evidence is worthless in the context of demonstrating employability unless the specific jobs in the LMS have been communicated to a claimant. The doctrine is not only unsupported by the cases and the Act, it is contrary to the essence of those subsequent Court of Appeals decisions, is contrary to standard evidentiary rules leaving the assessment of the weight of the evidence to the fact finder, and is premised upon a logically indefensible proposition, i.e., that the existence of anti-discrimination laws renders LMS data inherently unreliable.

We conclude this portion of our decision by making clear that, first, the claim that *Woodall* stands for the proposition that a LMS is, as a matter of law, insufficient to establish employability unless the jobs which form the basis of the LMS's conclusions as to employability have been communicated to a claimant is inaccurate: *Woodall* does not stand for that proposition. Second, regardless of whether or not *Woodall* stands for that proposition, we reject the doctrine, and hold that LMS evidence is to be treated like any other expert opinion evidence, and should be accorded such weight as the fact finder deems appropriate, considering the record as a whole.

There is one last matter that we wish to address. The following appears as the concluding paragraph of the Discussion section of the CO:

> As demonstrated by the vocational rehabilitation reports in evidence, Claimant had been provided employment leads several times by the case manager … and in some cases she did make serious efforts by applying and interviewing for the available positions without success. In other cases, Claimant subjectively dismissed the idea of pursuing the available positions either on the ground that she did not feel she was a good fit for the position or that the job leads were duplicates. However, even though Claimant did not follow up on all the job leads offered by the case manager, the undersigned does not find any pattern of non-cooperation with Employer's vocational efforts.

CO, page 9. This paragraph could be viewed as being in conflict with the previously quoted language from page 8 of the CO stating the ALJ's determination that Ms. Sinclair had failed in her burden of demonstrating diligence in her job search activities to overcome the LMS's showing of job availability. However, an additional issue was raised, "Employer is also alleging that [Ms. Sinclair] voluntarily limited her income and [sic] a failure to cooperate with vocational rehabilitation". CO, page 2; HT 6, line 17 – 18.[6]

[6] The transcript identifies the issues as (1) "medical causal relationship as it pertains to Claimant's leg giving way as a result of her back injuries"; (2) the nature and extent of her disability, if any; (3) voluntary limitation of income; and (4)

Since a finding of a failure to cooperate with vocational rehabilitation would have had the effect, under D.C. Code § 32-1507 (d), of not only having Ms. Sinclair's wage benefits suspended, but also of suspending her medical benefits, and given that she was seeking (and the ALJ awarded) additional medical care in this CO, a ruling on non-cooperation was required despite the denial of temporary total disability benefits. Thus, the ALJ properly made a separate finding that, while Ms. Sinclair's job seeking efforts were insufficiently robust to overcome the weight of the LMS, they were not so tepid as to amount to non-cooperation.

There was no issue raised by either party concerning this matter on appeal, and we only note it in order to signal our recognition that the two quoted provisions could appear to be in conflict in the absence of the claim of non cooperation, but that given the existence of that claim, they are in fact compatible.

CONCLUSION

The award of medical care was made applying the wrong standard concerning the burden of proof. The findings of fact concerning the Ms. Sinclair's declining to accept suitable alternative employment and her failure to rebut HUH's evidence of the availability of suitable alternative employment are supported by substantial evidence, and the conclusion that Ms. Sinclair is not disabled under the Act is therefore in accordance with the law.

ORDER

The denial of the claim for temporary total disability benefits is affirmed. The award of medical care is vacated, and the matter is remanded for further consideration of the claim with instructions that the ALJ apply the proper standard regarding the burden of proof, being the preponderance of the evidence.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

November 21, 2012
DATE

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failure to cooperate with vocational rehabilitation. By contrast, the issues as they are identified in the CO are (1) "Is Claimant's right knee injury medically causally related to her employment on January 8, 2004?" and (2) "What is the nature and extent of her injury and did she voluntarily limit her income?" The claim for relief in the CO includes "medical expenses for right wrist surgery". The right wrist was found by the ALJ to have been injured when Ms. Sinclair fell because her right knee "buckled" due to work-related her low back injury. Although it is not stipulated or addressed in the CO, Employer appears to concede legal causation, i.e., if the episode of knee buckling resulting in the wrist injury is found to be medically causally related to the low back work injury, the wrist injury, although not medically causally related to either the low back or leg condition, is nonetheless legally causally related to the employment, and hence compensable.