

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

Labor Standards Bureau

**Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD**



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CRB No. 03-39

ILLYAS ZAKARIYA,

Claimant – Petitioner,

v.

THE WASHINGTON POST,

Self-Insured Employer – Respondent.

Appeal from a Compensation Order on Remand of
Administrative Law Judge Amelia G. Govan
OHA No. 95-98, OWC No. 248715

David M. Schloss, Esq., for the Petitioner

John C. Ward, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, LINDA F. JORY and SHARMAN MONROE, *Administrative Appeals Judges*.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel; E. COOPER BROWN, *Chief Administrative Appeals Judge*, concurring:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative

BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order on Remand, which was filed on February 27, 2003, the Administrative Law Judge (ALJ), concluded Claimant-Petitioner (Petitioner) had not presented substantial evidence sufficient for an accurate determination of the extent of his wage loss, if any, since August 18, 1994.

The Compensation Order on Remand followed an Order for Limited Remand issued by the Director of the Department of Employment Services (the Director) on December 17, 2001. In that Limited Remand Order, the Director remanded the matter to OHA for the sole purpose of allowing the ALJ to rule upon additional evidence presented by Petitioner and requested by the ALJ in a Compensation Order dated July 11, 1997.

In his Application for Review, Petitioner alleges as grounds for his appeal that the tax returns he submitted are substantial credible evidence to demonstrate the extent of Petitioner's wage loss. Petitioner further asserts that even without the submitted tax returns the ALJ who issued the July 11, 1997 Compensation Order should have used the evidence before her to arrive at an appropriate level of compensation.

Employer-Respondent (Respondent) has filed a response asserting the Compensation Order on Remand is supported by substantial evidence in the record and is in accord with the applicable law.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) 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. D.C. Official Code § 32-1521.01(d)(2)(A). "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 Int'l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this panel are 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 reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In his Order for Limited Remand, the Director found:

Although it was determined that Claimant had a compensable injury, the Hearing Examiner was not able to ascertain the nature and extent of Claimant's injury and as

appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

a result, the Hearing Examiner requested additional information to determine the amount of benefits Claimant should receive. The Hearing Examiner ordered that 'claimant produce to the undersigned any and all evidence of his wages from self-employment as a taxicab driver/owner no later than October 1, 1997.' Compensation Order at 9. Claimant complied with this directive within the time limit indicated in the Compensation Order, but no action was ever taken by the Hearing Examiner. Thus, Claimant asks for a limited remand of this case for the sole purpose of allowing the Hearing Examiner to rule upon the evidence presented pursuant to the Compensation Order. Since the Hearing Examiner has not ruled on the requested evidence presented by Claimant, this case must be remanded to the Office of Hearings and Adjudication for that purpose.

The Director suspended any and all action on Respondent's Application for Review pending resolution of the matter by the ALJ.

The ALJ who issued the July 11, 1997 Compensation Order was no longer employed by OHA when the Order for Limited Remand was received and the matter was re-assigned. The new ALJ reviewed the evidence submitted by Petitioner on October 2, 1997² and found the evidence of claimant's wages from his self-employment as a taxi-cab driver consisted of income tax returns for 1994, 1995 and 1996. The ALJ concluded that the tax return forms were lacking in sufficient indicia of reliability to support a factual determination of Petitioner's earnings.

Petitioner initially asserted in support of his appeal that the tax returns he submitted are substantial credible evidence to demonstrate the extent of his wage loss. Petitioner cited the Court of Appeals decision in *WMATA v. DOES*, 515 A.2d 740, 741 (D.C. 1986) (*WMATA*) and asserted that the returns are the most reliable information available upon which to base a calculation and in light of any evidence to the contrary, it was error for the ALJ to refuse to accept them.

The Panel agrees with Respondent that Petitioner's reliance on this Court of Appeals case is misplaced. The issues in *WMATA* were whether "wage stacking" was permitted in calculating an average wage and, more applicable to the instant facts, whether employee's failure to report certain wages on his income tax barred their use in calculating his wage loss benefit under the Act. Nowhere in the Court's decision is a determination that all tax returns are to be considered reliable or the best evidence of actual earnings.

It has been held at the AHD/OHA level that the injured worker retains the burden to submit competent, credible evidence upon which a finding on his/her average weekly wage may be founded as he/she is not afforded a presumption as it concerns his/her wages under the Act. *See Leocadie Ayemonche v. Armand's Express*, H&AS No. 92-898A, OWC No. 239053 (January 23, 1995).³ In the instant matter, the ALJ provided in great detail her reasons for not finding

² The record reveals the original ALJ ordered the wage documentation be submitted by October 1, 1997.

³ *See inter alia*; *Dunston v. Limbach Mechanical*, OHA No. 05-100, OWC No. 603271 (April 6, 2006); *Glasgow v. Carlson Construction*, OHA No. 01-225A, OWC No. 561496 (June 26, 2003); *Jouni v. Sodexo Marriott*, OHA No. 01-055, OWC No. 552564, (March 20, 2001); *Bemis v. Psychological Services*, OHA No. 00-269, OWC No. 67992 (October 18, 2000); and *Graddick v. Configurations*, OHA No. 00-019, OWC No. 505701 (April 28, 2000).

Petitioner's tax returns competent, credible evidence of the amount of his actual earnings beginning with the fact that Petitioner had not signed the tax returns, and did not establish that they were in fact true copies of tax returns filed with the Internal Revenue Service.

The ALJ also pointed out:

The tax returns produced purported to reflect profits, earnings, and expenses for [Petitioner's] self-employment; however without an accompanying accounting and explanations of the bases therefore, these cannot be interpreted to compute disability in terms of actual wage loss.

Compensation Order on Remand at 4. The ALJ noted also that the submitted documents do not include any documentary proof of the underlying information such as business records, trip manifests or other contemporaneous documents generated during the course of the employment on which the tax forms were based. The ALJ further found the tax returns were inconsistent with Petitioner's own testimony as he testified that he worked for himself in 1994 and for his prior employer but no wages from driving the cab was reported for 1994 according to his returns.

Notwithstanding the inconsistency described above, the Director issued the Order for Limited Remand "for the sole purpose of allowing the Hearing Examiner to rule upon the *evidence presented pursuant to the Compensation Order*." Thus, the Panel must reject Petitioner's second argument that in the absence of other evidence, the Hearing Examiner should have relied on the uncontradicted testimony of Petitioner to determine his wage loss, relying on the Director's decision in *Soriano v. Barnes, Morris Pardoe & Foster*, Dir. Dkt. No. 99-30, OHA N. 98-187 (July 8, 1999) (*Soriano*). That the ALJ accepted the claimant's testimony because employer's evidence was not as reliable in *Soriano* and the Director affirmed the ALJ's reasoning for doing so does not create a rule that the ALJ must accept a claimant's testimony even if it is the only evidence of record. Similar, to accepting income tax returns, the ALJ retains the discretion to accept a claimant's testimony absent other documentary evidence but this is not the rule. Accordingly, in the instant matter, the ALJ was within her discretion to reject claimant's tax returns as they were not consistent with claimant's own testimony and with the absence of claimant's signature on the returns, the Panel agrees that some consistency is necessary in order to provide some indicia of accuracy.

The Panel further rejects Petitioner's third argument, that the Hearing Examiner who found the injury compensable yet found insufficient evidence on which to base an award should have held a supplementary hearing at which both sides can produce evidence. In rejecting Petitioner's argument, the Panel adopts Respondent's position that the lack of credibility and rejections of Petitioner's testimony as a basis to support his wage loss claim was previously decided in the initial order adverse to Petitioner, and that Compensation Order was never appealed by Petitioner. Employer filed an Application for Review of the July 11, 1997 Compensation Order only as to the legally and appropriateness of the submission of post-order evidence. In response to Respondent's application for review, Petitioner filed only a Motion of Limited Remand which was granted by the Director "for the sole purpose of allowing the Hearing Examiner to rule upon the evidence presented pursuant to the Compensation Order". Accordingly, the Board has no jurisdiction with regard to the 1997 Compensation Order.

CONCLUSION

The ALJ's conclusion that Petitioner did not present substantial evidence sufficient for an accurate determination of the extent of his wage loss, if any, since August 18, 1994 is supported by substantial evidence and in accordance with the law.

ORDER

The Compensation Order of February 27, 2003 is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

Date

E. Cooper Brown, Chief Administrative Appeals Judge, concurring:

I concur in the majority's affirmation of the Compensation Order on Remand of Administrative Law Judge Amelia Govan. I write separately to clarify certain legal points that lead me to this result.

The Compensation Order of February 27, 2003 that the Board was requested by Claimant to review cites *Dunston v. D.C. Department of Employment Services*, 509 A.2d 109 (DC 1986), for the well-recognized legal principle that the Workers' Compensation Act does not provide Claimant with a presumption regarding the nature and extent of his disability. Notwithstanding, the ALJ then incorrectly asserts that it is Claimant's burden of proof "to produce substantial credible evidence" that he suffered wage loss as a result of his injury.⁴ This is an incorrect statement of the burden of proof standard required of a claimant asserting disability as a result of a work-related injury. Rather, under *Dunston*, the claimant has the burden of proving *by a preponderance of the evidence* his entitlement to the requested level of benefits sought. *Darnes Merritt v. Clark Construction*, CRB No. 04-75, OHA No. 03-368A (Jan. 19, 2006); *Frank Johnson v. WMATA*, CRB No. 03-116, OHA No. 03-67 (March 2, 2006). *Accord, Rudolfo Rubio v. Renaissance Hotels Int'l*, OHA No. 02-094A, OWC No. 533971 (March 10, 2006). However, this misstatement of the applicable burden

⁴ The initial Compensation Order in this case, issued by ALJ Davis on July 11, 1997, H&AS No. 95-68, similarly asserted this standard as the burden of proof required of Claimant. That decision is not, however, before the CRB for review.

of proof standard does not change the ultimate outcome and disposition of this case because, as hereafter discussed, Claimant fails to meet even this minimal standard.⁵

In *Logan v. D.C. Department of Employment Services*, 805 A.2d 237 (DC 2002), the Court of Appeals noted that whereas *Dunston* places upon the claimant the burden of affirmatively establishing “the nature and extent” of his disability, in order to be found disabled “claimant must establish an inability to return to his usual employment.” 805 A.2d at 242. If the claimant makes this showing, “the burden shifts to the employer to establish suitable alternative employment opportunities available to claimant considering his age, education and work experience.” *Id.* As the Court further explained, “Once the claimant demonstrates inability to perform his or her usual job, a *prima facie* case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform.” *Id.*

In the instant case, Claimant Zakariya did establish a *prima facie* case of total disability, *i.e.* in the initial Compensation Order (July 11, 1997) the ALJ expressly found that Claimant was released by his treating physician, on September 13, 1994, to modified duty with restrictions against pulling, pushing or lifting more than 50 lbs (and with a recommendation for vocational training). Under such restrictions, Claimant was clearly limited from returning to his regular job duties with its extremely heavy lifting, pulling and pushing job requirements. Claimant thus established the necessary *prima facie* showing entitling him to the temporary total disability benefits that he sought. But, of course, his is not the end of the analysis. Pursuant to *Logan*, the burden of proof shifted to Employer to establish the existence of suitable alternative employment.

The evidence of record establishes that Employer neither offered Claimant a light duty position nor vocational rehabilitation services. However, by Claimant’s own admission, he was and has been driving a taxi from which he has derived income. This evidence defeats Claimant’s claim for temporary total wage loss benefits, but leaves open (as ALJ Govan recognized) the question of whether, and to what extent, Claimant is entitled to temporary partial disability benefits. At this point, by the amended nature of Claimant’s claim, the burden of proof necessarily returned to Claimant to prove that he is entitled to partial wage loss replacement benefits. Here, the ALJ correctly looked to Claimant’s evidence to determine whether or not he had met his burden of proof for partial disability benefits. My review of the evidentiary record as a whole indicates that, although not having followed this step-by-step process and having not correctly articulated Claimant’s required burden of proof, the ALJ’s determination that Claimant failed to present credible evidence establishing his entitlement to temporary partial disability benefits in any amount is fully supported by substantial evidence of record and is otherwise in accordance with law.

E. COOPER BROWN
Chief Administrative Appeals Judge

⁵ “Preponderance of the evidence” is a relatively low burden of proof. See *Henson v. DCRA*, 560 A.2d 543, 545 (DC 1989). All that is required is “proof which leads the [court] to find that the existence of the contested fact is more plausible than its non-existence.” *In re B.L.*, 824 A.2d 954, 956 (DC 2003).