**COMPENSATION REVIEW BOARD**

**CRB No. 10-063(2)**

**NURSAT AYGEN,**
**Claimant–Petitioner,**
**v.**
**THE WASHINGTON POST,**
**Self-Insured Employer-Respondent.**

Appeal from a Compensation Order on Remand by
Administrative Law Judge Linda F. Jory
AHD No. 92-433A, OWC 228739

Nursat Aygen, *pro se*
William H. Schladt, Esquire, for the Self-Insured Employer

Before LAWRENCE D. TARR, MELISSA LIN JONES, and HENRY W. MCCOY, *Administrative Appeals Judges.*

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Compensation Review Board.
MELISSA LIN JONES, *Administrative Appeals Judge*, concurring.

## DECISION AND ORDER IN RESPONSE TO CLAIMANT'S MOTION FOR CLARIFICATION AND RECONSIDERATION

### INTRODUCTION

This decision replaces the January 11, 2012, decision issued by the Compensation Review Board (CRB) in *Aygen v. The Washington Post*, CRB No. 10-063 (January 11, 2012).[1] For the reasons stated, we AFFIRM.

### BACKGROUND FACTS OF RECORD

The claimant worked for the employer as a copy aide, a position that required bending, stooping, reaching overhead and lifting objects weighing more than 10 pounds. In addition to this job, the claimant taught at the Spanish Education Development Center.

[1] The claimant filed a Motion for Clarification and Reconsideration on January 23, 2012, to the CRB's January 11, 2012 decision. By Order dated February 2, 2012, the CRB granted the claimant's motion and stated it will issue a new decision. This is that decision.

On January 10, 1992, the claimant injured her back after she carried three wire baskets, weighing about 45 pounds. The claimant notified her employer of her injury and continued to perform her work, despite feeling back pain.

The claimant first received professional medical treatment for her work injury on January 18, 1992, when she was examined by Dr. R. Holland, D.C. Dr. Holland restricted the claimant from lifting more than 10 pounds, from standing for extended periods, and from doing activities that involved increased mobility.

The claimant returned to work for this employer. There are disputes as to whether the claimant was able to perform her regular duties when she returned to work and if not, whether the employer was able to provide the claimant with work that met her physician's restrictions. There is no dispute that the claimant did not teach at the Spanish Education Development Center after her injury, even though the physical requirements of that teaching position did not exceed the claimant's medical restrictions.

On January 29, 1992, the employer fired the claimant. The claimant continued to treat with Dr. Holland after she was fired. Dr. Holland reported on August 11, 1992, that the claimant had full range of motion, normal muscle tone and that an MRI was "essentially normal." Thereafter, the claimant treated with several other doctors who stated the claimant only could do limited duty: Dr. V. Desidario, Dr. R. Azer, Dr. H. Goald, and Dr. S. Yousef.

On May 22, 1992, Dr. D. Johnson performed an IME on the claimant at the employer's request. Dr. Johnson opined that the claimant had no objective evidence of injury that substantiated her complaints of back pain.

## PROCEDURAL HISTORY

On February 28, 1995, the Director, who at that time had appellate authority at DOES, issued a Decision and Order that affirmed a hearing officer's finding that the claimant was not a victim of a retaliatory discharge when she was fired on January 29, 1992. The Director reversed the finding that the claimant's injury was not work-related and remanded the case for determinations on whether the claimant gave timely notice of her injury and if so, the nature and extent of the claimant's disability. *Aygen v. The Washington Post*, Dir. Dkt. No. 93-89, H&AS No. 92-433A, OWC No. 228739 (February 28, 1995).

After the remand, Administrative Law Judge (ALJ) Malcolm J. Harper held an evidentiary hearing on January 17, 1996. The Compensation Order on Remand (COR) was not issued until 2008 by a different ALJ, Terri Thompson-Mallet. ALJ Thompson-Mallet's COR in a footnote on the first page of the decision stated:

> An Order to Show Cause was issued by the Administrative Hearings Division regarding the reassignment of this matter to a second Administrative Law Judge for resolution. No objection was filed within the period allotted. Accordingly, the matter was reassigned to the undersigned.

In her January 10, 2008, decision ALJ Thompson-Mallet held that the claimant gave timely notice to her employer of her injury but, for several reasons, did not prove that she was temporarily totally disabled as claimed:

> Claimant has not met their [sic] burden of establishing the extent of her injury for more than one reason. Each deficiency alone is sufficient to deny Claimant's prayer for total temporary disability benefits. The record indicated, as was found, that Employer provided Claimant with alternate employment within Claimant's medical restrictions.
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> * * *
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> Claimant has also not met her burden of establishing the extent of their [sic] injury because Claimant has not presented clear and sufficient evidence indicating she could not earn any wages as a result of the work injury which arose on or around January 10, 1992. Dr. Holland states that Claimant should not lift weight greater than 10 pounds. However, Claimant's Doctor never stated that Claimant could not work. TR-171.
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> Claimant has not presented substantial credible evidence indicating that she could not continue to perform as a teacher due to her work injury. Where, as here the record is void of any substantial evidence which upon to [sic] predicate a finding Claimant was unable to perform any work, Claimant is not entitled to temporary total disability benefits.

*Aygen v. The Washington Post*, OHA No. 92-433, OWC No. 228739 (January 10, 2008) at 6.

On November 25, 2009, the CRB reversed and remanded this decision.

The CRB noted that while previous decisions held the claimant was fired from her job at the Washington Post for poor performance, the ALJ's decision had to be remanded because the ALJ used the wrong standard of proof. The ALJ incorrectly required the claimant to prove her claim by substantial evidence and not by a preponderance of the evidence.

The CRB held:

> The panel finds that although the ALJ made reference to the standard as enunciated in *Logan, supra*, and set forth her reasons for denying the claim for relief on nature and extent, the ALJ did so under the misapprehension that the Petitioner had to do so under the substantial evidence standard. This is in error. The Petitioner has to prove, by a preponderance of the evidence, whether or not she is temporarily and totally disabled from working for the time period claimed. The Petitioner must prove this in light of what is already the law of the case, namely that she was terminated from her job at the Washington Post for not meeting her performance standards as set forth in the Director's decision on October 25, 1993. The ALJ will need to consider this finding when

> determining whether or not, by a preponderance of the evidence, the Petitioner is entitled to wage loss benefits.

*Aygen v. The Washington Post*, CRB No. 08-095, OHA No. 92-433, OWC No. 228739 (November 25, 2009).

The COR issued after the CRB's November 25, 2009 decision was written by another ALJ, Linda F. Jory. In this COR, the ALJ Jory denied the claim for two alternative reasons: the claimant did not prove that any wage loss after the injury was due to her work injury and the claimant did not prove she was temporary and totally disabled because the employer provided her with suitable employment. *Aygen v. The Washington Post*, OHD No. 92-433, OWC No. 228739 (January 15, 2010). The claimant timely appealed.[2]

## THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed decision are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and §32-1521.01(d) (2) (A) of Act.

Consistent with this standard of review, the CRB must uphold a decision that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott, supra.*

## ANALYSIS

We shall first discuss a procedural issue relating to the fact that both CORs were issued by ALJs who did not preside at the formal hearing.

As noted, the evidentiary hearing was held by ALJ Harper; the first COR was written by ALJ Thompson-Mallet and the second COR was written by ALJ Jory. ALJ Harper was the only ALJ

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[2] It should be noted that the claimant attached certain documents to her Application For Review and to her Motion for Extension that were not presented at the formal hearing. The CRB's appellate jurisdiction is limited in its evidentiary review to the record that is certified to the CRB by AHD. 7 DCMR § 266.1. The CRB is not empowered to conduct a *de novo* review of matters appealed to this body. Therefore, we do not consider these documents.

Furthermore, "Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Enders v. the District of Columbia*, 4 A.3d 457, 471 n. 21 (D.C. 2010) quoting *McFarland v. George Washington University*, 935 A.2d 337, 351 (D.C. 2007); see also *Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993) (arguments raised but not argued in briefing are treated as waived). Therefore, any arguments made in footnotes without supporting legal analysis will not be addressed.

to observe the witnesses; ALJs Thompson-Mallet and Jory based their decisions on the testimony and documentary evidence presented to ALJ Harper.

The claimant asserts that this procedure was improper because only ALJ Harper observed the witnesses and, therefore, another judge cannot make credibility findings with respect to her case.[3] We disagree. We find that the procedure used by AHD was proper because the claimant, although given the opportunity, did not object to another judge deciding the case.

7 DCMR § 221.4 requires hearings pursuant to the private sector workers' compensation program to be conducted in accordance with the District of Columbia Administrative Procedure Act, D.C. Code §§ 205 *et seq.*, (APA). The APA, in § 2-509 (d), has a specific procedure to be followed when a judge takes over a case for another judge:

> Whenever in a contested case a majority of those who are to render the final order or decision did not personally hear the evidence, no order or decision adverse to a party to the case (other than the Mayor or an agency) shall be made until a proposed order or decision, including findings of fact conclusions of law, has been served upon the parties and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of those who are to render the order or decision, who, in such a case, shall personally consider such portions of the exclusive record, as provided in subsection (c) of this section, as may be designated by any party.

The CRB has held that this section of the APA applies to AHD hearings that are conducted by single adjudicators and is satisfied when the parties are apprised of the proposed outcome prior to the issuance of a final order, given the chance to submit argument and to identify record evidence in support of their preferred outcome. *Centorcelli v. American Red Cross*, CRB No. 06-042 (May 23, 2006).

Moreover, and particularly relevant to the present case, the CRB in *Centorcelli* held that these APA procedural requirements do not apply:

> if for example, neither party objects to a decision being issued by a new ALJ based upon the record previously adduced under a prior ALJ, pursuant to notice and an opportunity to show cause why the new ALJ ought not to render the decision without further argument or reference to specific parts of the record.

*Id.* at footnote 3.

That is what happened in the present matter. The claimant did not object to ALJ Thompson-Mallet's deciding the case. Therefore, we find no error in the fact that ALJ Thompson-Mallet made credibility findings with respect to the issues presented despite not observing or hearing the witnesses.

[3] Our previous, now vacated decision erroneously indicated that all the judges saw and heard the witnesses.

We further find no error with respect to ALJ Jory's decision. Judge Jory did not decide the case using her credibility findings--the CRB remanded the case so that the proper legal standard could be applied to the credibility findings previously made by ALJ Thompson-Mallet, credibility findings made by the ALJ to whom the claimant did not object.

Moreover, Judge Jory denied the claim for two independent reasons, only one of which was based on credibility. The first reason stated by Judge Jory for denying the claim was that the claimant did not prove her wage loss after she was fired was due to her injury. As Judge Jory held:

> As is now well settled, claimant has to prove, by a preponderance of the evidence, whether or not she is temporarily and totally disabled from working for the time period claimed. Further, as the CRB points out, "the Petitioner must prove this in light of what is already the law of the case, namely that she was terminated from her job at the Washington Post for not meeting her performance standards as set forth in the Director's decision on October 25, 1993."
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> It is clear, from the evidence submitted, that claimant's wage loss after her termination is not a function of her injury. This is supported by the fact that claimant continued to work after the injury up to her termination for performance reasons. It is the termination which is the cause of her wage loss, not her injury. Thus, under *Logan*, claimant has failed to show that her injury was the cause of her being unable to return to her employment. Simply stated, she returned to work regardless of her injury until her termination for performance reasons.

*Aygen v. The Washington Post*, OHD No. 92-433, OWC No. 228739 (January 15, 2010) at page 5.

Therefore, the ALJ Jory's finding that the claimant did not prove entitlement to workers' compensation benefits because any post-Washington Post wage loss is not due to her work injury is AFFIRMED.

In light of this decision, we need not address the alternative, credibility-based reason for denying the claim.

## CONCLUSION AND ORDER

The January 15, 2010, Compensation Order on Remand is supported by substantial evidence in the record, is in accordance with the applicable law and is AFFIRMED.[4]

[4] In reaching our decision we have not considered any documents that were not part of the record nor have there been any ex parte communications.

FOR THE COMPENSATION REVIEW BOARD:

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LAWRENCE D. TARR
*Administrative Appeals Judge*

May 2, 2012
DATE

MELISSA LIN JONES, *Administrative Appeals Judge*, concurring:

The regulations governing the activity of the Compensation Review Board require decisions be issued by panels of three members:

> Subject to and consistent with the provisions of D.C. Official Code §32-1521.01, subsections (b), (c) and (d), the Board shall sit, review appeals, render decisions, and perform all other delegated and related functions in Review Panels of three members.[5]

The November 25, 2009 Decision and Remand issued in this matter was issued by a review panel of only two members; although listed as a member of the panel, Judge Jeffrey P. Russell "recused himself and did not participate in this decision."[6]

Neither party raised this issue on appeal to the D.C. Court of Appeals,[7] and neither party has raised this issue in this appeal. As a result, I feel constrained to concur and raise the issue *sua sponte* without fully addressing it at this time.

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MELISSA LIN JONES
*Administrative Appeals Judge*

[5] 7 DCMR §255.1.

[6] *Aygen v. The Washington Post*, CRB No. 08-095, AHD No. 92-433A, OWC No. 228739 (November 25, 2009), nt. 1.

[7] Given that the November 25, 2009 order remanded the matter to AHD, it is possible the D.C. Court of Appeals would not have addressed the issue even if the parties had raised it.