

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. 98-46

OIDA MORRISON,

Claimant – Petitioner,

v.

GREATER SOUTHEAST COMMUNITY HOSPITAL,

Employer – Respondent.

Appeal from a Compensation Order of
Hearings & Appeals Examiner Gail L. Davis
H&AS No. 96-94B, OWC No. 279949

W. Scott Fungler, Esquire, for the Petitioner

Donald P. Maiberger, Esquire, for the Respondent

Before: FLOYD LEWIS, LINDA F. JORY and SHARMAN P. MONROE, *Administrative Appeals Judges.*

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER ON REMAND

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 D.C. 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. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative 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.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD), the Office of Hearings and Adjudication (OHA), District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on May 29, 1998, the Hearing Examiner concluded that Claimant-Petitioner (Petitioner) voluntarily limited her income by failing to accept suitable employment. Petitioner appealed the Compensation Order to the Director and on October 6, 1998, the Director affirmed the Hearing Examiner's conclusion that there was substantial evidence to support the finding that Petitioner voluntarily limited her income failed to accept employment commensurate with her abilities and physical restrictions when she rejected the employment offer extended to her. Petitioner then appealed the Decision of the Director to the District of Columbia Court of Appeals.

On November 6, 2003, the Court remanded this matter to the agency for a determination of whether Petitioner "was entitled to refuse the job offer at St. Anne's because it was not 'suitable employment', even though it was commensurate with the physical abilities, since she would be forced to give up her position at the Jackson Medical Group."

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review 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 §32-1522(d)(2). "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 Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

The Court agreed with the Director's determination that there was substantial evidence in the record to affirm the Hearing Examiner's finding that Petitioner failed to accept employment commensurate with her abilities when she rejected the employment offer extended to her by St. Anne's. Thus, the Court affirmed the Director on this issue.

However, the Court noted that the Director failed to address Petitioner's other argument that the job at St. Anne's Maternity Home was not suitable employment because Petitioner already had an acceptable job which she would have had to quit, if she began the position at St. Anne's. Petitioner argued that her annual salary at St. Anne's was insufficient considering that she would be required to quit her part-time position with Jackson.

The Hearing Examiner rejected Petitioner's argument that it was appropriate to refuse the job offer at St. Anne's because she would be required to quit her part-time position, stating:

Claimant asserts that the low annual salary offered by St. Anne's equates to unsuitable employment since she would be required to terminate her part-time employment in order to work full-time at St. Anne's. However, neither the Act nor its interpretive case law requires Employer to locate employment to match Claimant's pre-injury wages. The employment search for disabled Claimants is a joint venture with Claimant and Employer each having the burden of attempting to place Claimant in a job commensurate with her abilities. While the ideal result of said situations is to locate employment with wages that either equal or exceed the Claimant's pre-injury wage, often that is not the result. The law does not place this burden of Employers.

Compensation Order at 6.

This Panel must agree with the Hearing Examiner's analysis on this issue and reject Petitioner's argument concerning her rejection of the offer by St. Anne's. Under the Act, benefits for temporary partial disability are based on actual wages lost and "the wage loss shall be the difference between the employee's average weekly wage before becoming disabled and the employee's actual wages after becoming disabled." D.C. Official Code § 32-1508(5) (then D.C. Code § 36-308 (5)). While Petitioner argues that the St. Anne's job was not suitable because she would have to quit the part-time job at Jackson, where she worked for four hours on Mondays and eight hours on Friday, this Panel must emphasize that the calculation for Petitioner's temporary partial disability based on her actual wage loss, included Petitioner's actual wages at Jackson.

. As the Hearing Examiner correctly emphasized, an employer is not required to find suitable employment for its injured employee with a salary that matches the employer's pre-injury wages. However, it must be stressed that the employer would be obligated to make up the difference between the pre and post-injury wages in the form of temporary partial disability benefits.

Thus, in the instant matter, the Hearing Examiner properly rejected Petitioner's contention that the position at St. Anne's was unsuitable employment because she would have to quit her part-time employment at Jackson to work full-time at St. Anne's. The calculation of Petitioner's actual wage loss after her injury included her wages at Jackson, in addition to the wages she would have earned at St. Anne's, had she not voluntarily limited her income.

As such, the Hearing Examiner's conclusion that Petitioner voluntarily limited her income by failing to accept suitable employment offered to her by St. Anne's is supported by substantial evidence and is in accordance with the law. This Panel must reject Petitioner's argument that she entitled to refuse the job offer by St. Anne's because it was not "suitable employment," even though it was commensurate with her abilities, since she would be forced to give up her position at Jackson. *See Robinson v. D.C. Water & Sewer Authority*, CRB No. 04-49, OHA No. 03-231A (June 22, 2006); *Henry v. WMATA*, Dir. Dkt. No. 90-78, H&AS No. 89-586 (December 29,

1994) (rejection of a claimant's argument that she was entitled to refuse a suitable job offer because if she accepted the position, it would have conflicted with her personal academic commitments).

CONCLUSION

The Compensation Order of May 29, 1998 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of May 28, 1998 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

September 14, 2006
DATE