

**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 (Dir. Dkt.) No. 03-057**

**JOSEPH MURRAY,**

**Claimant–Petitioner,**

**v.**

**PAUL BROTHERS OLDSMOBILE AND SAFECO INSURANCE COMPANY,**

**Employer/Carrier–Respondent.**

Appeal from a Compensation Order of  
Administrative Law Judge Fred D. Carney, Jr.  
AHD No. 94-223, OWC No. 242625

Joseph Murray, *pro se*

Sarah O. Rollman, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

**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).<sup>1</sup>

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<sup>1</sup> 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 District of Columbia Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director’s Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers’ and disability compensation claims arising under the District of Columbia Workers’ Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia 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 District of Columbia Workers’

## BACKGROUND

This claim was the subject of two prior formal hearings held in the Office of Hearings and Adjudications (OHA), now the Administrative Hearings Division (AHD) of OHA. The first formal hearing was conducted on December 1, 1994. At that time, the issues presented for resolution included whether the claimant therein (Petitioner in this appeal) had sustained an accidental injury arising out of and in the course of his employment with employer (Respondent in this appeal), whether the claim raised was barred due to misrepresentations made concerning the claimant's physical condition and prior compensation injuries in the employment application at the time of hiring, and the nature and extent of claimant's disability, if any, including whether the claimant had voluntarily limited his income.

Following that first formal hearing, the ALJ issued a Compensation Order in which it was determined that the claimant had not sustained an accidental injury arising out of and in the course of his employment with the employer, and accordingly the ALJ did not reach any of the remaining issues.

That decision was appealed by the claimant to the Director of the Department of Employment Services (the Director), who affirmed the Compensation Order.

The claimant thereupon appealed the affirmance to the District of Columbia Court of Appeals, which appeal resulted in a reversal by the Court, on the basis that the ALJ had not provided the claimant with the presumption of compensability contained in D.C. Official Code § 32-1521 (the current codification of what was then found at D.C. Code § 36-321). The matter was remanded for further proceedings consistent with the proper application of that presumption, and for consideration of such additional issues as would be needed to be considered which had not previously been reached, should on remand the finding of an accidental injury be made.

In due course, a second formal hearing was conducted on October 1, 2002.<sup>2</sup> At that hearing, no additional exhibits were introduced by the employer; six additional exhibits were submitted by the claimant, generally supporting additional periods of temporary total disability that had arisen during the pendency of the appeals.

Following the second formal hearing, on March 31, 2003, after reviewing the evidence previously submitted at the prior formal hearing on this question, including the testimony of witnesses who testified at that prior formal hearing and exhibits submitted in the earlier proceeding, as well as the testimony and evidence presented at the second formal hearing, the ALJ issued a Compensation Order on Remand. In that Compensation Order on Remand, the ALJ accorded the claimant (referred to hereafter as Petitioner) with the presumption of compensability as directed by the Court of Appeals, and further determined that the employer (referred to hereafter as Respondent) had failed

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Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

<sup>2</sup> In footnote 6 of the Compensation Order on Remand, the ALJ erroneously gives October 2, 2002 as the date of the second formal hearing. The correct date, October 1, 2002, is noted on the transcript of those proceedings, HT II. Any transcript references to the first formal hearing herein are to HT I.

to present sufficient evidence to overcome that presumption, and that Petitioner had indeed sustained an accidental injury to his back, arising out of and occurring in the course of his employment with Respondent, on September 25, 1992. Having so found, the ALJ proceeded to consider additional issues still before him, including whether the claim was barred due to misrepresentations made by Petitioner in the application for employment. On that issue, the ALJ determined that the claim is barred, and the ALJ did not reach any remaining issues.

This appeal follows the issuance of the March 31, 2003 Compensation Order on Remand.

As grounds for this appeal, Petitioner's allegations of error are described in his written submission, which bears no specific title but is referred to hereafter as Petitioner's Application for Review (AFR), are described by Petitioner as follows, without editing:

1. I DO NOT AGREE WITH THE JUDGES FINDING THAT I HAD A MAJOR ILLNESS IN THE LAST SIX YEARS. SEE EMPLOYEE APPLICATION
2. I DO NOT AGREE WITH THE JUDGES FINDING THAT I MISREPRESENTED MY ABILITY TO PERFORM AS A AUTOBODY CRAFTSMAN WHICH PRECLUDES HIM FROM RECEIVING BENEFITS UNDER THE ACT
3. SEE APPEAL, PAGE 0, SEE MEDICAL REPORT, PAGE 3, 4, AND 5. SEE MARYLAND'S WORKMEN'S COMPENSATION CASE, PAGE 6 THRU 9, SEE MR. PAUL'S CROSS EXAMINATION BY MR. DOBBS AND MR. ACKERMAN SEE PAGE 4, 5, AND 11 SEE MEDICAL TREATING PHYSICIANS REPORT, SEE PAGE 12 THRU 16

AFR, first page (unnumbered). As an additional issue, Petitioner adds:

4. I BELIEVE MY EMPLOYMENT FALLS UNDER SUB-CONTRACTOR WITH THE AUTHORITY TO HIRE AND FIRE MY OWN HELPERS. I DID NOT RECEIVE A SALARY OF ANY KIND FROM PAUL BROTHERS, ONLY MY PART OF THE PERCENTAGE ON THE CONTRACT FROM CUSTOMERS AND IF THE CONTRACT IS NOT AGREEABLE TO ME I HAVE THE AUTHORITY TO MODIFY A SUPPLEMENT TO THE CONTRACT OF THE CUSTOMER. UNDER THESE CONDITIONS I DO NOT BELIEVE A PERSONS HANDICAP SHOULD NOT APPLY ONLY HIS ABILITY TO PERFORM SHOULD APPLY.

AFR, second page (numbered 0).

In response to this appeal, Respondent asserts that the decision of the ALJ relating to the denial of benefits due to misrepresentation made in the application process, as set forth in the Compensation Order on Remand, are supported by substantial evidence and are in accordance with the law.<sup>3</sup>

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<sup>3</sup> Respondent did not appeal the findings concerning Petitioner's having sustained an accidental injury arising out of and in the course of his employment, and they are therefore not before us.

## 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard 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.

Turning to the case under review herein, there is but one fundamental issue on appeal, that being whether the denial of the claim for misrepresentation is supported by substantial evidence, and is in accordance with the law.

The law governing the issue of whether and under what circumstances a claimant is barred from receipt of benefits under the Act in cases where there is alleged to have been a misrepresentation by the claimant in applying for the job is found in *Howell v. Omniplex Corporation*, CRB (Dir. Dkt.) No. 03-093 (Decision and Order July 22, 2005), and a case expressly approved by the CRB therein, *Watson v. George Hyman Construction Company*, Dir. Dkt. No. 01-004 (March 23, 2004). *Watson* itself relied upon the long-standing concept in workers' compensation jurisprudence, discussed in 1C, A. LARSON, *WORKERS' COMPENSATION LAW*, § 47.53, at 8-394, wherein that "common sense" rule precludes employees from recovering workers' compensation benefits when three factors are established: there is (1) a willful misrepresentation in obtaining employment by a job applicant who becomes a claimant, as to the applicant's physical condition; (2) reliance by the employer upon the misrepresentation and said reliance was a substantial factor in the hiring; and (3) there is a causal connection between the misrepresentation and the injury underlying the claim. *See, Larson, supra, Watson, supra, and Howell, supra.* In *Howell*, the CRB made clear that it is sufficient to bar the claim if the misrepresentation was a substantial factor, and not the sole or only reason for the hiring decision. In other words, the CRB in that decision rejected a suggestion that "but for" causation was required.

Petitioner's arguments of error are somewhat difficult to discern. However, review of his AFR indicates that, in general, he asserts that he did not misrepresent his medical condition to Respondent during the hiring process. This is because he asserts that he did not in fact have a relevant back condition at the time of hiring, so there was therefore nothing to "admit" to on the application, and further, perhaps in the alternative, that he told one of Respondent's supervisory employees, a Mr. Wimmer, about his condition, and Mr. Wimmer indicated that there was nothing about the condition that impacted the contemplation of Petitioner's being hired.

The ALJ determined that Petitioner did indeed have a relevant back condition at the time that he filled out the application for employment which is referred to as EE 8, from the first formal hearing. This determination is premised upon medical reports of Dr. Maxwell Hurston, CE 5 in the first hearing, reporting that Petitioner had been treating for back injuries from as early as 1982, and CE 4, a medical report from Dr. Franklin Garmon, who examined Petitioner in 1984 and authored a report opining that Petitioner would have to “abandon” employment requiring bending, stooping, pushing and pulling, as a result of an injury sustained while employed doing auto body repair work for Bob Banning Dodge in 1982, which injury had in his estimation resulted in Petitioner’s having sustained a 75% permanent partial impairment to his whole person. Further, the ALJ based this conclusion upon the fact that Petitioner had filed a claim for that injury before the Maryland Workers’ Compensation Commission (WCC), ultimately obtaining an award from that commission of “20% Industrial loss of use of the body as a result of the injury to the back (includes left leg)” as set forth in EE 15 from the first formal hearing.<sup>4</sup>

That Petitioner answered “no” in the application, dated February 4, 1991, when asked about the existence of “any physical condition” that “may limit” Petitioner’s “ability to perform the particular job for which” he was applying, is not disputed by Petitioner, nor is it disputed that his only affirmative response to questions concerning whether he had received compensation for any prior injuries was a statement that he had received only “one check” for a 1982 injury to his left leg.

Similarly, Petitioner does not dispute that, in that same application, he listed several previous employers for whom he had worked repairing auto bodies and frames, but that he omitted the employer against whom he had previously sought and obtained benefits for a prior back injury, Bob Banning Dodge<sup>5</sup>.

The conclusion by the ALJ that Petitioner, in omitting reference to his prior employment with Bob Banning Dodge, in denying any “physical defects which preclude” him from performing “certain kinds of work”, and describing his 1982 injury as being merely a left leg injury for which he had obtained but “one check”, had misrepresented his physical condition, is supported by substantial evidence, which evidence is described in the Compensation Order on Remand and is referenced in the three preceding paragraphs above. The fact that the ALJ found further that Petitioner is not a credible witness (Compensation Order on Remand, page 4) renders this finding subject to special deference by us on review. To the extent that Petitioner argues in this appeal that he did not misrepresent his condition, or did not do so intentionally, and that he bases this argument on different interpretations of the evidence, including his argument that he told Mr. Wimmer about the

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<sup>4</sup> We note that the Compensation Order on Remand contains typographical error about the date of the Bob Banning Dodge injury. While the Compensation Order on Remand refers to the date of that prior injury as “August 6, 1992” (page 6), EE 15, the WCC award for permanent partial disability resulting from that injury clearly indicates that the injury at Bob Banning Dodge occurred August 9, 1982. The document also demonstrates that that permanency award was made following a WCC hearing conducted on August 31, 1992, indicating that even after ten years, Petitioner suffered the sequelae of that 1982 injury.

<sup>5</sup> We also note that the ALJ discussed Petitioner’s proffered explanation for this omission, at page 7 of the Compensation Order on Remand. The ALJ rationally discounted that explanation, which was that Petitioner claimed that he physically worked at a dealership under the name “Beltway Dodge”, only to learn later that it was owned by Bob Banning Dodge. As the ALJ points out, this does not really explain the omission, because Petitioner likewise made no mention of “Beltway Dodge” in the application.

condition, such arguments are not sufficient to overcome the fact that the ALJ reached a different conclusion based on the evidence before him, and that conclusion is one which a reasonable person might reach based thereon, even if contrary conclusions might also be drawn from the evidence of record. Accordingly, we must and do affirm the facts concerning the willful misrepresentation as found by the ALJ.

The ALJ then considered whether Respondent relied upon the misrepresentation in making the hiring decision. The ALJ considered the testimony of Frank Paul, given at the first hearing, who testified that he is President of Paul Brothers Oldsmobile, a position he held since 1989. Mr. Paul testified further that when considering whether to hire an applicant, he considers prior injuries in the context of determining whether an applicant is physically capable of performing the job, and that if he had been aware of the prior leg and back injuries, or of the fact that Petitioner had a pending workers' compensation claim for those injuries at the time of the application, Petitioner would not have been hired.

The substance of this testimony, cited in the Compensation Order on Remand and being found in HT I at 119, is not disputed by Petitioner in this appeal. Rather, Petitioner refers in to the testimony of Mr. Wimmer, whose testimony was also referred to and was discounted by the ALJ in the Compensation Order on Remand as being less credible than that of Mr. Paul. At most, the differences between the testimony of these witnesses is a conflict to be resolved by making a credibility determination, to which we must give deference to the ALJ. Compensation Order on Remand, page 8. Again, therefore, while Petitioner argues for a different determination based upon the evidence, the determination of the ALJ that Respondent relied upon the misrepresentation in making the decision to hire Petitioner is supported by substantial evidence.

Further, there seems little doubt that the prior conditions and injuries involved the left leg and back, and the injuries for which Petitioner seeks compensation in this claim are likewise to the left leg and back. This was found by the ALJ at page 8 of the Compensation Order on Remand, and is not disputed by Petitioner in this appeal. That is, nothing that we have seen in Petitioner's AFR suggests that the prior injuries were to some other body part than that for which he seeks benefits herein. Thus, the ALJ's conclusion as to the causal relationship of the misrepresentation to the claimed injury in this case is likewise supported by substantial evidence.

The ALJ therefore made factual findings on each of the three factors that are required to be considered, which findings are supported by the evidence cited by the ALJ in support of those findings. The ALJ properly concluded, therefore, that based upon those facts, the claim is barred. Accordingly, we affirm the Compensation Order on Remand.<sup>6</sup>

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<sup>6</sup> We are mindful that Petitioner has made an argument, number 4 above, which involves whether or not he was in some fashion "a sub-contractor" as opposed, we presume, to an employee. We are unable to discern the nature of this argument, and note that it was stipulated in the first hearing that there was an employer-employee relationship under the Act. As far as we are aware, this "sub-contractor" argument was never raised before the ALJ, no evidence on the issue was presented at either formal hearing, it was not raised before or addressed by the Court of Appeals, and it does not appear to be an issue properly before us. Further, Petitioner has cited us to no authority that would suggest that a person who, while not a "normal" or "regular" employee as the term is generally construed under the Act, is nonetheless hired and works under circumstances wherein he is entitled to be treated as an employee for compensation benefits purposes, is entitled to make material misrepresentations concerning his physical condition in order to obtain such status, which representations would have precluded a "normal" or "regular" employee from obtaining benefits. We are aware of no

CONCLUSION

The Compensation Order on Remand of March 31, 2003 is supported by substantial evidence in the record and is in accordance with the law.

**ORDER**

The Compensation Order of March 31, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
Administrative Appeals Judge

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September 26, 2006  
DATE

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such authority, and we do not believe that we would be inclined to fashion such a rule if given the opportunity, in that the rule barring benefits for willful misrepresentation in the hiring process would appear to have equal application in such a circumstance.