

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau**

**Office of Hearings and Adjudication
Compensation Review Board**

**(202) 671-1394 -Voice
(202) 673-6402 - Fax**



CRB No. 07-76

CARLOS HERRERA,

Claimant – Respondent

v.

AMTRACK/GATE GOURMET AND LIBERTY MUTUAL INSURANCE,

Employer/Carrier – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Amelia G. Govan
AHD No. 06-239A, OWC No. 618940

Christopher R. Costabile, Esq., for the Petitioner

Peter L. Scherr, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the 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).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 (2005). In accordance with the

BACKGROUND

This appeal follows the issuance of a Compensation Order 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, which was filed on March 8, 2007, the Administrative Law Judge (ALJ) granted the Claimant-Respondent's (Respondent) request for temporary total disability benefits beginning April 1, 2006 along with the payment of causally related medical expenses and for authorization for right lower extremity surgery recommended by Dr. Knolmayer and Dr. Draper. The Employer/Carrier-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the Compensation Order is not in accordance with the law. The Respondent timely filed an Opposition.

ANALYSIS

As an initial matter, the standard 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 § 32-1521.01 (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. App. 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, the Petitioner alleges that the ALJ misapplied the law to the facts of this case on the issue of voluntary limitation of income. The Petitioner asserts that if it had known the Respondent was able to perform light duty work, it would have provided such work. The Petitioner asserts that while the Respondent was informing it that he was unable to perform light duty work, the Respondent was working in a restaurant owned by him and his wife. Therefore, the Petitioner argues that the Respondent voluntarily limited his income. The Petitioner maintains that the Respondent was aware of its policy on the availability of light duty

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.

employment, given that he worked as a supervisor, but that he never requested light duty work, either before the restaurant was opened or after it closed. Moreover, the Petitioner argues that the Respondent heard the testimony of its representative at the formal hearing on the availability of light duty work but has not returned to work. Wherefore, the Petitioner argues that it sustained its burden to show suitable alternative employment by substantial evidence and cites *Robinson v. Celient Technologies*, OHA No. 03-438A, OWC No. 581049 (August 6, 2004) and *Hawkins v. CTI/DC, Inc.*, OHA No. 01-281, OWC No. 561458 (September 27, 2001) as support for its position.

Under the Act, an injured worker is provided with a rebuttable presumption that an injury arises out of and in the course of employment, but this presumption does not extend to the question of the nature and extent of any resultant disability which an injured worker must prove by substantial evidence. See *Dunston v. D.C. Department of Employment Services*, 509 A.2d 109 (1986). Herein, the ALJ found, and the finding is supported by substantial evidence in the record, that the Respondent sustained his burden of showing that his current wage loss is the result of his work injury. Dr. Bruce Knolmayer, the treating physician, opined that the Respondent is unable to return to work at this time and requires a repeat surgical procedure to his right knee. See Claimant Exhibit No. 1. Dr. Robert Draper, the independent medical examiner, opined that the Respondent is not capable of performing his regular employment and should use a knee brace as he may have a tendency to fall given the instability of his knee. See Employer Exhibit No. 1.

The Petitioner's argument that the Respondent voluntarily limited his income is rejected. The Petitioner submitted a surveillance tape showing the Respondent performing activities in the restaurant and at a store named Costco. The ALJ found, and the finding is supported by substantial evidence, that the activities shown did not indicate that the Respondent was physically capable of performing the duties required as a food service supervisor. Additionally, the Panel rejects the Petitioner's argument that the Respondent voluntarily limited his income because he never requested light duty work. As the D.C. Court of Appeals indicated in *Washington Post v. D.C. Department of Employment Services*, 675 A.2d 37, 41 n.4 (1986), there is no support in this jurisdiction for the position that an injured worker must ask for light duty work.

The Panel also rejects the Petitioner's argument that it sustained its burden to show suitable alternative employment by substantial evidence. The burden is on an employer to demonstrate the availability of a job that an injured employee is capable of performing. In *Joyner v. D.C. Department of Employment Services*, 502 A.2d 1027 (D.C. 1986), the Court of Appeals indicated:

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 the 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 the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

Joyner, 502 A.2d at 1031 n.4.

A review of the evidence shows that, prior to the formal hearing, the Petitioner made no efforts to locate suitable alternative employment for the Respondent. At the hearing, however, the Petitioner asked Mr. Rubel, general manager, if he would have provided the Respondent with suitable alternative employment in 2004 to which question Mr. Rubel responded in the affirmative. See Hearing Transcript (HT at 74). This bald statement, without more, is, as the ALJ found, not sufficient to meet the Petitioner's burden under the Act. See *Anderson v. May Department Stores*, CRB No. 05-247, OHA No. 01-456B, OWC No. 565431 (September 20, 2005). The Panel is not persuaded by the cases cited by the Petitioner since the CRB, as the appellate body, is not bound by rulings from the AHD. See *Clark v. Verizon Communications*, Dir. Dkt. No. 03-92, OHA No. 92-793B, OWC No. 279179, n.4 (February 10, 2004). The Panel notes that in *Robinson, supra*, the offer of employment was made to the claimant during an earlier formal hearing and the claimant failed to follow up with the employer.

In sum, the Panel thoroughly reviewed the record and determines that the ALJ's factual findings are supported by substantial evidence on the record as a whole, and are, therefore, conclusive. *Marriott Int'l., supra*; D.C. Official Code § 32-1521.01(d)(2)(A). Further, the ALJ's conclusions of law are in accordance with the law. The record fully supports the ALJ's thorough, well reasoned decision, and the Panel, therefore, adopts the reasoning and legal analysis expressed by the ALJ in that decision in affirming the Compensation Order in all respects.²

CONCLUSION

The Compensation Order of March 8, 2007 is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order of March 8, 2007 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

June 7, 2007
DATE

² 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)(B) requires a more detailed and thorough written order than the instant Decision and Order where there is a reversal of the Compensation Order.