

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. 05-250

CLEVELAND BURGESS,

Claimant-Petitioner,

v.

MTI CONSTRUCTION COMPANY AND MARYLAND CASUALTY COMPANY,

Employer/Carrier-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
OHA/AHD No. 96-032E, OWC No. 249930

David M. Schloss, Esquire, for the Petitioner

Jamie L. DeSisto, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY, and SHARMAN J. MONROE, *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).¹

¹Pursuant 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

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 June 24, 2005, the Administrative Law Judge (ALJ) granted modification of a prior Compensation Order issued July 7, 1997 as requested by Respondent, by ruling that Petitioner had experienced a change in medical condition such that he had become permanently totally disabled due to deterioration in his medical condition and physical capacity resulting from non-work related events. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ's finding that Petitioner's current disability is not causally related to the work injury is not in accordance with the law. Respondent opposes this appeal, and argues that the ALJ's determination that Petitioner had failed to establish that his disability is causally related to the work injury is in accordance with the law.

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.

This case deals with a request by Respondent for a modification of an existing Compensation Order under which Respondent was obligated to pay ongoing temporary total disability benefits. As such, Respondent had the burden of demonstrating that "a change of condition has occurred which raises issues concerning ... [t]he fact or the degree of disability or the amount of compensation payable [to a claimant]". D.C. Code Ann. § 32-1524 (a) (2005). Under the Act, "disability" is defined as "physical or mental incapacity because of injury which results in loss of wages", (D.C. Code Ann. § 32-1501 (8)) and "injury" is defined as "accidental injury or death arising out of and in the course of employment" (D.C. Code Ann. § 32-1501 (12)).

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

Further, as held by the Court of Appeals in *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 703 A.2d 1225 (D.C. 1997) (*Anderson*), under *Snipes v. District of Columbia Department of Employment Services*, 555 A.2d 832 (D.C. 1988), a party seeking such a modification of an existing Compensation Order must make a preliminary showing that there is “some evidence” of such a change of conditions, and upon such a showing, a formal hearing is required to determine whether such a change of conditions effecting “[t]he fact or the degree of disability or the amount of compensation payable” has indeed occurred, with the burden of demonstrating such a change being placed upon the party seeking the modification. *Anderson, supra*, at 1231.

In the case under review herein, the ALJ undertook the *Snipes* review and analysis, writing as follows:

In making the threshold showing of a change in condition, Employer relies on the Dodge County, Georgia property records showing that Claimant purchased a building on April 2, 2002 and ... [Claimant’s testimony that] he operated a business called the Burgess Farmers Market in that building from April 2002 to July 2003. Employer produced certification from the Mayor of Rhine, Georgia that Claimant purchased and renewed his business license and his license to sell beer and wine; and [Claimant’s testimony that], he was the sole operator of the business by opening for business two or three times a week and going to wholesale companies to pick up inventory and supplies ordered from distributors. In addition, subsequent to the prior Compensation Order, [Respondent proffered evidence that] Claimant has suffered a number of medical events including coronary bypass surgery and three strokes, leaving him impaired on both his right and left sides to the point where he is confined to a wheelchair and unable to ambulate in any capacity, even with crutches.

As stated in *Walden v. D[istrict of] C[olumbia] Department of Employment Services*, 759 A.2d 186, 191 (D.C. 2000), the burden of demonstrating a change of condition for the purpose of entitlement to a hearing is a light one. Given this standard, Employer has made a threshold showing that there is reason to believe that there has been a change in Claimant’s condition.

While we agree that this finding by the ALJ is correct, it must be noted that this recitation of proffered evidence is of two distinct varieties, one being “economic” or “vocational” (that is, raising the possibility that Petitioner has in fact returned to the work force and was earning wages from self-employment), and the second being medical, establishing that Petitioner had sustained subsequent medical maladies that had caused his medical condition to deteriorate such that his physical capacity had actually gotten worse since the prior formal hearing.

It must be recalled that, under the prior Compensation Order, Petitioner was adjudged totally disabled, albeit as of that time temporarily. Thus, the only “change” in “the fact or degree of disability” that could be relevant for a modification would an improvement from total disability status to partial or non-disability.² In other words, there can be no change from total disability to

² Of course, a claimant could seek a modification from temporary total to permanent total disability status, upon appropriate evidence.

some greater (or worsening) level of disability. Therefore, the only evidence relevant to the inquiry of modification of the prior Compensation Order in this case is the economic/vocational evidence; the medical worsening evidence proffered in this case could have no positive effect upon the level or degree of “disability”, which as previously discussed, is defined as “loss of wages” caused by the previously awarded “work injury”. In other words, evidence that an injured worker who is already totally disabled becomes even more physically debilitated and further incapacitated as a result of subsequent intervening non-work related medical maladies and deterioration is not relevant to the fact or degree of wages lost due to the work related injury.

In this case, therefore, the only relevant evidence proffered as to a possible change of conditions concerning the fact or degree of disability was the evidence that Petitioner may have, prior to suffering the intervening worsening of his physical capacity from the unrelated medical events, experienced a change in disability status from total to partial (or non-disabled altogether), by becoming engaged in the ownership, operation and wage earning from the Burgess Farmer’s Market enterprise.

In considering this issue, the ALJ ultimately determined that “There is insufficient evidence upon which to base a finding that owning and operating the business warrants a change in [Petitioner’s] disability status”, Compensation Order, page 7. That finding was not appealed by Respondent, and is certainly one which the ALJ was permitted to make, based upon the factors that he cited, and in light of the concepts enunciated in *Washington Post v. District of Columbia Department of Employment Services*, 675 A.2d 37 (D.C. 1996) (*Mukhtar*), which the ALJ properly cited.

However, the ALJ then proceeded to discuss the medical and physical deterioration evidence which, as previously discussed, is not relevant to any possible change (or improvement) in Petitioner’s “disability” status, as that term is used in the Act, referring as it does to the level of wages lost as a result of the work injury. Simply put, the fact that a totally disabled worker becomes even more physically debilitated due to non-injury related medical events has no bearing on his work-related disability status.

Further, by requiring that Petitioner meet the burden under *Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109 (D.C. 1986), the ALJ impermissibly relieved Respondent, as the party seeking the modification, of the obligation under *Anderson* of demonstrating the requisite change of condition, shifting the burden to Petitioner to demonstrate that no such change had occurred.

Therefore, the ALJ’s holding that Respondent had demonstrated a change in conditions “effecting the fact or degree of disability” is not in accordance with the law, and must be reversed.

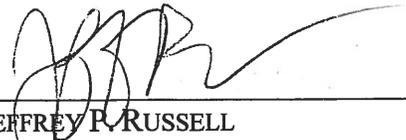
CONCLUSION

The modification of the prior Compensation Order of July 7, 1997, contained in the Compensation Order of June 24, 2005 is not in accordance with the law, and must be reversed.

ORDER

The Compensation Order of June 24, 2005 is hereby affirmed in part, insofar as the ALJ found that Respondent had failed to demonstrate a change in economic circumstances such as to warrant a modification of the Compensation Order of July 7, 1997, and is reversed insofar as the ALJ modified the Compensation Order of July 7, 1997, said modification not being in accordance with the law.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

August 31, 2005
DATE