

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-052

CHARLES DAVIS,
Claimant-Respondent,

v.

STANDARD BUSINESS FURNITURE and SPECIALTY RISK SERVICES,
Employer/Carrier-Petitioner.

Appeal from an March 2, 2012 Compensation Order on Remand by
The Honorable Heather C. Leslie
AHD No. 11-095, OWC Nos. 652717

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2012 DEC 28 PM 1 15

Shawn Nolen, Esquire for the Petitioner
Frank Kearney, Esquire for the Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and JEFFREY P. RUSSELL,¹ *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.²

DECISION AND ORDER

ISSUE ON APPEAL

Did the ALJ err in awarding Mr. Charles Davis temporary partial disability benefits from March 9, 2011 to the date of the formal hearing and continuing?

¹ Judge Russell has been appointed by the Director of the Department of Employment Services ("DOES") as a temporary Compensation Review Board ("CRB") member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

² Jurisdiction is conferred upon the CRB pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, ("Act"), 7 DCMR §250, *et seq.*, and the Department of Employment Services Director's Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD, PROCEDURAL HISTORY, AND ANALYSIS³

On August 19, 2008 while working as a shipping and receiving manager for Standard Business Furniture (“Standard”), Mr. Davis injured his back. A dispute arose over Mr. Davis’ entitlement to temporary total disability benefits from March 9, 2011 to the date of the formal hearing and continuing, and in response to Mr. Davis’ claim for benefits, Standard raised the defense of voluntary limitation of income.

In a Compensation Order issued on July 19, 2011, an administrative law judge (“ALJ”) ruled Mr. Davis had voluntarily limited his income when he had failed to accept a job offer that was within his physical and vocational capacity. As a result, the ALJ denied Mr. Davis’ request for “an award under the Act of temporary totally [sic] disability from March 9, 2011 to the present and continuing.”⁴

On appeal to the CRB, Mr. Davis asserted the ALJ thrice had erred. Mr. Davis asserted the ALJ’s reasons for rejecting a one-hour limit on his ability to commute was improper; he disagreed that the District of Columbia metropolitan-area is the relevant labor market for evaluating alternative employment; and he asserted Standard’s job offer was not sufficiently descriptive to constitute suitable, alternative employment. The CRB rejected all three of Mr. Davis’ arguments; however, because the ALJ had denied Mr. Davis any wage loss benefits as a result of his voluntary limitation of income, the CRB remanded the matter for consideration of Mr. Davis’ entitlement to temporary partial disability benefits pursuant to §32-1508(5) of the Act:

However, the effect of such a voluntary limitation of income is not denial of wage loss benefits. Rather, as the ALJ noted in footnote 3, the section provides that where such a limitation occurs, a claimant’s “wages after becoming disabled shall be deemed to be the amount he would earn if he did not voluntarily limit his income or did accept employment commensurate with his abilities.” In this instance, the parties stipulated to an average weekly wage (AWW) of \$694.80. The offer letter states an hourly rate and a number of weekly hours at which Mr. Davis would be employed. We must remand the matter to permit further fact finding concerning the extent of ongoing wage loss that Mr. Davis suffers and an award commensurate with any such wage loss, in the nature of temporary partial disability as established by D.C. Code §32-1508(5).^[5]

³ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand 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 International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁴ *Davis v. Standard Business Furniture*, AHD No. 11-095, OWC No. 652717 (July 19, 2011), p. 2.

⁵ *Davis v. Standard Business Furniture*, CRB No. 11-078, AHD No. 11-095, OWC No. 652717 (February 22, 2012), p. 4.

On remand, the ALJ analyzed the wage associated with Standard's offer of suitable, alternative employment and awarded appropriate temporary partial disability benefits:

A review of the letter reveals the Employer offered the Claimant a 30 hour per week light duty job commencing on July 21, 2011, paying \$15.00 per hour. This equates to \$450.00 per week. Thus, the Claimant would have suffered a partial wage loss in the amount of \$244.80, had he accepted the light duty job and not voluntarily limit [*sic*] his income. This entitles the Claimant to \$163.04 in temporary partial disability benefits per week to be paid by the Employer.^[6]

Standard's argument that the ALJ erred by awarding Mr. Davis temporary partial disability benefits when entitlement to temporary partial disability was not in dispute represents a misunderstanding of the consequences of its own defense.⁷ Section 32-1508(5) of the Act states:

In case of temporary partial disability, the compensation shall be 66⅔% of the injured employee's wage loss to be paid during the continuance of such disability, but shall not be paid for a period exceeding 5 years. Wage loss shall be the difference between the employee's average weekly wage before the employee had the disability and the employee's actual wages after the employee had the disability. If the employee voluntarily limits his income or fails to accept employment commensurate with his abilities, then his wages after the employee had the disability shall be deemed to be the amount he would earn if he did not voluntarily limit his income or did accept employment commensurate with his abilities.

The ALJ clearly ruled Mr. Davis had voluntarily limited his income by failing to accept employment commensurate with his abilities. As a result, Standard was successful in its defense, and Mr. Davis was entitled to temporary total disability benefits reduced by the amount he would have earned had he not voluntarily limited his income, a.k.a. temporary partial disability benefits pursuant to §32-1508(5) of the Act.

The ALJ ruled on Mr. Davis' request for temporary total disability benefits and determined he had limited his income. That Standard may have been voluntarily paying Mr. Davis an amount equal to the amount awarded by the ALJ does not change that the issues for resolution were the nature and extent of Mr. Davis' disability and whether he had voluntarily limited his income. Mr. Davis was temporarily, totally disabled, but he was only entitled to temporary, partial disability benefits because he had voluntarily limited his income.

CONCLUSION AND ORDER

The ALJ properly considered Mr. Davis' request for temporary total disability benefits and Standard's defense of voluntary limitation of income when awarding temporary partial disability benefits from March 9, 2011 to the date of the formal hearing and continuing. The March 2, 2012

⁶ *Davis v. Standard Business Furniture*, AHD No. 11-095, OWC No. 652717 (March 2, 2012), p. 2.

⁷ Mr. Davis did not file any response to Standard's Application for Review.

Compensation Order on Remand is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

December 28, 2012
DATE