

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. 03-93

DEBORAH HOWELL,

Claimant–Petitioner

v.

OMNIPLEX CORPORATION AND THE HARTFORD INSURANCE COMPANY,

Employer/Carrier–Respondent

Appeal from a Compensation Order of
Administrative Law Judge Karen R. Calmeise
AHD No. 03-056, OWC No. 521087

Kirk D. Williams, Esquire, for the Petitioner

Francis H. Foley, 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:

SUPPLEMENTAL AND AMENDED 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 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 26, 2003, the Administrative Law Judge (ALJ) granted Petitioner's claim for temporary total disability benefits from July 8, 2002 through August 14, 2002, and from August 24, 2002 through October 17, 2002, and denied the claim for temporary total disability benefits thereafter, to the date of the formal hearing and continuing. Petitioner sought review of the denial of those benefits as contained in the Compensation Order.

Respondent also filed an Application for Review of that portion of the Compensation Order that rejected Respondent's defense to the compensability of the claim generally, said defense being that certain material misrepresentations were made by Petitioner in the course of her application for employment with Respondent, and that said representations were relied upon by Respondent in the hiring process and were a substantial factor in the decision to hire her, under the principles enunciated in *Watson v. George Hyman Constr. Co.*, Dir. Dkt. No. 88-26, H&AS No. 87-623, OWC No. 117060 (Remand Order June 22, 1989).

When this matter was initially reviewed by the panel, said Respondent's Application for Review (RAFR) appeared not to have been filed in a timely fashion, in that the date stamp on the file copy of the RAFR indicated that it had been received by the Office of the Director of the Department of Employment Services on July 28, 2003, rendering it untimely. Based thereon, the issue raised therein was not considered, pursuant to established Agency precedent. See, *Hughes-Smith v. District of Columbia Department of Fire Emergency Services*, Dir. Dkt. No. 01-04, OHA No. PBL 00-043B, OBA No. 000120 (March 23, 2004).

The panel proceeded to consider Petitioner's appeal and in so doing also considered Respondent's Opposition to Petitioner's timely filed Application for Review. On June 29, 2005, the panel, on behalf of the CRB, issued a Decision and Order reversing the Compensation Order and remanding same to the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) for the entry of a Compensation Order awarding the requested temporary total disability benefits. In that Decision and Order, the panel noted that it had not addressed or considered the merits of the RAFR due to its apparent untimeliness.

On July 6, 2005, Respondent filed "Employer/Carrier's Motion for Reconsideration", wherein Respondent asserted that the RAFR had been filed timely on July 25, 2005. In support of that assertion, Respondent attached a copy of a delivery manifest from a company called "Delivery, Inc." purporting to confirm a June 25, 2003 delivery of a package to "64 NY Ave. NE", and bearing the signature of an employee of the then Office of the Director known to the CRB to be an individual whose duties include receiving such packages. Respondent also provided a copy of a letter dated August 12, 2003, from counsel for Respondent and addressed to a former employee of

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.

the General Counsel to the Office of the Director, in which counsel stated that following counsel's receipt of a "Notice of Application for Review Filed" and an "Amended Notice of Application for Review Filed" he became aware that the agency file indicated that the RAFR had been filed on July 28, 2003. Counsel asserted in that letter that this was erroneous, and in support he attached a copy of the delivery manifest previously described.

No opposition or other response to the "Employer/Carrier's Motion for Reconsideration" has been filed.

Based upon the foregoing, the panel has determined that the RAFR was indeed timely filed, and the motion for reconsideration is granted. The matters raised in the RAFR will therefore be considered.

In the Compensation Order, the ALJ rejected Respondent's defense to the claim which was based upon Respondent's asserting that the claim is barred due to misrepresentations by Petitioner concerning her prior physical condition at the time of her application for employment

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 now under review, in *Watson, supra*, the Director reversed the decision of a Hearing Examiner which rejected an employer's attempt to defend a claim for benefits under the Act on the theory that the claimant had made material misrepresentations in the pre-employment hiring process concerning the claimant's physical health and abilities, and that making such misrepresentations should bar receipt of benefits. Noting that while there are penalties in the Act for misrepresentations made in an attempt to secure benefits, it is silent on concerning such pre-employment misrepresentations, the Hearing Examiner concluded that such misrepresentations do not constitute a bar to benefits. The Director reversed this ruling, and remanded the matter to the Hearing Examiner for further consideration of the defense raised. In so doing, the Director wrote:

As a matter of law it should not matter if there is a misrepresentation to obtain workers' compensation benefits or if there is a misrepresentation to obtain employment, as a material false representation should not be condoned or sanctioned under the Act. The Director does not believe that it was the legislature's intent to

have a material false representation serve as the basis for an award of workers' compensation benefits under the Act.

This view has been endorsed by Professor Larson in 1C A. Larson *Workers' Compensation Law* § 47.53, at 8-394. This "common sense" rule precludes employees from recovering workers' compensation benefits when the following factors are present: 1) the employee knowingly and willfully made a false representation as to his physical condition; 2) the employer relied upon the false representation and this reliance was a substantial factor in the hiring; and 3) there is a causal connection between the false representation and the injury.

Watson, supra, page 3. In the case before us, the ALJ correctly identified *Watson* as the controlling case, and properly set forth the standards to be applied. She thereupon reviewed the evidence that Respondent presented in support of its defense, which included: medical records from a physician who treated Petitioner for lumbar discopathy and radiculopathy between August 23, 2000 and February 15, 2002, and in which records are noted "significant spasm" and "giving way of the legs", which "has not been relieved with rest from her usual workplace duties", (Compensation Order, page 5, citing EE 1); a pre-employment physical form dated April 23, 2002, in which Petitioner denied having "any physical disorder or physical impairment which would interfere in any way with the full performance of the duties" of the prospective job, which were identified as standing and walking for 8 hours and carrying up to 45 pounds (Compensation Order, page 6, citing CE 2); testimony at the formal hearing which the ALJ determined to be "misleading and clearly lacking in veracity" (Compensation Order, page 6, citing HT 101 – 102); a medical report, dated July 8, 2002, from her treating physician stating that a patient with her back problems should not be working in a job requiring significant standing (CE 1).

Based upon this record evidence and her own views of Petitioner's credibility, the ALJ concluded that Petitioner had knowingly misrepresented her physical condition in her pre-injury employment application, and that there was a causal relationship between the misrepresentation and the work-related injury, which was an "exacerbation of ... lumbar discopathy and radiculopathy" brought on by working beyond a seven hour shift on July 6, 2002, leading Petitioner to miss work from July 8, 2002 through August 14, 2002, and again from August 24, 2002 through September 27, 2002 (Compensation Order, page 7; see also, Compensation Order, page 3). These findings and conclusions are supported by the evidence cited by the ALJ in the Compensation Order, which evidence is such that a reasonable person might have reached the same conclusions based thereon. Hence, they are supported by substantial evidence.

Concerning the remaining issue in the *Watson* test, that of whether Respondent relied upon the misrepresentation to the point that the misrepresentation was a substantial factor in the hiring decision, the ALJ cited the testimony of Nancy Currie, in the following passage:

Ms. Currie [Respondent's Director of Safety and Health] testified she was responsible for review of the physical forms and any discrepancy noted on the pre-employment form and she was responsible for clearing the job applicant for hire. Ms. Currie testified the claimant's physical examination report did reveal a vision problem which she followed up with claimant to have resolved. However, Ms. Currie

was not aware of claimant's pre-existing back condition and if it was so indicated that claimant had a problem with her back, she (Ms. Currie) would have inquired further as to claimant's ability to perform the job duties of Special Police. ... She testified, that she would have had claimant follow-up with her physician to confirm claimant's capability to perform the work duties of a Special Police [sic] taking into consideration claimant's pre-existing back condition.

Compensation Order, page 6 – 7, citing HT 185 – 187 (parentheses in original).

Nonetheless, the ALJ rejected Respondent's defense, for the following reason:

In this case no evidence was presented that claimant would not have been hired but for the misrepresentation about her back condition. Although [Ms. Currie] is responsible for employee safety and health issues, she is not responsible for hiring decision and she relies on the physicians report to determine whether the candidates are fit to do the work. [She also testified] if the physical evaluation showed the applicant had an impairment that related to a work duty, the claimant would have an opportunity to have her personal physician review the job description and make their recommendation for employment (HT pg. 182) I find there is insufficient evidence to prove that the offer of employment would not have been extended to claimant, even if claimant had answered truthfully as to her medical history regarding her back condition.

Compensation Order, page 7. We must agree with Respondent that the ALJ applied a different standard than that which the Director adopted in *Watson*. That case does not have a "but for" requirement, rather, it requires only that the "misrepresentation" be a "substantial factor" in the hiring decision. Respondent's evidence, which appears to be uncontradicted on the record and which the ALJ appears to have accepted as credible, is that Respondent's hiring process includes inquiry into pre-existent conditions effecting the capacity to perform the job, and that had Petitioner truthfully revealed her pre-existent back condition, Respondent would have made further inquiry, either by additional medical evaluation or obtaining additional clearances from the Petitioner's doctor. That this did not occur is the result of the misrepresentation found by the ALJ to have occurred. How, in such a situation, any employer could ever "prove" that no offer of employment would have been made had the applicant not lied about not having a bad back is not apparent. Conversely, the very fact that the uncontradicted evidence is that significant further medical inquiry would have resulted from a truthful response mandates a conclusion that the misrepresentation was a "substantial" factor effecting the hiring decision. While we will never know whether a truthful answer to the questions concerning her pre-employment physical condition *might* not have prevented her from getting the physically demanding job that she obtained from Respondent, it is clear that such a truthful answer would have significantly effected the process, and would have yielded more information concerning whether the hiring of Petitioner posed a significantly greater prospect of Respondent "exposing itself and others to major liability risks" in the "vacuum" created by Petitioner's failure to "truthfully divulge information on [her] medical history and condition when applying for employment". See, *Watson, supra*, page 2.

Accordingly, we conclude that the ALJ misapplied the law when she judged the evidence using the “but for”, rather than the “substantial effect” test. Further, we see no need to remand the matter at this point, in that the uncontradicted evidence, accepted by the ALJ as true, compels but one result, that being that the decision making process utilized by Respondent in hiring the Petitioner was substantially effected, to Respondent’s greater risk and potential detriment, by the willful and knowing material misrepresentations found to have been made by Petitioner. The claim is therefore barred.

CONCLUSION

That portion of the Compensation Order of June 26, 2003 finding that Petitioner’s claim for benefits is not barred due to knowing and willful misrepresentation of her physical condition is not in accordance with the law.

ORDER

The award of temporary total disability benefits contained in Decision and Order of June 29, 2005 is hereby VACATED; although the prior findings contained therein concerning Petitioner’s disability remain, the claim for benefits is denied for the reasons as set forth in this Supplemental and Amended Decision and Order.

FOR THE COMPENSATION REVIEW BOARD

JEFFREY. P. RUSSELL
Administrative Appeals Judge

July 22, 2005
DATE