GOVERNMENT OF THE DISTRICT OF COLUMBIA

DEPARTMENT OF EMPLOYMENT SERVICES

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Mayor

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2016 OCT 28 PM 1 57

CRB NO. 16-079

JULIO A. RODRIGUEZ,
Claimant–Petitioner,

v.

MILLER & LONG COMPANY, INC.,
Self-Insured Employer-Respondent.

Appeal from a May 16, 2016 Compensation Order on Remand
by Administrative Law Judge Nata K. Brown
AHD No. 07-224F, OWC No. 630575

(Decided October 28, 2016)

David J. Kapson for Claimant
William S. Sands Jr. for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges,*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER AMENDING COMPENSATION ORDER ON REMAND

BACKGROUND

The following recitation of the factual and procedural background of this case is taken from the Decision and Remand Order issued by the Compensation Review Board ("CRB") in a prior appeal of a Compensation Order brought by Julio A. Rodriguez ("Claimant"):

> In a Compensation Order issued April 25, 2008 (CO 1) by an administrative law judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES), Julio A. Rodriguez (Claimant) was awarded temporary total disability benefits (TTD) and causally related medical care for a work-related cumulative trauma injury to his low back. CO 1 was affirmed by the Compensation Review Board (CRB) on September 11, 2008.

Subsequently, Employer filed an Application for Formal Hearing (AFH) alleging that Claimant has failed to co-operate with vocational rehabilitation efforts offered by Employer, and that Claimant has voluntarily limited his income by failing to accept suitable alternative employment offered by Employer. Employer sought modification of CO 1, seeking that Claimant's "benefits be terminated because of voluntary limitation of income." HT at 14. Employer formulated its position both in terms of failure to co-operate with vocational rehabilitation, claiming that Claimant's refusal to fill out a job application and background check authorization for the position proffered by Employer was a "failure to co-operate with the hiring process", and also constituted voluntary limitation of income.

A formal hearing was held on Employer's AFH on March 12, 2014.

On September 15, 2015, the ALJ issued a Compensation Order (CO 2) in which she denied Employer's request for termination of benefits, concluding that no vocational rehabilitation services had been offered, but ordering a reduction in Claimant's TTD due to his voluntarily refusing to return to suitable alternative employment offered by Employer. CO 2 contained no findings concerning what the return to work wages would have been.

Claimant appealed CO 2 to the CRB by filing an Application for Review and memorandum of points and authorities in support thereof (Claimant's Brief). In his appeal, Claimant argues that the ALJ's finding that Claimant has voluntarily limited his income is not supported by substantial evidence. Claimant asserts "The ALJ failed to realize that Mr. Rodriguez is no longer an employee of Miller & Long and that the 'employer/employee' relationship identified in the Stipulation Form refers to the status of that relationship at the time of the injury, not necessarily the time of the Formal Hearing." Claimant's Brief at 4. Claimant further argues that the proffered position is a job created specifically for Claimant and "this position does not exist in the job market for which any person seeking employment could compete for and obtain." *Id.*, at 5.

Employer filed an Opposition to Claimant's appeal and memorandum and points and authorities in support thereof (Employer's Opposition Brief) arguing that the finding of voluntary limitation of income is supported by substantial evidence and should be affirmed, and a Notice of Cross Appeal (Employer's Cross-Appeal), arguing that the ALJ's failure to find that Claimant failed to co-operate with vocational rehabilitation was legally erroneous and ought to be reversed.

Because the ALJ's determination that Claimant had not been offered vocational rehabilitation services as they are contemplated in the Act is supported by substantial evidence, the failure to suspend benefits for failure to co-operate with vocational rehabilitation is in accordance with the law and is affirmed.

Because the ALJ's determination that Claimant has voluntarily limited his income by failing to fill out a new job application required to return to employment with Employer is undisputed and is supported by substantial evidence, the determination that Claimant's compensation be reduced to account for the

voluntary limitation of income is affirmed. Because the ALJ failed to make a finding of fact concerning the amount that Claimant would earn if he had not voluntarily limited his income, the matter must be remanded for further findings of fact on this issue and entry of an order specifying to what extent Claimant's compensation should be reduced.

Rodriguez v. Miller & Long, CRB No. 15-167 (March 29, 2016), at 1-3 (footnotes omitted) ("*Rodriguez*").

The following is taken from the same Decision and Remand Order, being the relevant portions of the CRB's "Discussion and Analysis" and the "Conclusion and Order":

DISCUSSION AND ANALYSIS

* * *

We note that Claimant presented no evidence that the offer of employment was anything other than a *bona fide* offer by Employer to provide modified employment in one of its three eight-hour watchman shifts. Claimant implies something untoward in the fact that Employer has been holding the job open for Claimant. Claimant presented no evidence from any labor market expert to support its assertion in this appeal that positions such as the one offered to Claimant don't exist in the labor market, or that the position offered was of no practical value to Employer in its overall business operations. These unsupported arguments are unpersuasive on this record.

Our review of the record suggests that the voluntary limitation of income in this case appears to be total, inasmuch as the testimony is uncontradicted that Employer was willing to pay Claimant his pre-injury wage to take the position. We are tempted to amend CO 2 to make this clear. However, the District of Columbia Court of Appeals has made apparent its strong preference for such factual findings to be made by the ALJ, and not inferred from the record by the CRB. *See Washington Metropolitan Area Transit Authority v. DOES (Juni Browne, Intervenor)*, 926 A.2d 140 (D.C. 2007). Accordingly, we remand the matter for the sole purpose of having the ALJ make further findings of fact and conclusions of law concerning to what extent Claimant's voluntary limitation of income should reduce his ongoing compensation rate.

CONCLUSION AND ORDER

The ALJ's findings that Claimant has not failed to co-operate with vocational rehabilitation but has voluntarily limited his income are supported by substantial evidence, and the determination that Claimant's ongoing compensation is to be reduced commensurate with the extent of that limitation is in accordance with the law. The matter is remanded for the sole purpose of having the ALJ make further findings of fact and conclusions of law concerning the extent to which the voluntary limitation of income reduces Claimant's entitlement to ongoing temporary total disability benefits.

Rodriguez, supra, at 5, 6.

On May 16, 2016, the ALJ issued a Compensation Order on Remand ("COR"), which contains the following relevant material:

> **FINDINGS OF FACT**
>
> The findings of fact as set forth in the September 15, 2015 Compensation Order are hereby adopted and incorporated herein by reference.
>
> The following additional findings of fact are based upon the record evidence.
>
> Claimant's average weekly wage was $868.50. I find that Employer offered Claimant employment at the same wage he earned before his injury. (HT 13, 37, 41).
>
> * * *
>
> **CONCLUSIONS OF LAW**
>
> Claimant voluntarily limited his income by rejecting suitable alternative employment provided by Employer. Claimant's disability benefits must be reduced by the amount employee would earn if the employee did not voluntarily limit his income or did accept employment commensurate with the employee's abilities.
>
> **ORDER**
>
> It is **ORDERED** that Claimant's ongoing temporary total disability benefits be **REDUCED** by $868.50, which is the amount of wages associated with the alternative employment offered by Employer.

COR at 2, 3.

Claimant filed "Claimant's Application for Review" and "Claimant's Memorandum in Support of the Application for Review" ("Claimant's Brief") with the CRB, arguing that:

> Mr. Rodriguez did not voluntarily limit his income by refusing to fill out the requirements [sic] for a background check, because the position offered was sheltered employment that cannot be used to determine an injured worker voluntarily limited his income.

Claimant's Brief at 5.

Employer filed a "Memorandum of Points and Authorities in Opposition to Claimant's Application for Review" ("Employer's Brief"), arguing that accommodating physician-imposed restrictions is a proper course for an employer to follow, quoting from the DRO:

> As the CRB found in its Decision and Remand Order at 5 there was no evidence that the "offer of employment was anything other than a *'bona fide'* offer of modified duty" and there was "no evidence from any labor market expert to support [claimant's] ... that positions such as the one offered was of no practical value to Employer in its overall business operations."

Employer's Brief at 7.

Because the ALJ substantially followed the mandate of the DRO, the COR is in accordance with the law, and is affirmed, as amended below.

DISCUSSION AND ANALYSIS

The mandate contained in the DRO was simple and explicit: instead of the CRB entering a finding that Claimant's limitation of income was equal to his pre-injury average weekly wage, thereby requiring a 100% reduction in Claimant's ongoing compensation rate, the CRB decided as a matter of discretion and in light of the "strong preference" expressed by the court for the CRB to refrain from such actions, and to instead remand cases to AHD for entry of substantive amendments to compensation orders (*see Washington Metropolitan Area Transit Authority v. DOES* (*Juni Browne, Intervenor*), 926 A.2d 140 (D.C. 2007) (*Juni Browne*) to so act in this instance.

Upon remand, the ALJ properly identified D.C. Code § 32-1508(3)(V)(iii) as the operative statutory provision. It provides that a claimant who voluntarily limits his or her income or fails to accept employment commensurate with the claimant's abilities, shall have the ongoing compensation rate reduced to the amount the claimant would be entitled to receive in the absence of the voluntary limitation of income or failure to accept such employment.

The Order entered by the ALJ in the COR obviously intended to do precisely that. However, the language employed does not technically accomplish this, since the compensation rate is not to be reduced by the amount of the alternative wages; rather, a new calculation is to be made comparing the pre-injury average weekly wage with the wage that would have been paid had Claimant accepted the modified job, and changing the rate to compensate for two thirds of the difference.

In this instance, the ALJ's technical error is harmless, since the modified job would have paid the same as the pre-injury job (a factual finding made in the COR that Claimant does not contest or dispute in this appeal), and thus the ongoing wage loss from the pre-injury position is completely offset by the wages the modified position would have paid.

We will take this opportunity, therefore, consistent with *Juni Browne*, which the court allowed would permit technical, non-substantive corrections to be made by the CRB, to amend the COR as follows. The "Order" portion of the COR of May 16, 2016 is vacated and replaced with:

> **Order**
>
> It is Ordered that Claimant's ongoing compensation rate be reduced to zero, in light of the fact that any ongoing wage loss is completely offset by the wages

> Claimant would have been paid had he not voluntarily limited his income by refusing the modified job offered by Employer.

Finally, we note that Claimant has taken the occasion of this appeal to expand upon an argument previously raised in the prior appeal which the CRB rejected at that time. We decline to consider the additional points and authorities raised in this appeal, inasmuch as the issue has previously been decided in this case. A remand with so limited a mandate as was made in the DRO is not an invitation to raise new issues or re-litigate that which was previously decided, even if the party employs new terminology (i.e., in this case, "sheltered employment") or new theories.

We express no views with respect to the new formulation of the prior argument.

CONCLUSION AND ORDER

The Compensation Order on Remand of May 16, 2016, as amended herein, is supported by substantial evidence, is in accordance with the law, and is affirmed.

So ordered.