

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-167

JULIO A. RODRIGUEZ,
Claimant–Petitioner and Cross-Respondent,

v.

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

Appeal from a September 15, 2015 Compensation Order
by Administrative Law Judge Nata K. Brown
AHD No. 07-224F, OWC No. 630575

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 MAR 29 AM 10 12

(Decided March 29, 2016)

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

Before JEFFREY P. RUSSELL, LINDA F. JORY, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

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 1,¹ seeking that Claimant's "benefits

¹ There is no reference in the compensation order under review to any preliminary evidentiary review under *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988), having been conducted. However, at a proceeding occurring on the record on February 11, 2014, the issue was addressed (*see* HT I), and at the formal hearing on March 12, 2014, Claimant conceded that "employer has satisfied their burden under *Snipes* to demonstrate evidence enough for there to be ... reason to believe that there has been a change in condition", HT II at 6.

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.²

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.³ 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

² We note that one of Employer’s witnesses, Francisco Antonio Trujillo, testified that if Claimant returned to the proffered position, he would be paid the same as his prior wage at Miller & Long. HT II, at 41, lines 18 – 20. Our review of the transcript fails to reveal any attempt by Claimant’s counsel to refute that testimony.

³ In Claimant’s brief there are unsubstantiated representations concerning events that occurred following the issuance of CO 2 concerning Claimant’s medical and vocational status. They are not part of the record before us and will not be considered in this appeal.

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.

STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Compensation Order under review 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01(d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB must affirm 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 this panel might have reached a contrary conclusion. *Id.* at 885.

DISCUSSION AND ANALYSIS

This case centers on the essentially undisputed facts that Employer offered Claimant a job as a yard watchman, which even as of the date of the formal hearing, Employer was willing to provide to Claimant.

It is undisputed that Claimant's treating physician reviewed the job description and approved the job as being within Claimant's physical capacity. Claimant does not argue that he is unable to perform the job, which is completely sedentary, and permits such standing, sitting, or reclining in a chair described as a "La-Z-Boy" type recliner, as needed. The only requirements for the position were that Claimant observe the comings and goings of people entering and leaving one of Employer's work yards, to make notations concerning anything unusual that transpires, and to notify Employer's security detail of any need for a response.

The ALJ found that Claimant failed or refused to fill out a new job application, which included an authorization for Employer to conduct a background check (a centralized process that Employer's witnesses testified has been in place for all new employees for approximately the last three or four years, and is the result of United States Department of Labor regulations and/or insurance requirements. *See, e.g.*, HT at 23).

It is undisputed in this case that that is the sole reason Claimant has not returned to work in the modified job.

The ALJ correctly cited to the appropriate provision in the Act mandating suspension of benefits for the unreasonable refusal to co-operate with vocational rehabilitation, D.C. Code § 32-1507(d), and concluded that Employer had adduced no evidence that it did anything beyond offering Claimant a return to work in a modified position. Although not quoted in CO 2, that provision also includes the following:

(c) Vocational rehabilitation shall be designed, within reason, to return the employee to employment at a wage as close as possible to the wage the employee earned at the time of injury. The Mayor shall monitor the provision of vocational

rehabilitation of employees with disabilities and determine the adequacy and sufficiency of such rehabilitation. Where, in the judgment of the Mayor, the employer fails or refuses to provide adequate and sufficient rehabilitation services as required in subsection (a) of the section, the Mayor may order that the supplier of such services be changed, and may use the Special Fund provided in § 32-1543 in such amounts as may be necessary to procure such services, including necessary prosthetic devices and appliances. When the Mayor pays for such services out of the special fund, he shall institute proceedings against such employer to recover the amounts expended.

From this language, it is evident that vocational rehabilitation is a process separate from an employer's modification of the pre-injury job, or relocating an injured worker to a different job than the pre-injury position to accommodate physical incapacities. The Act refers "services" and "providers", clearly implicating something outside the normal business of an employer.

Employer did not offer (nor is there any evidence that Claimant sought) anything in the nature of a program of vocational rehabilitation. Accordingly the ALJ's denial of Employer's request for suspension of benefits is in accordance with the law.

Turning to Claimant's appeal, Claimant argues that the ALJ's finding that the stipulation of an "employer/employee" relationship can only be read as an agreement that Claimant was an employee of Employer at the time of the injury. We agree. However, this question does nothing to shed light upon whether for some reason Claimant was required to fill out a new application.

We fail to see, and Claimant fails to explain in Claimant's Brief, how Claimant's status as either an employee or non-employee at the time the modified position was offered has any relevance concerning whether Claimant voluntarily limited his income by not filling out the forms and accepting the position. To posit, as Claimant does in Claimant's Brief, that because an application had to be filled out there was no offer of employment is a specious argument and is entirely a red herring. Reading EE 3 as anything other than a job offer is without merit.⁴

⁴ The letter, dated October 2, 2013 on Employer's letterhead reads:

Dear Mr. Rodriguez:

...

Please allow this letter to serve as notification that we are welcoming your return back to work [sic] Miller & Long Co., Inc.

We have received your physician, Dr. Joshua Ammerman's September 30, 2013, approval of the Facility Watchman position. We are contacting you at this time [sic] that Miller & Long Co., Inc., has work available for you as a Facility Watchman, and there will be no wage loss.

You are to report to work on Wednesday October 16, 2013. Location: Maryland Yard*, 8415 Westphalia Road, Upper Marlboro, Maryland 20774. Jimmy Jameson is the Superintendent. The shift hours are from 6:30AM-2:30PM.

Please report to our Human Resources Department with proper identification for new paperwork since you last worked with us December 18, 2009.

Date: October 7, 2013
Hours: 8:00 AM – 11:00AM

The evidence is uncontradicted that Claimant would be given the modified job once he filled out the requisite employment application forms. There is no evidence or claim in this record that there was any work-injury related impediment to Claimant filling out the forms. Claimant points to no legal authority for the proposition that failing to fill out job application forms renders a limitation of income “involuntary”.

Had Employer located a similar job with another employer and had Claimant voluntarily failed or refused to fill out a job application for the position, it is undeniable that Claimant would be found to be voluntarily limiting his income. There is no reason to distinguish the facts of this case from that scenario.

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.

Location: 4842 Rugby Avenue, Bethesda, Maryland 20814

We are looking forward to your return.

Respectfully,

MILLER & LONG CO., INC.
By: Kristina Swope
Construction Claim Services

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.

So ordered.