

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 No. 07-143

KENNETH BURKS,

Claimant – Respondent

v.

PERFORMANCE CONTRACTORS, INC. AND AMERICAN CASUALTY, CO.,

Employer/Carrier – Petitioner.

Appeal from a Compensation Order of  
Administrative Law Judge Reva M. Brown  
AHD No. 06-035A, OWC No. 612877

Joseph C. Veith, III, Esquire, for the Petitioner

Rebakah A.. Miller, Esquire, for the Respondent

Before: LINDA F. JORY, FLOYD LEWIS AND SHARMAN J. MONROE, *Administrative Appeals Judges.*

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the Review Panel:

**DECISION AND ORDER**

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).<sup>1</sup>

<sup>1</sup> 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility

## 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 Order, which was filed on June 29, 2007, the Administrative Law Judge (ALJ) concluded that Claimant-Respondent (Respondent) was entitled to continued receipt of temporary total disability benefits, but that no penalties should be assessed against Employer-Petitioner (Petitioner). However, the ALJ concluded that Petitioner is entitled to a credit for the limited period that Respondent worked in January of 2007. Petitioner now appeals that Order.

As grounds for this appeal, Petitioner alleges that the ALJ's decision is erroneous and should be reversed.

## 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. D.C. Official Code §32-1522(d)(2). "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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this scope 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 under review herein, Petitioner alleges that the ALJ committed error by concluding that Respondent had not unreasonably refused to cooperate with Petitioner's vocational rehabilitation efforts. Petitioner argues that Respondent's benefits should be suspended as of October 23, 2005, as the facts establish that Respondent unreasonably refused to cooperate with vocational rehabilitation. Respondent counters that the Compensation Order is supported by substantial evidence and should be affirmed in its entirety.

In the instant matter, Petitioner sought to modify a Compensation Order issued in May of 2006, which awarded Respondent temporary total disability benefits from May 17,

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

2005 and continuing. Petitioner asserted that Respondent did not cooperate with and thwarted its vocational rehabilitation efforts and that Respondent's unreasonable behavior resulted in his termination from a position that Petitioner had created for him.

After properly holding a preliminary hearing for a modification request established by *Snipes v. Dist. of Columbia Dep't. Employment Servs.*, 542 A.2d 832 (D.C. 1988), and concluding that the *Snipes* requirements were met, the ALJ proceeded to a determination on the merits. As to Petitioner's argument that Respondent unreasonably failed to cooperate with vocational rehabilitation, the ALJ correctly noted that:

It is also a well-entrenched proposition in this jurisdiction that disability is an economic concept, dependent on the realities of the market place. A claimant must initially demonstrate that he is suffering from the residuals of a work-related injury that prevents said claimant from returning to his usual employment. Where shown, the burden of production is thereby shifted to employer to demonstrate the availability of suitable employment given a claimant's age, transferable skills, physical capabilities, educational background and geographic location. *The Washington Post v. District of Columbia Department of Employment services*, 675 A.2d 37, 40 (D.C. 1996); Also see *Ann O. Joyner v. District of Columbia Department of Employment Services*, 502 A.2d 1027 (D.C. 1986).

Compensation Order at 7.

At the hearing, Petitioner asserted that it designed a position in accordance with Respondent's restrictions and after only working for a week, Respondent hurried back to his physician, Dr. Dinesh Shah, to obtain different restrictions. Petitioner contended that the qualifications of its physician, Dr Jeffrey Yablon, a neurological surgeon, are superior to Dr. Shah, a family physician and Dr. Yablon's reliance on Respondent's functional capacity evaluation (FCE) report, demonstrates Respondent's ability to work.

In concluding that Petitioner did not offer a suitable position to Respondent, the ALJ found that Drs. Shah and Yablon both opined that Respondent, at most, was capable of working in a light duty position that limited his lifting to twenty pounds or less. Moreover, the ALJ specifically noted that although Dr. Yablon maintained a driving restriction of no more than one hour at a time on Respondent, the modified position that Petitioner provided :

. . . required claimant to drive about an hour and a half—thirty minutes beyond the latest driving restriction issued by employer's own IME, Dr. Yablon. Said position, being full-time in nature, was also beyond the hourly restraints for claimant, issued by Dr. Shah on January 30, 2007. Thus, even without invoking the evidentiary preference normally accorded treating physicians . . . under the

circumstance the modified job in question did not comport with the physical restrictions rendered claimant.

Moreover, even if the said position had initially been suitable for claimant, due to claimant's termination by employer, it is no longer available to him. It is irrelevant whether claimant's termination was for cause, or not. The fact still remains that given either Dr. Yablon's or Dr. Shah's restrictions, claimant is in a different position than other pipefitters/insulation mechanics, who would be required to drive more than an hour to work on a full-time basis; due to his medical incapacitations he would not be capable of working in such a position. Hence, employer has not demonstrated that the modified position it provided to claimant is suitable and available, nor has employer shown that there are other suitable, available positions for claimant.

#### Compensation Order at 9.

In addition, the ALJ specifically addressed Petitioner's contention that Respondent voluntarily limited his income by behaving in a manner that eventually led to his termination. The ALJ found that Respondent's, at times, somewhat erratic behavior was a "consequential disorientation" of his work injury and his "increased pain and sleep deprivation are residuals of his work injury that prevented him from performing his duties appropriately." In rejecting Petitioner's argument that this was an example of how Respondent voluntarily limited his income, the ALJ stressed that quite to the contrary, by reporting to work two hours earlier than the required time, "claimant showed a willingness and motivation to work." *Id.*

On appeal, Petitioner asserts that Respondent's counsel unreasonably refused to allow Petitioner's vocational rehabilitation counselor to meet with Respondent and as such, Respondent failed to accept vocational rehabilitation. The ALJ rejected this argument concluding that it was not unreasonable for Respondent not to again meet with Petitioner's vocational counselor, Cheryl Duncan.

The ALJ noted that it was important to comply with the request of Petitioner's physician, Dr. Yablon, that a MRI, as well as a FCE be conducted on Respondent. However, since the MRI was never conducted on Respondent, a complete picture of Respondent's condition and capabilities was never developed in accordance with the request of Petitioner's own physician. The ALJ also noted that the goal set by Ms. Duncan of placing Respondent in an employment position by March 24, 2007, was easily met, as Respondent, on January 19, 2007, reported for the modified position that Petitioner had created, although the position was not completely within Respondent's restrictions.

Respondent, in opposing this appeal, also reiterates that it was not unreasonable for Respondent not to meet with Ms. Duncan for more counseling, until all of the diagnostic

examinations and results had been taken and analyzed by Dr. Yablon. Respondent asserts that because the requested MRI was never authorized, Petitioner's own physician, Dr. Yablon could not complete his work restriction analysis for Respondent and Ms. Duncan was not able to proceed with placement in the vocational rehabilitation process, as she needed Respondent's work restrictions from Dr. Yablon. Respondent also emphasized that Respondent returned to work at Petitioner's facility more than two months before Ms. Duncan had targeted for him to do so.

Petitioner also cites the case of *Makins v. Dis. Of Columbia*, 861 A.2d 590, 593 (D.C. 2004) as support for its contention that vocational rehabilitation and job placement efforts did not proceed forward because Respondent's counsel prevented Ms. Duncan from meeting with Respondent after October 23, 2006. Petitioner asserts that since Respondent's counsel was acting as Respondent's agent, Respondent is bound by counsel's acts and as such, has unjustifiably refused to accept vocational rehabilitation. However, as Respondent points out, *Makins* is a sexual discrimination wrongful termination case not related to workers' compensation or vocational rehabilitation as Petitioner seems to imply.

In addition, the focal point in this matter is a question of reasonableness and the ALJ concluded that it was not unreasonable for Respondent's counsel to suspend Respondent's further participation in the vocational rehabilitation process until all diagnostic tests had been authorized and performed and Ms. Duncan was properly informed as to Respondent's appropriate work restrictions by Dr. Yablon, which were to be taken into consideration in the vocational rehabilitation and job placement process. Moreover, Respondent clearly demonstrated the willingness to return to work, when he returned to a position offered by Petitioner, which was, in fact, not in accordance with the recommendations of Petitioner's own physician, Dr. Yablon. After closely looking at this issue, this Panel must agree with the ALJ and reject Petitioner's argument on this point.

Accordingly, after a complete review of the record, this Panel concludes that the ALJ's decision is supported by substantial evidence, is in accordance with the law and should not be disturbed.

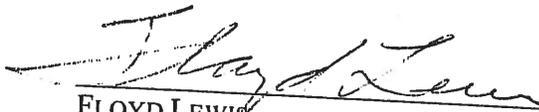
#### CONCLUSION

The Compensation Order of June 29, 2007 is supported by substantial evidence and is in accordance with the law.

**ORDER**

The Compensation Order of June 29, 2007 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

A handwritten signature in cursive script, appearing to read "Floyd Lewis", written over a horizontal line.

FLOYD LEWIS  
Administrative Appeals Judge

September 18, 2007  
DATE