

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. 03-94

SHAWN KOPPER,

Claimant – Petitioner,

v.

NOYES AIR CONDITIONING AND SELECTIVE INSURANCE,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Reva Brown
OHA No. 03-130, OWC No. 585404

Frank R. Kearney, Esq., for the Petitioner

Thomas G. Hagerty, Esq., for the Respondent

Before SHARMAN J. MONROE, LINDA F. JORY and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, 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 D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq.*, including responsibility 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.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Office of Hearings and Adjudication (OHA)² in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on June 26, 2003,³ the Administrative Law Judge (ALJ) granted in part, and denied in part the relief requested by the Claimant-Petitioner (Petitioner). Specifically, the ALJ denied the Petitioner's request for temporary total disability benefits from December 12, 2002 to December 17, 2002 and from January 6, 2003 to February 23, 2003, but granted causally related medical expenses and authorized facet rhizotomy procedure. The Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error the ALJ's failure to award temporary total disability benefits although there was substantial evidence that he was under medical restrictions to do light duty work which the Respondent failed to provide commiserate work.

ANALYSIS

As an initial matter, the standard 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. Official Code §32-1501 *et seq.*, at §32-1522(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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 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 under review herein, Petitioner alleges that the ALJ's decision is contrary to the law because of a misinterpretation of *The Washington Post v. District of Columbia Department of Employment Services*, 675 A.2d 37 (D.C. 1996). He asserts that during the periods for which he requested benefits, he was under light-duty restrictions imposed by his treating physician, Dr. James Gilbert. Since the Respondent did not show the availability of suitable alternative employment, the Petitioner maintains that he is entitled to temporary total disability benefits for both periods requested. As support for his assertions, the Petitioner

² Pursuant to the Director's Directive, Administrative Policy Issuance 05-01, the functions of the Office of Hearings and Adjudication have recently been assigned to the Administrative Hearings Division. (AHD).

³ On July 9, 2003, the ALJ issued an Errata because the Compensation Order was unsigned.

references the reports of his treating physician, Dr. James Gilbert, and his testimony regarding the absence of light duty work with the Respondent.

The Respondent argues that the Petitioner is not entitled to temporary total disability benefits for the periods requested. The Respondent maintains that when the Petitioner returned to his usual employment and worked full-time without complaints or modification to his duties, he conclusively showed that he was not temporarily totally disabled, and is he is not entitled to benefits from December 12, 2002 to December 17, 2002. Further, the Respondent argues that because the Petitioner was terminated from his employment for reasons unrelated to his injury, he is not entitled to benefits from January 6, 2003 to February 23, 2003.

After reviewing the arguments of the parties, the record and the applicable law, the Compensation Order is reversed in part and affirmed in part. The Compensation Order indicates that the Petitioner is seeking temporary total disability benefits for two periods: from December 12, 2002 to December 17, 2002, and from January 6, 2003 through February 23, 2003. For the sake of clarity, the Panel will address the two periods separately.

With respect to the first period, December 12, 2002 to December 17, 2002, the ALJ found, and her findings are supported by substantial evidence, the Respondent ended its voluntary payment of temporary total disability benefits on December 12, 2002 and that the Petitioner returned to work on December 18, 2002 based upon the recommendation of Dr. Robert Draper, the independent medical examiner. The ALJ then denied benefits for the period December 12, 2002 to December 17, 2002. In doing so, however, the ALJ failed to make findings of fact and conclusions of law on the nature and extent of the Petitioner's disability, if any, for the period December 12, 2002 to December 17, 2002. A review of the evidence reveals that the Petitioner's treating physician, Dr. James Gilbert, had placed the Petitioner under light duty work restrictions in August 2002 which were in still in effect during this time period. Claimant Exhibit No. 1. Without findings of fact and conclusions of law, and a discussion on the competing medical opinions in the record, the Panel is unable to ascertain if the denial is based upon substantial evidence. This issue must be remanded for further proceedings. *See Georgetown University v. D.C. Department of Employment Services*, 862 A.2d 387, 391 (D.C. 2004).

With respect to the period January 6, 2003 through February 23, 2003, the ALJ found, and the finding is supported by substantial evidence, that the Petitioner's termination from employment was not related to his injury. The Respondent presented the testimony of Mr. Charles Poch, one of the owners of the Respondent, that the employment relationship was ended because of the Petitioner's misconduct before his injury, during his absence due to his injury, and after his return to work. Hearing Transcript at pp. 65-66; 71-76. The ALJ credited his testimony over the testimony of the Petitioner and the Panel discerns no reason to disturb the conclusion reached. *See Dunston v. D.C. Department of Employment Services*, 509 A.2d 109 (D.C. 1986). As the Petitioner's wage loss from January 6, 2003 through February 23, 2003 was not the result of his injury, he is not entitled to benefits for this period.

CONCLUSION

The portion part of the Compensation Order of June 26, 2003 denying benefits for the period December 12, 2002 to December 17, 2002 is not supported by substantial evidence in the record and is not in accordance with the law, and is reversed and remanded. On remand, the ALJ is to make findings of fact and conclusions of law on the nature and extent of the Petitioner's disability, if any, for the aforesaid period.

The portion of the Compensation Order of June 26, 2003 denying benefits for the period January 6, 2003 through February 23, 2003 is supported by substantial evidence in the record and is in accordance with the law, and is affirmed.

ORDER

The Compensation Order of June 26, 2003 is hereby REVERSED IN PART and AFFIRMED IN PART in accordance with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

August 3, 2005
DATE