

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

CRB No. 14-151(1)

**KWAKWEA STRIPLING,
Claimant-Petitioner,**

v.

**COASTAL INTERNATIONAL SECURITY and
CHARTIS INSURANCE,
Employer/Insurer-Respondent.**

Appeal from a November 14, 2014 Compensation Order by
Administrative Law Judge Gregory P. Lambert
AHD No. 10-340B, OWC No. 667757

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JUN 29 PM 12 47

Michael J. Kitzman for the Claimant
Joel E. Ogden for the Employer

Before HEATHER C. LESLIE, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE for the Compensation Review Board, JEFFREY P. RUSSELL, *dissenting*.

**ORDER ON RECONSIDERATION
FACTS OF RECORD AND PROCEDURAL HISTORY**

On June 2, 2009, Claimant was employed by Employer as a security guard. On that date she sustained an injury to her right shoulder, which was caused by Claimant being required to repeatedly open and shut a heavy, bullet proof sliding glass door, the sliding mechanism of which was malfunctioning. After having Claimant seen and evaluated by independent medical examiner (IME) Dr. Louis Levitt on November 17, 2009, Employer accepted Claimant's claim for workers' compensation in connection with the right shoulder injury, and provided benefits, including right rotator cuff repair surgery performed by Dr. Uchenna Nwaneri on October 19, 2009.

On October 10, 2009, Claimant was involved in a non-work related motor vehicle accident. Following that accident an MRI was performed revealing that Claimant has degenerative disc disease at the C4-5, 5-6 and 6-7 levels. Claimant was evaluated on April 10, 2010 by Dr. Mustafa Hacque for continuing right shoulder pain, and she sought treatment for neck and left shoulder pain from Dr. Haddis Hagos, at the Washington Metro Pain Institute commencing sometime in February 2011.

In a formal hearing conducted by an ALJ in DOES on September 28, 2011, Claimant sought to obtain benefits in connection with her claim that her left shoulder injury was also causally related to the June 2, 2009 work injury. In a Compensation Order issued November 1, 2011, the ALJ denied the claim, finding that the left shoulder injury was the result not of the June 2, 2009 work injury, but rather was the result of the October 10, 2009 motor vehicle accident. That Compensation Order was appealed to the CRB, which affirmed the ALJ's decision on February 2, 2011.

In a formal hearing conducted September 15, 2011, Claimant sought to obtain medical benefits in connection with an injury to her neck, claiming that it, too, is causally related to the June 2, 2009 work injury. The request was denied in a Compensation Order dated May 4, 2012. Claimant appealed the Compensation Order to the CRB, which affirmed the conclusion that the neck condition was not causally related to the work injury.

Claimant was eventually placed under permanent restrictions pertaining to the use of her right shoulder. Claimant was advised by Dr. Nwaneri to avoid lifting or carrying over 5 pounds. Claimant began vocational rehabilitation services in 2011. Claimant began part time employment with Innovative Security Systems on August 2, 2013 and Maryland Parks in January 2014. Employer also had a market labor survey done on January 10, 2014.

Claimant continued to treat with Dr. Nwaneri. After results of objective testing, Dr. Nwaneri recommended further surgery to her right shoulder. Employer sent Claimant's records for Utilization Review (UR) on October 8, 2014, which stated the requested surgery is not reasonable or necessary. This surgery has not been authorized. Claimant is not receiving benefits.

A full evidentiary hearing occurred on October 14, 2014. Claimant sought an award of temporary total disability benefits from February 6, 2013 through March 19, 2013, temporary partial disability benefits from August 1, 2013 to the present and continuing, payment of causally related medical expenses, and authorization for medical treatment. Employer requested a suspension of benefits from December 4, 2012 through March 19, 2013 based upon a failure to cooperate with vocational rehabilitation. The issues to be adjudicated were the nature and extent of Claimant's disability, whether Claimant's requested medical treatment reasonable and necessary, whether Claimant failed to cooperate with vocational rehabilitation, and whether Claimant voluntarily limited her income.

A Compensation Order (CO) was issued on November 26, 2014, denying Claimant's claim for relief. Employer's request to suspend Claimant's benefits from December 4, 2012 through March 19, 2013 was granted.

Claimant appealed. Claimant argued the ALJ's denial of disability benefits based upon Claimant reaching maximum medical improvement is not in accordance with the law, the ALJ erred in concluding Claimant had failed to cooperate with vocational rehabilitation service, erred in finding Claimant had voluntarily limited her income, erred in concluding the requested medical treatment was not reasonable or necessary and erred in rejecting the treating physician's opinion.

Employer's opposition to the Application for Review was not considered as it was untimely filed.

A Decision and Remand Order (DRO) was issued on June 11, 2015 by the CRB. The panel determined the CO's conclusion that Claimant's requested surgery was not reasonable and necessary, that Claimant failed to cooperate with vocational rehabilitation from December 4, 2012 through March 19, 2013 and voluntarily limited her income was supported by substantial evidence in the record and in accordance with the law. The DRO, relying in part on argument by the Employer at the Formal Hearing as acknowledged in footnote 1, determined that the Claimant was still entitled to disability benefits from August 1, 2013 to the present and continuing, pursuant to D.C. Code § 32-1508(V)(iii). The CRB vacated and remanded the CO with instructions to reconsider Claimants entitlement to disability benefits.

Employer filed a Motion for Reconsideration. In that Motion, Employer argues that per the Joint Pre-Hearing statement, permanency benefits outlined in § 32-1508(V)(iii) were not requested by either party and it would be a due process violation for the Employer to defend such a claim when none was requested by Claimant. Employer also states at no time did Employer acknowledge that Claimant was entitled to benefits as stated in footnote 1 of the DRO.

The June 11, 2015 DRO stated:

Claimant's shoulder injury may have reached maximum medical improvement, however, that does not mean her wage loss ceased. Indeed, the parties agree that because of her restrictions pertaining to her right shoulder, Claimant cannot return to her pre-injury job, which is the reason Claimant was placed in vocational rehabilitation.

DRO at 6.

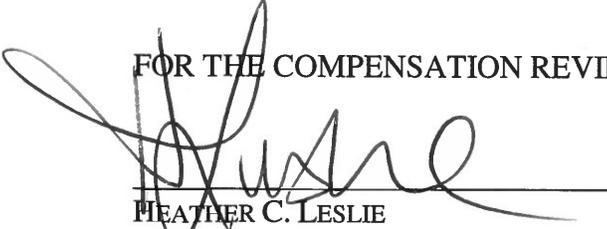
After further review, and in light of Employer's arguments that it did not concede to any wage loss, we must agree that it would prejudice Employer on remand to consider a claim for relief that was not sought after by Claimant. Employer was not on notice of such a claim and would be prejudiced if such a claim was considered. *See Transportation Leasing Co. v. DOES*, 690 A.2d 487 (D.C. 1997).

As we determined the CO's rejection of the treating physician was in accordance with the law, the ALJ determined Claimant had reached maximum medical improvement. To be clear, we affirm this finding as supported by the substantial evidence in the record and in accordance with the law. In light of these findings, the ALJ denied temporary partial disability benefits as the Claimant's condition is no longer temporary in nature. Indeed, the ALJ was quick to note in footnote 1 that "whether she is entitled to permanent partial disability compensation is not currently at issue and no opinion is expressed on the matter." CO at 5.

CONCLUSION AND ORDER

The Employer's Motion for Reconsideration is GRANTED. That portion of the Compensation Review Board's June 11, 2015 Decision and Remand Order vacating and remanding the case for further determination of Claimant's entitlement to disability is STRICKEN. The ALJ's denial of temporary partial disability benefits is supported by the substantial evidence in the record and in accordance with the law. Thus, the November 26, 2014 Compensation Order is AFFIRMED

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE
Administrative Appeals Judge

June 29, 2015
DATE

JEFFREY RUSSELL, *dissenting*:

I would deny the Motion for Reconsideration as I believe the original Decision and Remand Order was legally correct.

Jeffrey P. Russell
JEFFREY P. RUSSELL
Administrative Appeals Judge