

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-050 (R)

SUSAN DAMEGREENE,
Claimant–Petitioner,

v.

AMERICAN RED CROSS,
Self-Insured Employer–Respondent.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 AUG 6 PM 12 57

On Remand from the District of Columbia Court of Appeals,
No. 13-AA-732, May 27, 2014, Received by the CRB on July 25, 2014
AHD No. 97-411F, OWC No. 532792

Benjamin T. Boscolo for the Petitioner
Robert D. Baker for the Respondent

Before JEFFREY P. RUSSELL, and HENRY W. MCCOY, *Administrative Appeals Judges*, and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION ON REMAND

The District of Columbia Court of Appeals has remanded the matter to the CRB “[b]ecause the CRB did not provide a reasoned analysis and resolution of the issue [of whether a worker who is receiving partial disability benefits because the full time job that person holds pays less than the pre-injury average weekly wage has an obligation to co-operate with vocational rehabilitation] based upon its own reasonable interpretation of the statute, and because resolution of this issue is critical to our review of this case it is ORDERED that the case is hereby remanded to the Compensation Review Board for analysis and statutory support for its interpretation of the Workers’ Compensation Act in this instance.”

The court made this statement and Order immediately following having written this: “the CRB finally answered the question in the affirmative, although in a footnote with limited analysis of the governing statute. *American Red Cross v. Susan DameGreene*, CRB No. 10-135, Decision and Remand Order at 3 n.4 (Dec. 1, 2011).”

The referenced footnote reads as follows:

Although the issue is not raised in this appeal, we note that the ALJ, correctly in our view, determined that despite the fact that a claimant may be working a full time job, a claimant can remain under a continuing obligation to cooperate with vocational rehabilitation efforts. For so long as an employer remains liable for disability benefits based upon ongoing wage loss, it is entitled to undertake reasonable steps to reduce or eliminate that ongoing wage loss. As the ALJ noted, the fact that a claimant is working full time is a factor to be considered in determining whether the failure to participate in a specific program is reasonable.

Id.

So, although this Decision on Remand is not a response to a remand of *American Red Cross v. Susan DameGreene* CRB No. 10-135, (Dec. 1, 2011), it is that footnote that we have been instructed to clarify.

The statute at issue, D.C. Code § 32-1507, “Medical services, supplies and insurance”, contains three sections relating to vocational rehabilitation, including its purposes or goals, and when the vocational rehabilitation provisions are applicable.

Subsection (a) reads, in pertinent part:

The employer shall furnish such medical, surgical, vocational rehabilitation services...including necessary travel expenses and other attendance or treatment...*for such period as the nature of the injury or the process of recovery may require.* The employer shall furnish such additional payment as the Mayor may determine is necessary for the maintenance of an employee undergoing vocational rehabilitation, not to exceed \$50 a week.

Subsection (c) reads, in pertinent part:

Vocational rehabilitation shall be designed, within reason, *to return the employee to employment at a wage as close as possible to the wage that the employee earned at the time of the injury.* The Mayor shall monitor the provision of vocational rehabilitation of disabled employees 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 this 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... . When the Mayor pays for such services out of the special fund, he shall institute proceedings against such employer to recover the amounts expended.

Subsection (d) reads, in pertinent part:

If at any time *during such period* the employee unreasonably refuses to ... accept vocational rehabilitation the Mayor shall, by order, suspend the payment of further compensation ... unless the circumstances justified the refusal.

Id., all italics supplied.

Thus, the statute imposes an obligation upon a claimant to “accept vocational rehabilitation” for *some* period, and the court has written [bracketed material in original]:

D.C. Code § 32-1507 imposes reciprocal obligations on an employer and an employee in respect to vocational rehabilitation. Sections 32-1507 (a) & (c) require the employer to furnish vocational rehabilitation services "designed, within reason, to return the employee to employment at a wage as close as possible to the wage that the employee earned at the time of injury." Conversely, § 32-1507 (d) provides that "if at any time [while receiving worker's compensation] the employee unreasonably refuses to . . . accept vocational rehabilitation[,] the Mayor shall . . . suspend the payment of further compensation . . . during such period, unless the circumstances justified the refusal." An employer requesting suspension of payment on this ground does so by filing a motion under D.C. Code § 32-1524 to modify the compensation award based on "a change of conditions," which, in this case, would be the failure to cooperate. Any such motion, of course, must be accompanied by notice to the employee. See generally 7 DCMR § 210.2 et seq. (1986) ("Notice of Controversion").

Epstein v. DOES, 850 A.2d 1140 (May 27, 2004), at 1142.

The court in *Epstein* assumed, if it did not decide, that “during such period” means “while receiving workers’ compensation.” We endorse this reading of the statute.

A claimant, like Ms. DameGreene, earning less than the pre-injury wage is entitled to partial compensation for the wage differential. Even though she returned to employment, her employer is still obligated to pay workers’ compensation based upon the ongoing diminution in earnings caused by the injury (assuming the disability is not a schedule award). There is nothing in the statute that prohibits a claimant who has returned to work to still request vocational rehabilitation services, and if the request is reasonable, the employer must provide them. Conversely, there is nothing in the

statute that eliminates the obligation to accept vocational rehabilitation services of a claimant who has returned to employment earning less than the pre-injury wage.

The statute does not differentiate between a part time return to work and a full time return to work. The question the statute poses is whether the claimant's lack of participation in any given program or rehabilitation plan is reasonable under the circumstances. Bearing in mind that suspension of benefits is only mandated where the refusal to accept an employer's offer of rehabilitation services is unreasonable, the fact that the employee is working full time is certainly a relevant consideration in determining whether a failure to accept rehabilitation services was reasonable. But full time employment is not, in and of itself, a condition that prevents an injured worker receiving workers' compensation benefits from seeking better or higher paying employment. Indeed, such attempts to advance one's career and earn higher wages are more the rule than the exception in the workplace. Full time employees seek out better employment opportunities all the time.¹

Our analysis in this instance is similar to the analysis that we have adopted in cases involving claimants who have been determined to be permanently and totally disabled. Thus, we have held:

It must be understood that "permanent total disability" is a statutory construct, and in many senses, it is a term of art which has the meaning that the legislature and the D.C. Court of Appeals have ascribed to it; as such, the meaning may be somewhat at odds with the meaning the phrase would have if the words were understood in their vernacular sense. Thus, a person is permanently and totally disabled if (1) he or she has reached permanency in connection with the medical condition caused by the work injury, (2) he or she is unable to return to the pre-injury job because of the effects of that medical condition, and (3) there is no suitable alternative employment available in the relevant labor market.

While a permanently and totally disabled person remains under an obligation to cooperate with an employer's efforts to return that person to the labor market and while that person's entitlement to ongoing permanent total disability benefits is contingent upon that cooperation, that person is nonetheless permanently and totally disabled until such time as that person is employable. Then, the person's condition may be said to have changed, rendering him or her either only partially disabled or

¹ Of course, being employed full time and suffering from an injury related disability places some barriers on job seeking, including time constraints on identifying potential employers, applying for potential jobs, and interviewing for positions where a potential employer has expressed an interest in hiring the worker. It would be expected that an employer's vocational rehabilitation services take these constraints into account. And the Act contemplates that employers be given the opportunity mitigate future ongoing exposure by seeking to return the injured worker to as close to the pre-injury wage level as possible. Such a goal is beneficial to injured workers and employers alike.

not disabled at all, depending upon the level of wage earning capacity that has been recovered.

Braswell v. Greyhound Lines, CRB No. 12-120, AHD No. 09-519A, OWC No. 603794 (November 13, 2012). See also *Kostas v. PEPCO*, CRB No. 14-014, AHD No. 10-062B, OWC No. 618413 (May 29, 2014); *Renwick v. WMATA*, CRB No. 13-159, AHD No. 07-108D, OWC No. 587264 (April 9, 2014).

Accordingly, consistent with (i) what we have previously stated in this case, (ii) our understanding of the court's implied interpretation of the phrase "during such period" as is contained in *Epstein, supra*, and (iii) the goal of encouraging employers and injured workers to return injured workers to employment "as close as possible to the wage the employee earned at the time of his injury", we interpret the Act's vocational rehabilitation provisions to remain applicable even where an injured employee has returned to full time employment but is earning less in the new employment so that the employer remains obligated to pay compensation. How the services and participation comport with the requirements of "reasonableness" may be effected by that status, but their applicability does not.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

August 6, 2014

DATE