

**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. 07-128**

**TIMOTHY BURROUGHS,**

**Claimant–Respondent,**

**v.**

**J & J MAINTENANCE, INC.,**

**Self-Insured Employer–Petitioner.**

Appeal from a Compensation Order of  
Administrative Law Judge Belva D. Newsome  
AHD No. 06-094, OWC No. 597835

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

Rebekah Arch Miller, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY, *Administrative Appeals Judges*, and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation 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).<sup>1</sup>

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<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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* 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 District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for

## 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 Compensation Order, which was filed on May 23, 2007, the Administrative Law Judge (ALJ) granted Respondent's claim for temporary partial disability benefits. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that "the legal conclusions set forth in the Compensation Order were not supported by substantial evidence and were contrary to established law". The bases of these allegations are (1) Petitioner contends that there is no objective medical evidence corroborating Respondent's claim that he is unable to return to work in his pre-injury job, (2) Petitioner contends that Respondent's testimony at the formal hearing established the availability of suitable alternative employment which employment, if undertaken, would result in no wage loss and (3) Petitioner argues that, by not returning to his pre-injury job, and by not actively seeking work at the present time, Respondent is voluntarily limiting his income.

Respondent opposes the appeal, arguing that the ALJ's decision is supported by substantial evidence, and that Petitioner's appellate arguments constitute nothing more than disagreements with the interpretation of the evidence made by the ALJ.

Because we agree with Respondent's view of the Petitioner's arguments on appeal, we affirm the Compensation Order.

## 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(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 International v. District of Columbia Dep't. of Employment Serv's.*, 834 A.2d 882 (D.C. 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.

Review of Petitioner's Application for Review and Memorandum in Support of Application for Review reveals that it consists of a recitation of the factual and procedural background of the case

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

(pages 1 – 4), followed by a section entitled “Argument” (pages 4 – 7). The “Argument” contains the assertion that “Claimant has clearly failed to carry his burden of showing that he is entitled to temporary partial disability benefits” (page 6), because “the medical records of the treating physician, as well as the Claimant’s own testimony, confirms that he was released to return to work full duty as of May 17, 2004” and that the physician “never issued an opinion subsequent to that date stating that Claimant is unable to return” to his pre-injury job. Even were this a completely accurate statement, it nonetheless is insufficient to support a reversal of the ALJ’s finding, based upon the testimony of Respondent, that despite this written authorization to return to work, his attempt to do so failed. See, Compensation Order, page 2 (“Claimant’s testimony is credible based upon his level of education, the injury he has suffered, his testimony concerning his ability only to do light duty work, and the supporting medical documentation”), page 5 (“When he returned to work on May 18, 2004, he returned to the full duties of his pre-injury job and found that he was not able to do that”) and the medical opinion of Dr. Raymond Drapkin (“Based upon the requirement of significant bending and lifting, Dr. Drapkin ... opined that the Claimant could not return to his previous job as a plumber”) at page 5, explaining the finding that Respondent could not return to his pre-injury employment. Review of Respondent’s testimony in the transcript demonstrates that it is as the ALJ characterized it, as does review of the report of Dr. Drapkin.

Respondent’s showing in this regard (that Respondent was unable to return to his pre-injury job) shifted to Petitioner the burden of demonstrating the availability of work within Respondent’s physical capacity. *Logan v. District of Columbia Dep’t. of Employment Services*, 805 A.2d 237 (2002). Petitioner proffered no such evidence, beyond obtaining some general testimony that Respondent had engaged in some limited post-injury employment as a painter that sometimes had the potential to pay more than his pre-injury wages. This testimony did not convince the ALJ that Respondent was re-employable in that capacity, and we can not say that, as a matter of law, the ALJ was wrong in her assessment.<sup>2</sup>

Regarding the claim that Respondent should have been found to be voluntarily limiting his income, Petitioner’s argument fails for the simple reason that Petitioner has failed to demonstrate, to the satisfaction of the ALJ, the availability of work within Respondent’s capacity that he has declined to perform or accept. See, *Logan, supra*.

We find the arguments of Petitioner to amount to nothing more than assertions that the ALJ placed too much weight upon Respondent’s testimony. It is, however, the ALJ’s province to determine what weight is to be accorded the evidence, especially as they relate to credibility determinations, and we are not inclined or permitted to substitute our judgment for that of the ALJ.

#### CONCLUSION

The Compensation Order of May 23, 2007 is supported by substantial evidence in the record and is in accordance with the law.

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<sup>2</sup> We note that the extent of disability in this case was found to be partial, based upon the apparently uncontested fact that Respondent had returned to work in a lighter duty capacity earning less than his pre-injury wages, as a truck driver for Lowe’s, but left that job for personal reasons unrelated to his injury.

**ORDER**

The Compensation Order of May 23, 2007 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
Administrative Appeals Judge

September 11, 2007  
DATE