

**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. 04-11**

**OLIVER WATKINS,**

Claimant – Petitioner

v.

**JOHN E. BARRY PLUMBING & HEATING AND ERIE INSURANCE.**

Employer/Carrier – Respondent.

Appeal from a Compensation Order of  
Administrative Law Judge Reva M. Brown  
OHA No. 03-4489, OWC No. 583626

Heather S. Leslie, Esquire, for the Petitioner

Michael Dobbs, Esquire, for the Respondent

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

FLOYD LEWIS, *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).<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 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 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 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 December 29, 2003, the Administrative Law Judge (ALJ) denied the claim for temporary total disability benefits requested by Claimant-Petitioner (Petitioner) and ordered that Employer-Respondent (Respondent) pay Petitioner's causally related medical bills. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the Compensation Order is unsupported by substantial evidence in the record and is not in accordance with the law.

## 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. App. 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 substantial evidence establishes that he is temporarily totally disabled, that no record evidence supports rejecting the treating physician's opinion and that Petitioner did not voluntarily limit his income. Respondent counters by arguing that the ALJ's decision is completely in accordance with the law and facts of the case and should not be disturbed.

When it is demonstrated that an employee is unable to return to his or her usual employment due to a work related-injury, the burden shifts to the employer to demonstrate the availability of suitable employment, considering the employee's age, transferable skills, physical capabilities, educational location and geographic location. *Joyner v. Dist. of Columbia Dep't. of Employment Servs.* 502 A.2d 1027, 1031 n. 4 (D.C. 1986). Thus, once an employee establishes a prima facie case of total disability, an employer must then present sufficient evidence of suitable job availability to overcome a finding of total disability. If the employer does meet that evidentiary burden, the employee then may challenge the legitimacy of the employer's evidence of job availability. *Logan v. Dist. of Columbia Dep't. of Employment Servs.*, 805 A.2d 237, 244 (D.C.

2002). In this matter, the ALJ concluded that Petitioner remains temporarily and totally disabled from his usual employment, but any wage loss benefits ordinarily due Petitioner are barred because he voluntarily limited his income by terminating the modified employment that Respondent provided him and/or not seeking to resume his employment when he became fit to do so.

Initially, in reviewing this matter, it must be emphasized that the ALJ found that Petitioner was not credible, stating, "Thus, given claimant's misleading, disjointed, internally and otherwise, inconsistent testimony, in addition to his withholding of his previous injuries from his treating physician, his testimony is deemed unreliable, unless otherwise supported." Compensation Order at 6. The ALJ found that Petitioner was not truthful about his employment status, his physical capabilities and based upon Respondent's surveillance tape, the ALJ determined that Petitioner lied to his treating physician, Dr. Joel Falik, concerning his physical capabilities.

It should be noted that it is well settled that the credibility determinations of the fact-finder are entitled to great weight. *Dell v. Dist. of Columbia Dep't. of Employment Servs.* 499 A.2d 102, 109 (D.C. 1985); *Nasser v. Moran Limousine Serv.*, Dir. Dkt. No. 91-80, H&AS No. 90-818 (September 9, 1992). As such, deference should be given to the ALJ's credibility findings in this matter.

At the hearing, Petitioner relied on the reports of his treating physician, Dr. Falik, who prohibited Petitioner from returning to his pre-injury employment and required Petitioner to engage in sedentary employment as of March 18, 2003. Petitioner argued that he was willing to engage in sedentary, light duty work, but Respondent never provided him with any work to accommodate his restrictions.

It must be noted that contrary to Petitioner's arguments, the ALJ did rely on the opinion of Petitioner's treating physician. While Dr. Falik opined that Petitioner could not perform his usual employment duties, the physician also clearly indicated that Petitioner was able to work in a sedentary, light duty position. However, the record indicates, as the ALJ found, that Petitioner admitted that he never advised Respondent that his physician had cleared him to work in a sedentary position in March of 2003 and Petitioner never contacted Respondent to either seek to resume employment or update Respondent concerning his medical status. Hearing Transcript (HT) at 36-37, 117-118. On this point, Respondent's witness, John Barry, testified that there were sedentary positions available for Petitioner and that Respondent is generally able to accommodate its injured employees with some form of light-duty employment. The ALJ specifically noted that Mr. Barry's testimony was not controverted by Petitioner.

In addition, the record reveals that after Respondent finally became aware that Petitioner had been released to sedentary work, Respondent sent Petitioner a letter requesting that he return to work and placed Petitioner on the schedule for August 19, 20 and 21, 2003. However, Petitioner failed to report to work and after initially denying that Respondent offered him any work, he admitted that he had received the letter from Respondent. As such, the ALJ concluded:

Hence, had claimant not constructively terminated his employment with employer, or failed to seek resumption thereof, he could have been working in a modified capacity for employer, at least since March 2003. Consequently, employer has met its burdens of suitability and availability regarding employment alternative to claimant's usual plumbing work. Accordingly, claimant is not entitled to any wage compensation because he has voluntarily limited his income.

Compensation Order at 9.

After carefully reviewing the record, this Panel concludes that this determination is supported by substantial evidence and should not be disturbed.

Moreover, it must be noted that the ALJ found that even Petitioner admitted that most of his symptoms improved because of his physical therapy sessions and his physical therapy sessions were officially discontinued on March 4, 2003. As such, the ALJ emphasized that Petitioner stopped attending physical therapy sessions before the beginning of his claim period of March 29, 2003 and "at the beginning of the claim period claimant was clearly capable of performing in the modified position employer had earlier provided for him." Compensation Order at 9.

Finally, the record contains the testimony of Respondent's investigator, who followed Petitioner in April of 2003 and videotaped him. The investigator testified that Petitioner seemed to be performing plumbing work, as he was seen carrying buckets of tools into what appeared to be an automotive garage at the beginning of the day and then at the end of the day, he would return to his truck with the tools. Respondent notes that on cross-examination at the hearing, Petitioner at first admitted that he was at the garage working for a friend. HT at 69. However, after viewing the video tape and realizing that there was no film of him actually working inside of the garage, Petitioner then suggested that he was not actually doing plumbing work, but was only supervising others who were working inside of the garage. HT at 160-161.

Accordingly, the ALJ's decision to deny Petitioner's request for temporary total disability benefits because he voluntarily limited his income, is supported by substantial evidence and is in accordance with the law.

#### CONCLUSION

The Compensation Order of December 29, 2003 is supported by substantial evidence in the record and is in accordance with the law.

**ORDER**

The Compensation Order of December 29, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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FLOYD LEWIS  
Administrative Appeals Judge

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October 28, 2005  
DATE