

**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. 04-25**

**RICHARD ANDERSON,**

**Claimant – Petitioner**

**v.**

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,**

**Self Insured Employer – Respondent.**

Appeal from a Compensation Order of  
Administrative Law Judge Amelia G. Govan  
OHA No. 03-484, OWC No. 567873

Matthew Peffer, Esquire, for the Petitioner

Donna Henderson, Esquire, for the Respondent

Before: LINDA F. JORY, FLOYD LEWIS and JEFFREY P. RUSSELL, *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*

## 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 January 27, 2004, the Administrative Law Judge (ALJ) concluded that Claimant-Petitioner (Petitioner) was not temporarily and totally disabled, that Petitioner voluntarily limited his income in April of 2003, and that his wage loss benefits must be suspended until he requests another opportunity to take the driving test of Employer-Respondent (Respondent). Petitioner now seeks review of that Order.

As grounds for this appeal, Petitioner alleges as error that ALJ's decision is arbitrary, capricious, unsupported by substantial evidence 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.

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*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.

Turning to the case under review herein, Petitioner alleges that the ALJ's decision is erroneous, contending that substantial evidence establishes that Petitioner is temporarily totally disabled, no record evidence supports the rejection of the treating physician's opinion as to Petitioner's physical capabilities and Petitioner did not voluntarily limit his income. Respondent counters that Petitioner is not entitled to temporary total disability benefits after March 30, 2003, because he is not disabled from performing his duties as a bus operator and that Petitioner voluntarily limited his income, as he deliberately failed, or otherwise sabotaged his driving test on April 29, 2003.

At the hearing, Petitioner argued that due to the residuals of his November 26, 2000 injury to his left upper extremity, he is no longer able to perform his duties as a bus operator. He relied on the medical opinion of his treating orthopedic specialist, Dr. Phillip H. Omohundro. Employer contended that Petitioner did not put forth his best effort when he took Respondent's required driving test, that his left shoulder complaints are exaggerated, and that his actual symptoms are not limiting in terms of his ability to safely operate a passenger bus. As such, Respondent argued that Petitioner's failing of the road test constitutes a voluntary limitation of income.

After considering the medical testimony, the ALJ concluded that Dr. Omohundro's written reports and deposition testimony did not preclude Petitioner from attempting to drive when he was tested in April of 2003. The ALJ noted that in his deposition testimony, Dr. Omohundro indicated that despite Petitioner's complaints of arm fatigue, there was no physical limitation which would have prevented Petitioner from lifting his arm to grip or hold the steering wheel of a bus. Petitioner's Exh. 1, p. 17-25. Moreover, Dr. Omohundro on March 28, 2003 indicated that Petitioner would be released to full duty capacity for work as a bus driver, as long as the bus had power steering.

The ALJ also relied on the testimony of David Nobles, an ergonomic specialist, who directed the work hardening program for Petitioner. Mr. Nobles testified that Petitioner could return to full duty as a bus operator, after observing Petitioner steering a vehicle, performing bench press and lat pull down exercises and playing basketball. Despite his ability to perform these activities, Petitioner refused to use his left arm for testing activities during the work hardening sessions. Mr. Nobles noted that he and his staff had concerns about Petitioner's "motivation with regards to returning to work", and specifically noted this concern in his progress reports. Respondent's Exh. 4. Also, the record contains the testimony of Roger Langston, who gave Petitioner his driving test. Mr. Langston testified that Petitioner refused to put his left hand on the steering wheel, despite instructions to do so.

In addition, in support of Respondent's position, the ALJ noted that on April 25, 2002, Dr. Robert Collins opined that Petitioner could return to his bus driving job on a full duty basis. Also, the ALJ emphasized that Dr. Clifford Hinkes, who examined Petitioner a second time in May 2003 after Petitioner had completed Respondent's work hardening program, opined that the limitation in Petitioner's left shoulder range of motion was a voluntary limitation of effort rather than a true range of motion limitation. The ALJ stressed that:

Dr. Hinkes apparently relied heavily on the work hardening program, which referred to claimant's failure to complete assigned activities and socializing with other patients during time allocated to exercise. He concluded claimant was fully capable of returning to the full duties of a bus operator by May of 2003

I concluded that in April of 2003, claimant was physically capable of making a *bona fide* attempt to perform the physical activities required for his passenger bus driving test, but did not do so.

Compensation Order at 7-8.

Finally, as to the voluntary limitation of income issue, the ALJ concluded:

There is no substantial medical evidence to support claimant's refusal to attempt to place both hands on the steering wheel for a reasonable period of time during the driving test. Claimant's refusal to cooperate with employer's efforts to ascertain his physical capability for return to full duty work obstructed the process and equates to a voluntary limitation of income. By doing so, claimant attempted to thwart employer's efforts to provide an opportunity for suitable employment.

*Id.* at 8.

As a result, this Panel concludes that the ALJ explained the reasons, which are supported by substantial evidence, to justify the decision to conclude that Petitioner was not temporarily and totally disabled from his usual work activities during the time period at issue and that Petitioner voluntarily limited his income in April of 2003.

Accordingly, the Compensation Order of January 27, 2004 must be affirmed.

#### CONCLUSION

The Compensation Order of January 27, 2004 is supported by substantial evidence in the record and is in accordance with the law.

**ORDER**

The Compensation Order of January 27, 2004 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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FLOYD LEWIS  
Administrative Appeals Judge

May 5, 2006  
DATE