

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

**VINCENT C. GRAY**  
**MAYOR**



**LISA MARÍA MALLORY**  
**DIRECTOR**

**COMPENSATION REVIEW BOARD**

**CRB No. 12-191**

**OSCAR FUENTES,**  
**Claimant–Respondent,**

**v.**

**WILLARD INTERCONTINENTAL HOTEL AND ZURICH AMERICAN INSURANCE COMPANY,**  
**Employer/Insurer–Petitioner.**

Appeal from a November 16, 2012 Compensation Order on Remand of  
Administrative Law Judge Amelia G. Govan  
AHD No.11-235, OWC No. 670513

D. Stephenson Schwinn, Esquire, for the Petitioner  
David J. Kapson, Esquire, 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 AND ORDER**

**BACKGROUND**

On February 9, 2010, Claimant slipped and fell on ice outside Employer's building, breaking his left leg. Claimant worked full time as a server's assistant/food runner at Employer's Cafe du Parc and upon leaving that job worked the night shift as a food expediter at Potenza restaurant. Both jobs required Claimant to be constantly on his feet.

After treatment, including hospitalization and surgical repair of the fracture, Claimant came under the care of orthopedist Dr. Warren Yu who released Claimant to his regular work duties with no restrictions as of June 2, 2010, and discharged him from further care on August 3, 2010.

Claimant returned to Dr. Yu on April 5, 2011 where it was noted that he works two jobs that require a lot of walking and standing and that he continued to experience pain, particularly after walking for more than 40 minutes. Dr. Yu gave Claimant handicap-parking approval and limited him to lifting no more than 20 pounds. Claimant returned to work at both jobs. While he continued

to work full time at Employer's café, Claimant stopped working at Potenza in July 2010 when the pain and swelling in his left leg worsened.

Because he was only working one job and earning less than he did before his work injury, Claimant filed a claim for temporary partial disability benefits. After an evidentiary hearing, despite finding that Claimant left the Potenza job because the pain and swelling had “become too great to bear”, the presiding ALJ denied the claim after determining Claimant voluntarily limited his income and therefore was not entitled to wage loss benefits. Claimant appealed the denial to the CRB, with Employer filing in opposition.

Claimant argued on appeal that the Compensation Order (CO) was not in accordance with the law as the ALJ had misapplied the legal standard by requiring specific medical enunciation by a physician of the impairment responsible for a claim of continuing inability to work his second job. Employer argued to the contrary and submitted that the CO under review was supported by substantial evidence and should be affirmed.

After considering the arguments of the parties, the CRB issued a Decision and Remand Order containing the following concluding analysis and mandate:

There is no requirement under the Act or in the case law that mandates that a medical condition be the subject of a written medical restriction before it can be the basis for a wage loss - based award of benefits. Such written restrictions may make adjudication of disputed claims easier, and the lack of such a restriction certainly can, in some instances, be a legitimate basis for denying a claim. However where, as here, the ALJ finds as facts that the work injury is causing a claimant to be unable to work to the same degree that was being worked prior to the injury, and that the claimant is earning less post-injury because of that inability, the claimant is entitled to a partial disability award based upon that ongoing wage loss, until such time as the claimant becomes eligible for an award under the schedule.

On this record there is but one possible result, and that is that Claimant be granted ongoing temporary partial disability benefits based upon his lost earnings from the job at Potenza. However, as the District of Columbia Court of Appeals has held:

Although D.C. Code § 32-1521.01 provides that the CRB may amend a compensation order, this language does not authorize the CRB to reverse an order of an ALJ denying compensation and in its place issue an award of compensation. In cases where, as here, the CRB concludes that the ALJ's findings compel an award of compensation, it must remand the matter to the ALJ with instructions that the latter issue such an order. The decision by the CRB to award compensation must, therefore, be reversed and the matter must be remanded.

*Washington Metropolitan Area Transit Authority v. DOES and Juni Browne. Intervenor*, 926 A.2d 140 (D.C. 2007), at 148. Accordingly, we must remand the matter with instructions that an award be issued granting Claimant's claim.

### CONCLUSION AND ORDER

The Compensation Order of November 21, 2011 is not supported by substantial evidence and is not in accordance with the law. Accordingly, the Compensation Order of November 21, 2011 is hereby VACATED. This matter is therefore REMANDED with the instruction to issue a CO awarding the claim for relief requested by Claimant.

Decision and Remand Order, page 5.

On November 16, 2012<sup>1</sup>, the ALJ issued a Compensation Order on Remand in which, referring to the specific directive of the CRB, the ALJ granted the claim for partial disability benefits to compensate for the ongoing wage loss. Employer appealed the Compensation Order on Remand, to which appeal Claimant has filed an opposition.

### STANDARD OF REVIEW

The scope of review by the CRB is generally 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

### DISCUSSION AND ANALYSIS

Employer makes no new arguments, but has indicated that this appeal is taken as a procedural step to have the CRB decision reviewed by the District of Columbia Court of Appeals.

Inasmuch as the ALJ did as the CRB instructed, the Compensation Order on Remand is affirmed.

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<sup>1</sup> The date on the signature page erroneously states that the year of issuance is 2011. The correct date appears on the Certificate of Service.

CONCLUSION AND ORDER

The Compensation Order on Remand comports with the instructions on remand and is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Jeffrey P. Russell  
JEFFREY P. RUSSELL  
*Administrative Appeals Judge*

June 24, 2013  
DATE