Compensation Review Board

CRB No. 11-149(2)

OSCAR M. FUENTES,
Claimant–Petitioner,

v.

WILLARD INTERCONTINENTAL HOTEL AND ZURICH AMERICAN COMPANY,
Employer/Carrier-Respondent

Appeal from a Compensation Order by
The Honorable Amelia G. Govan
AHD No. 11-235, OWC No. 670513

David J. Kapson, Esquire, for the Claimant/Petitioner
D. Stephenson Schwinn,[1] Esquire, for the Employer-Carrier/Respondent

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL,[2] AND LAWRENCE D. TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

ORDER DENYING EMPLOYER/CARRIER'S MOTION FOR RECONSIDERATION

In a Compensation Order (CO) dated November 21, 2011, Claimant was denied temporary partial disability benefits from August 2, 2010 to the present and continuing. Claimant timely appealed this denial. On May 9, 2012, the CRB issued a Decision and Remand Order (DRO) vacating the CO and remanded the matter with the instruction to issue a CO awarding the claim for relief as requested by Claimant.

On May 18, 2012, Employer filed a Motion for Reconsideration. Employer requests the CRB to vacate its May 9, 2012 DRO and affirm the underlying CO that denied compensation. Employer

[1] On May 18, 2012 and simultaneous with the filing of the instant motion, Attorney Schwinn filed notification of a change in counsel from Mark H. Kopelman to himself.

[2] Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

argues that in the DRO, the CRB "used a tortured reading of the compensation order . . . to make it appear [the ALJ's] decision was internally inconsistent and irrational", "reversed the burden of proof on appeal, and established a new rule whereby the claimant can declare himself disabled without any supporting medical opinion."[3]

On May 23, 2012, Claimant filed an opposition to Employer's motion. In his opposition, Claimant argues that Employer's motion was filed in error because insofar as the CRB vacated the CO on appeal and remanded it back to the ALJ to issue a CO awarding the requested claim for relief, the CRB no longer had jurisdiction over the claim.[4]

The CRB's regulations provide for reconsideration at 7 DCMR § 268.1, wherein it states:

> Any party may, within ten (10) calendar days from the date shown on the certificate of service of the Decision and Order of the Board or any order issued by the Board, file a request for reconsideration thereof with the Clerk of the Board.

As noted above, Employer filed its motion on May 18, 2012 requesting reconsideration of the CRB's DRO which was served on the parties on May 9, 2012. As the motion was filed within ten calendar days from the date shown on the certificate of service, the motion was timely filed and thus the CRB has jurisdiction to consider the motion and Claimant's argument is without merit. We therefore proceed to address Employer's arguments.

In the May 9, 2012 Decision and Remand Order, the CRB determined:

> The record evidence is such that after Claimant's left leg was surgically repaired and after a period of time off, his treating orthopedist, Dr. Yu, released him to return to work performing his regular duties without restrictions as of June 22, 2010. Upon receiving this release, Claimant returned to work with Employer during the day and to his second job in the evening at Potenza. After working several weeks at both jobs, Claimant determined that he was unable to continue working at Potenza due to unbearable pain in his left leg and voluntarily quit in late July 2010.
>
> The ALJ found the following facts: In the preliminary paragraph to the Findings of Fact section she found Claimant was a credible witness, specifically regarding "his post-injury symptoms and the effect on his physical capabilities"; in numbered Finding of Fact 6, she found that Claimant "stopped working for Potenza in July of 2010 because after three-four weeks of trying to work both jobs, his left leg pain and swelling were unbearable"; in numbered Finding of Fact 7, she found "Because Fuentes is working only one job, he currently earns less than he did before the February 9, 2010 work accident"; in the Discussion portion of the CO, she wrote "After the injury and lost time from both jobs, Fuentes was not able to continue

[3] Employer's *Motion for Reconsideration*, p. 1.

[4] See *Claimant's Opposition to the Employer/Insurer's Motion for Reconsideration*.

working for Potenza due to left leg pain, reduced strength, and inability to endure long periods of standing."

That each of these findings is supported by substantial evidence is undisputed by either party to this appeal.

Further, there is no claim by either party that Claimant has reached maximum medical improvement or that his medical status has attained permanency for what appears to be an injury to a scheduled member, the left leg. Thus, any wages lost due to the incapacity to his leg resulting from the work injury are compensable. Until such time as Claimant attains permanency and returns to suitable employment (thereby rendering him eligible for a schedule award) he is entitled to be compensated for the wages he is losing as a result of the injury.

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.[5]

Based upon the findings made by the ALJ that were determined to be supported by substantial evidence in the record, the CRB vacated the ALJ's ruling that Claimant was not entitled to temporary partial disability benefits because he voluntarily limited his income after he stopped working his second job.

The ALJ made an initial finding that Claimant was credible as to his "injury, his post-injury symptoms and the effect on his physical capabilities" and that this finding was based in part on "the congruence between his testimony and the other record evidence."[6] As Employer noted in its motion, there was no medical opinion evidence in the record that addressed Claimant's ability to continue working his second job at Potenza. As such, the substantial credible evidence in the record became Claimant's own credible testimony as found by the ALJ and the uncontradicted evidence that Claimant returned to work for over one month at Potenza before he stopped working. Employer's failure to find any case where a claimant's credible testimony alone was deemed sufficient to support a disability claim does not preclude such an award in the case, such as here, where that claimant's credible testimony and his good faith but unsuccessful attempt to return to work becomes the substantial evidence in the record on the issue.

---

[5] *Fuentes v. Willard Intercontinental Hotel*, CRB No. 11-149, AHD No. 11-235, OWC No. 670513 (May 9, 2012), pp. 4 – 5.

[6] *Fuentes v. Willard Intercontinental Hotel*, AHD No. 11-235, OWC No. 670513 (May 9, 2012), p. 3.

We also find no merit in Employer's argument that Claimant was ineligible for temporary partial disability benefits because he had reached maximum medical improvement (MMI). The issue of MMI was only raised for illustrative purposes to show that until a finding of permanency was found, and the ALJ made no such finding, Claimant remained entitled to wage loss benefits.

Having addressed the arguments presented in the Employer's Motion for Reconsideration, the motion is DENIED.

FOR THE COMPENSATION REVIEW BOARD:

_____
HENRY W. MCCOY
Administrative Appeals Judge

June 5, 2012
DATE