

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

CRB No. 11-138

Haidar Al-Nori,
Claimant–Petitioner,

v.

Four Points by Sheraton and Liberty Mutual Insurance Company,
Employer-Respondent.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2012 MAY 2 AM 9 15

Appeal from a Compensation Order on Remand by
The Honorable Belva D. Newsome
AHD No. 10-150A, OWC No. 664824

Michael Kitzman, Esquire for the Petitioner
Robin Cole, Esquire for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE,¹ and JEFFREY P. RUSSELL,² *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (“CRB”) pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, (“Act”), 7 DCMR 250, *et seq.*, and the Department of Employment Services Director’s Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On October 23, 2009, Mr. Haidar Al-Nori worked as a bellman for Four Points By Sheraton (“Four Points”). He injured his back and hip when a luggage cart knocked him into the trunk of a taxicab.

¹ Judge Leslie has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

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

At a formal hearing, Mr. Al-Nori requested temporary total disability benefits from September 28, 2010 through January 5, 2011, temporary total disability benefits from February 11, 2011 to the date of the formal hearing and continuing, causally related medical expenses, and interest. In a Compensation Order dated July 26, 2011, an administrative law judge (“ALJ”) denied Mr. Al-Nori’s claim for temporary total disability benefits from February 11, 2011 to the date of the formal hearing and continuing but granted his request for temporary total disability benefits from September 28, 2010 through January 5, 2011.

Mr. Al-Nori appealed the July 26, 2011 Compensation Order. On September 13, 2011, the CRB vacated that Compensation Order because it failed to consider the independent medical examination evidence as it relates to the nature and extent of Mr. Al-Nori’s disability and because it failed to address the treating physician preference. Consequently, the matter was remanded:

The following problematic matters require a remand for further consideration of this claim: (1) the absence of discussion concerning the significant and fundamental problem with the FCE Discharge Summary being at a variance from the intake form [footnote omitted] *vis a vis* the physical demand level of the pre-injury job, and the concomitant lack of an explanation as to how that variance does not defeat a finding that the Discharge Summary supports Mr. Al-Nori’s being able to return to his pre-injury job; (2) the lack of findings of fact as to the requirements of the pre-injury job, including the lack of a credibility finding concerning Mr. Al-Nori’s testimony concerning those requirements; (3) the paucity of persuasive reasons for rejecting the opinion of Dr. Salter that Mr. Al-Nori is incapable of returning to work as a bell person; and (5) the failure to identify any reason in connection with the rejection of the opinion of Dr. Meyer to that same effect.³

In response, the ALJ issued a Compensation Order on Remand on November 10, 2011. The ALJ reached the same result as had been reached in the July 26, 2011 Compensation Order.

In this appeal, Mr. Al-Nori asserts the ALJ erred in determining he is capable of performing his pre-injury employment because he continues to have physical limitations and restrictions, because he has not reached maximum medical improvement, and because Four Points has not offered him suitable, alternative employment. Mr. Al-Nori argues the Compensation Order on Remand fails to make proper findings regarding his work capacity and the requirements of his pre-injury work. Finally, Mr. Al-Nori argues the ALJ erred by rejecting the opinion of his treating physician.

Four Points asserts the Compensation Order on Remand is supported by substantial evidence and a proper application of the law because Mr. Al-Nori is capable of returning to his pre-injury job. Specifically, Four Points states:

Although the treating physician’s opinion is accorded great weight, the rule is not absolute. [Citation omitted.] In the case at bar, the ALJ found the employer/carrier’s witness to be more persuasive. The ALJ is required to base her decision on substantial

³ *Al-Nori v. Four Points by Sheraton*, CRB No. 11-079, AHD No. 10-150A, OWC No. 664824 (September 13, 2011), p.5.

evidence. In the case at bar, she did so. Judge Newsome specifically enumerates that Dr. Scheer's opinion is backed up by:

(1) the normal x-ray of claimant; (2) the MRI scan that revealed [sic] minimal degenerative [sic] disc disease at L4-S1 with no evidence for disc herniations or stenosis; (3) the normalcy of Claimant's electrodiagnostic [sic] studies[;] (4) his physical examination of Claimant on two evaluations; and (5) the finding of the FCE that Claimant did not give maximal effort.

Given the contradictory medical evidence, the ALJ was forced to look at issues other than the medical records in order to make her decision. Specifically, because the claimant's complaints [sic] are all subjective, she was compelled to examine the credibility of the person making the complaints. The ALJ, as hearing examiner, is in the best position to rule upon a claimant's credibility. [Citation omitted.] The ALJ has heard live testimony and observed the demeanor of the witness. After making these observations, she concluded that the claimant was "not credible or reliable based upon the evidence of record and his demeanor at the formal hearing."

The Compensation Order [on Remand] issued on November 10, 2011 was not issued lightly. Judge Newsome analyzed the issues and the facts before her in concluding that the claimant's [sic] request for relief should be denied. She based her decision on substantial evidence which was enumerated throughout the Order.⁴

Four Points requests we affirm the Compensation Order on Remand.

ISSUES ON APPEAL

1. Does substantial evidence in the record support that the ALJ properly considered the directives in the September 13, 2011 Decision and Remand Order?
2. Is the November 10, 2011 Compensation Order on Remand supported by substantial evidence and in accordance with the law?

⁴ Employer/Carrier's Opposition to Claimant's Second Application for Review, unnumbered at p.4.

ANALYSIS⁵

In response to the September 13, 2011 Decision and Remand Order, the ALJ issued the Compensation Order on Remand including a section with the misnomer “Analysis.” This section of the Compensation Order on Remand consists of

- Two paragraphs stating applicable provisions of D.C. workers’ compensation law;
- A paragraph summarizing medical evidence without making specific findings;
- Another paragraph stating the law regarding the “treating physician preference;”
- Three more paragraphs summarizing medical evidence; and
- A final paragraph including 1 sentence summarizing medical evidence, 1 sentence stating the ALJ accepts the independent medical examination physician’s opinion regarding the nature and extent of Mr. Al-Nori’s disability, and 1 sentence concluding Four Points has rebutted Mr. Al-Nori’s medical evidence “by presenting opposing medical evidence” regarding the nature and extent of Mr. Al-Nori’s disability.⁶

There is no analysis of the law as it applies to the facts, and the defects in the Compensation Order on Remand remain the same as those previously requiring remand:

(1) the absence of discussion concerning the significant and fundamental problem with the FCE Discharge Summary being at a variance from the intake form [footnote omitted] *vis a vis* the physical demand level of the pre-injury job, and the concomitant lack of an explanation as to how that variance does not defeat a finding that the Discharge Summary supports Mr. Al-Nori’s being able to return to his pre-injury job; (2) the lack of findings of fact as to the requirements of the pre-injury job, including the lack of a credibility finding concerning Mr. Al-Nori’s testimony concerning those requirements; (3) the paucity of persuasive reasons for rejecting the opinion of Dr. Salter that Mr. Al-Nori is incapable of returning to work as a bell person; and (5) the failure to identify any reason in connection with the rejection of the opinion of Dr. Meyer to that same effect.⁷

⁵ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁶ *Al-Nori v. Four Points by Sheraton*, AHD No. 10-150A, OWC No. 664824 (November 10, 2011), p.4

⁷ *Al-Nori v. Four Points by Sheraton*, CRB No. 11-079, AHD No. 10-150A, OWC No. 664824 (September 13, 2011), p.5.

The ALJ's failure to address these defects requires we, again, remand this matter.

CONCLUSION AND ORDER

The November 10, 2011 Compensation Order on Remand is not supported by substantial evidence and is not in accordance with the law. The Compensation Order on Remand is VACATED, and this matter is remanded for further proceedings consistent with this Decision and Remand Order as well as the September 13, 2011 Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:


MELISSA LIN JONES
Administrative Appeals Judge

May 2, 2012

DATE