

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-072

**JOHN F. RICHARDSON,
Claimant-Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and XCHANGING
Employer/Carrier-Respondent.**

Appeal from a July 6, 2011 Compensation Order on Remand by
The Honorable Anand K. Verma
AHD No. 10-266, OWC No. 661702

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2012 FEB 6 PM 12 14

Rebekah A. Miller, Esquire, for the Petitioner
Sarah O. Rollman, Esquire, for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE,¹ and HENRY W. MCCOY, *Administrative Appeals Judges.*

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

DECISION AND 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

Mr. John F. Richardson worked for the Washington Metropolitan Area Transit Authority ("WMATA") as a train operator. On June 12, 2009, he injured his back when his body jerked forward after the train he was operating suddenly stopped. WMATA paid temporary total disability

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).

benefits from June 13, 2009 to August 21, 2009, from September 5, 2009 to September 14, 2009, and from September 22, 2009 to October 5, 2009.

In a Compensation Order dated September 16, 2010, an administrative law judge (“ALJ”) denied Mr. Richardson’s request for an award of temporary total disability benefits from October 6, 2009 to the date of the formal hearing and continuing. The ALJ further held that Mr. Richardson’s assertion that WMATA had failed to timely controvert his claim was mooted by the ruling denying temporary total disability benefits.

On June 1, 2011, the CRB vacated the September 16, 2010 Compensation Order. In failing to assess Mr. Richardson’s work capacity (as opposed to his wage loss), the ALJ improperly had applied the burden-shifting analysis required by *Logan*.² Furthermore, the ALJ’s statement that Dr. Jackson “did not render any opinion regarding claimant’s continued inability to return to his regular employment”³ was not supported by substantial evidence inasmuch as on January 22, 2010, Dr. Jackson had stated

[t]he question is to whether this patient can return to his job as a train operator. My response to that question is that we have already seen the result of him returning to work with his back condition, meaning specifically the incident of 06/12/09. It is my opinion that such an incident will recur every time this patient is required to return to those types of duties. We already have proof of significant exacerbation and aggravation of his condition by working as a train operator. At the present time his [*sic*] is to continue with pain management.^[4]

Finally, an analysis of the issue of timely controversion was missing from the Compensation Order.

In a Compensation Order on Remand issued July 6, 2011, the ALJ, again, denied Mr. Richardson’s claim for benefits. To assess Mr. Richardson’s work capacity, the ALJ determined Mr. Richardson was not “continually incapacitated after October 6, 2009 to return to work as a train operator.”⁵ Although the ALJ did reference Dr. Jackson’s January 12, 2010 report in a footnote, the ALJ discounted the opinion contained in that report because it did not explicitly certify Mr. Richardson as unable to work as a train operator after September 14, 2009,⁶ and upon review of the evidence of record, even in light of the treating physician preference, the ALJ definitively determined Mr.

² *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

³ *Richardson v. Washington Metropolitan Area Transit Authority*, AHD No. 10-266, OWC No. 661702 (September 16, 2010).

⁴ *Richardson v. Washington Metropolitan Area Transit Authority*, CRB No. 10-178, AHD No. 10-266, OWC No. 661702 (June 1, 2011).

⁵ *Richardson v. Washington Metropolitan Area Transit Authority*, AHD No. 10-266, OWC No. 661702 (July 6, 2011).

⁶ *Richardson v. Washington Metropolitan Area Transit Authority*, AHD No. 10-266, OWC No. 661702 (September 16, 2010).

Richardson did not prove he remained unable to resume his work as a train operator after September 14, 2009.⁷

On appeal, Mr. Richardson requests the July 6, 2011 Compensation Order on Remand be reversed because it is not supported by substantial evidence in the record. In support of his position that he proffered sufficient and substantial evidence to support his claim, Mr. Richardson sets forth a detailed statement of facts regarding his accident and his medical treatment including multiple quotes from various medical reports.⁸

WMATA asserts the Compensation Order on Remand is supported by substantial evidence and should be affirmed.

ISSUE ON APPEAL

Is the July 6, 2011 Compensation Order on Remand supported by substantial evidence and in accordance with the law?

ANALYSIS

In the June 1, 2011 Decision and Remand Order, the ALJ was directed to assess Mr. Richardson's work capacity, consider Dr. Jackson's January 22, 2010 report, and analyze the issue regarding WMATA's alleged failure to timely file a Notice of Controversion. In the Compensation Order on Remand, the ALJ determined Mr. Richardson was not "continually incapacitated after October 6, 2009 to return to work as a train operator."⁹ The ALJ also referenced Dr. Jackson's January 12, 2010 report, even though he ultimately rejected it.¹⁰

While it may be true, as Mr. Richardson asserts, the record contains sufficient documentation to demonstrate his inability to perform his pre-injury job, the scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order are

⁷ In addition, the ALJ ruled WMATA had failed to timely controvert Mr. Richardson's claim. WMATA has not appealed the ALJ's assessment of a \$100 penalty for failure to timely file a Notice of Controversion.

⁸ At the formal hearing, Mr. Richardson had the burden of proving his entitlement by a preponderance of the evidence. See *Golding-Alleyne v. DOES*, 980 A.2d 1209, 1216 (D.C. 2009) ("Merely presenting 'substantial evidence' to support [a] claim is not necessarily enough to carry the burden[.]")

⁹ *Richardson v. Washington Metropolitan Area Transit Authority*, AHD No. 10-266, OWC No. 661702 (July 6, 2011).

¹⁰ Although the report was issued by Mr. Richardson's treating physician, the ALJ provided sufficient reasons for rejecting Dr. Jackson's opinions. See *Kralick v. DOES*, 842 A.2d 705, 712 (D.C. 2004) (When assessing the weight of competing medical testimony in workers' compensation cases, an attending physician ordinarily is preferred as a witness over a doctor who has been retained to examine the claimant solely for purposes of litigation.) See also *Butler v. Boatman & Magnani*, H&AS No. 84-348, OWC No. 044699 (Remand Order December 31, 1986) citing *Murray v. Heckler*, 624 F. Supp. 1156 (D.C. 1986) (The preference for the opinions of a treating physician is just that, a preference. The preference is not absolute, and when there are specific reasons for rejecting the opinion of the treating physician, the opinion of another physician may be given greater weight.)

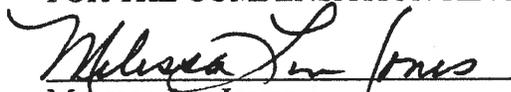
based upon substantial evidence¹¹ in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.¹² Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also 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;¹³ therefore, by law, the ALJ's denial of temporary total disability benefits from October 6, 2009 to the date of the formal hearing and continuing is affirmed.

Having affirmed the ruling that Mr. Richardson is not entitled to temporary total disability benefits from October 6, 2009, no installments of compensation payable without an award have been due since that time.¹⁴ Consequently, any penalty owing to Mr. Richardson for WMATA's failure to timely file a Notice of Controversion is zero.

CONCLUSION AND ORDER

The July 6, 2011 Compensation Order is AFFIRMED because it is supported by substantial evidence and is in accordance with the law.

FOR THE COMPENSATION REVIEW BOARD:


MELISSA LIN JONES
Administrative Appeals Judge

February 6, 2012

DATE

¹¹ "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

¹² Section 32-1521.01(d)(2)(A) of the Act.

¹³ *Marriott, supra*.

¹⁴ Section 32-1515(e) of the Act states

[i]f any installment of compensation payable without an award is not paid within 14 days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10% thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the Mayor after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.