

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD  
CRB 11-041**

**RICHARD PRATT,  
CLAIMANT-RESPONDENT,**

v.

**POWER COMPONENT SYSTEMS, INC., AND ARGO GROUP,  
EMPLOYER AND CARRIER-PETITIONERS**

Appeal from a Compensation Order issued by  
The Honorable Heather C. Leslie  
AHD No. 10-545, OWC No. 661586

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2012 JAN 19 AM 10 43

Joshua A. Davenport, Esquire, for the Claimant  
Jeffery W. Ochsman, Esquire, for the Employer and Insurer

Before LAWRENCE D. TARR, HENRY W. MCCOY, and JEFFREY P. RUSSELL,<sup>1</sup> *Administrative Appeals Judges*

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Review Panel.

**DECISION AND AMENDED COMPENSATION ORDER**

This case is before the Compensation Review Board (CRB) on the request filed by the Employer and Carrier for review of the March 28, 2011, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia's Department of Employment Services (DOES). In the CO, the ALJ held the claimant did not voluntarily limit his income by refusing the employer's offer of employment.

For the reasons stated, we reverse the ALJ's decision and vacate the award of benefits.

**BACKGROUND FACTS OF RECORD**

The claimant, Richard Pratt, worked for this employer as a laborer and demolitionist. On November 19, 2009, the claimant was working at a construction site located on North Capitol Street in Washington, D.C. To get to that work site, the claimant would either take the bus, subway, or drive his truck.

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<sup>1</sup> Judge Russell has been appointed by the Director of DOES as a CRB member pursuant to DOES Policy Issuance No. 11-03 (June 13, 2011).

The claimant sustained an injury at work on November 19, 2009, when he fell from a 15-foot ladder. The claimant was transported to the Howard University Hospital and then came under the care of Dr. Buchanan.

Dr. Buchanan referred the claimant to Dr. Sameer Nagda, who began treating the claimant on April 16, 2010. Dr. Nagda performed arthroscopic surgery (meniscectomy, synovectomy, and debridement) on the claimant's right knee in August, 2010.

A few weeks before the surgery, the employer sent the claimant a letter in which it offered him work at its warehouse in Hanover, Maryland. The letter stated that after the surgery, the employer "will make a position available for you, with whatever restrictions you are issued." (EE5).

After the surgery, Dr. Nagda released the claimant to sedentary work. The claimant did not accept the offer of light duty because, according to the claimant's September 20, 2010, letter (EE6), he did not own a vehicle and the Hanover warehouse was 66 miles from his residence. At the formal hearing the claimant admitted that he did own a vehicle and that the warehouse was 33 miles from his residence. The claimant ultimately accepted the position on January 17, 2011.

In the March 28, 2011, CO, the ALJ held that the claimant's knee problems were medically causally related to the November 19, 2009, accident at work and that the light duty job offered the claimant at the employer's warehouse in Hanover, Maryland was suitable and within the claimant's physical and vocational capacity. CO at 6, 7. Neither party has appealed these determinations.

The ALJ held the claimant did not voluntarily limit his income by refusing to accept the light duty job in Hanover, Maryland because it was outside the District of Columbia's metropolitan area and because the claimant did not have reliable transportation. The employer has appealed these determinations.

#### THE STANDARD OF REVIEW

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 based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. "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) and §32-1521.01(d) (2) (A) of Act.

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. *Marriott, supra*.

## ANALYSIS

The only issue is whether the claimant voluntarily limited his income by refusing the light duty position in Hanover, Maryland. As the ALJ correctly noted, this determination involves resolution of two questions;

The District of Columbia Court of Appeals has stated that the idea of job availability should incorporate the answer to two [substantive] questions:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job. *Logan v. DOES*, 805 A.2d 237, (D.C. 2002) quoting *Joyner*, supra, 502 A.2d at 1031 n.4 (citations omitted).

CO at 7.

There is no current dispute as to the first *Logan* question; the claimant has not appealed the ALJ's determination that the offered job was within the claimant's physical and vocational capacities.

The ALJ held that the employer's evidence did not satisfy the second *Logan* question.

The ALJ first determined the position in Hanover, Maryland was not, as a matter of law, within the District of Columbia metropolitan area labor market. The ALJ wrote:

The Employer, however, fails in the second [Logan] question, as the job in Hanover, Maryland, clearly is not in the "community." In other words, the job location is not within the District of Columbia metropolitan area labor market. This is supported by evidence both parties submitted. Hanover, Maryland is closer to Baltimore and can be more properly termed as in the Baltimore Metropolitan District. Although only approximately 33 miles away from District of Columbia, the Claimant credibly testified it is approximately a 50 minute car drive. The Undersigned will take judicial notice that the area's traffic congestion can be atrocious at times, and a 50 minute drive can, more often than not, turn into over an hour. As the Claimant testified, public transportation to Hanover, Maryland is not a feasible alternative.

*Id.* at 7-8.

We disagree with the ALJ's finding. We hold that a position 33 miles and 50 minutes from the claimant's residence is within the District of Columbia's metropolitan labor market.<sup>2</sup> Neither the distance nor the commuting time is too great to disqualify the position that was offered to, and eventually accepted by, the claimant.

Additionally, the evidence of record does not support the ALJ's apparent factual finding used to support her legal conclusion; that the claimant's commute "can, more often than not, turn into over an hour."

The only evidence in the record as to the actual driving time was the claimant's testimony that it takes him 50 minutes to drive to the Hanover worksite. The claimant, who had done the drive for over one month at the time of the formal hearing, never testified that it took him over an hour to get to work. Thus, there is no evidence before the ALJ that the claimant's commute could take more than 50 minutes.

The ALJ also found the claimant did not voluntarily limit his income by not accepting the Hanover position, because he was afraid his truck would overheat while commuting. The ALJ concluded

The Claimant credibly testified that his car was unreliable and would often overheat necessitating the car to be turned off. His hesitation in attempting to return to work at such a long distance with questionable transportation is not unreasonable to the Undersigned.

As to the ALJ's credibility finding, the ALJ's decision did not identify that on September 20, 2010, the claimant rejected the position because it was about 60 miles from his residence and because he did not own a vehicle. (EE5). The testimony at the hearing was that the position was 33 miles from his house and he owned a truck. These material inconsistencies in the claimant's testimony were not identified, discussed, or reconciled by the ALJ in making her credibility determination.<sup>3</sup>

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<sup>2</sup> Curiously, in apparent dicta, the ALJ inconsistently wrote at page 8 that the job might be appropriate:

This being said, the Undersigned would be remiss in cautioning the parties that such a determination, what constitutes the District of Columbia Metropolitan area labor market, is largely dependant upon the circumstances of each case. The current finding that the Claimant did not voluntarily limit his income does not automatically mean such a conclusion will be made in the future.

<sup>3</sup> We also note that the ALJ appears to have based her decision in part upon the fact that she did not find the claimant's refusal of the position to be "unreasonable". We caution that, unlike refusing to co-operate with rehabilitation, "reasonableness" is not a statutory consideration where the issue is "voluntary limitation of income." Reducing or even eliminating a claimant's compensation rate because the claimant is voluntarily limiting his or her income is not a sanction, as is the case with a suspension of benefits. Rather it is merely a determination that the work injury is not causing the claimant to lose some or all of his or her pre-injury wages and that not all of the difference between the pre- and post-injury earnings are the result of the injury, but rather are the result of a voluntary decision by the claimant not to perform a certain job, for whatever reason. There are many reasons that claimants might choose to decline a position that is available and within their industrial, physical and practical