GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-164

HOWARD SMENTKOWSKI,
Claimant–Respondent,

v.

ELCON ENTERPRISES, INC. and ARGONAUT INSURANCE COMPANY,
Employer/Carrier-Petitioner.

Appeal from a Compensation Order by
The Honorable Amelia G. Govan
AHD No. 12-073, OWC No. 654457

Sarah M. Burton, Esquire, for the Petitioner
William B. Newton, 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.[3]

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Mr. Howard Smentkowski started working for Elcon Enterprises, Inc. ("Elcon") in 1997. He modernized and serviced elevators which required lifting and carrying tools and equipment exceeding 100 pounds.

[1] Judge Leslie has been appointed by the Director of the Department of Employment Services ("DOES") as a temporary Compensation Review Board ("CRB") member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

[2] Judge Russell has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

[3] Jurisdiction is conferred upon the 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 DOES Director's Administrative Policy Issuance 05-01 (February 5, 2005).

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On September 7, 2007, Mr. Smentkowski's right shoulder popped as he was catching a heavy piece of metal. Following surgery, physical therapy, and other treatment, Mr. Smentkowski returned to work in a light duty position in May 2008.

In September 2011, Mr. Smentkowski was assigned to a different light duty position; this position did not include two immediate helpers to assist him with elevator repairs. After performing this assignment for five days, Mr. Smentkowski informed his supervisor (Mr. John Hofbauer) he physically was not able to perform the duties required by this position.

Dr. Debra K. Spatz (Mr. Smentkowski's treating physician) recommended an MRI, but Elcon did not authorize that test until seven months after Mr. Smentkowski had stopped working in September 2011. After he finally was able to get the MRI, Mr. Smentkowski was released to light duty on May 1, 2012 with restrictions on overhead lifting and lifting over ten pounds.

Mr. Smentkowski reported to his third light duty position on May 1, 2012. This assignment required overhead reaching and lifting more than ten pounds; it exceeded his physical limitations and restrictions, and after four days, Mr. Smentkowski stopped working.

A dispute arose over Mr. Smentkowski's entitlement to workers' compensation benefits. Following a formal hearing, an administrative law judge ("ALJ") issued a Compensation Order dated September 19, 2012; Mr. Smentkowski was "awarded temporary total disability benefits from September 16, 2011 to April 30, 2012, resuming May 5, 2012 to the present and continuing, as well as ongoing medical benefits."[4]

On appeal, Elcon asserts it was error for the ALJ to award Mr. Smentkowski ongoing medical treatment. Elcon also asserts the Compensation Order fails to address its defense of voluntary limitation of income. Finally, Elcon asserts the Compensation Order is not supported by substantial evidence. For these reasons, Elcon requests the CRB vacate the Compensation Order.

On the other hand, Mr. Smentkowski contends Elcon's arguments lack merit and the Compensation Order is supported by substantial evidence. Consequently, Mr. Smentkowski requests the CRB affirm the Compensation Order.

ISSUES ON APPEAL

1. Was it error to award Mr. Smentkowski ongoing medical treatment?

2. Does the September 19, 2012 Compensation Order appropriately address the voluntary limitation of income defense?

3. Is the Compensation Order supported by substantial evidence and in accordance with the law?

[4] *Smentkowski v. Elcon Enterprises, Inc.*, AHD No. 12-073, OWC No. 654457 (September 19, 2012).

ANALYSIS[5]

The only issue for resolution noted in the Compensation Order is "What was the nature and extent of disability during the periods at issue?"[6] While it is true that in addition to awarding Mr. Smentkowski temporary total disability benefits from September 16, 2011 to April 30, 2012 and from May 5, 2012 to the date of the formal hearing and continuing the ALJ also awarded "ongoing medical benefits,"[7] we find no error in the award.

Pursuant to §32-1507(a) of the Act, and employer is obligated to

> furnish such medical, surgical, vocational rehabilitation services, including necessary travel expenses and other attendance or treatment, nurse and hospital service, medicine, crutches, false teeth or the repair thereof, eye glasses or the repair thereof, artificial or any prosthetic appliance for such period as the nature of the injury or the process of recovery may require.

The Compensation Order merely iterates Elcon's obligations under the Act. We read nothing in the Compensation Order that restricts either party from requesting further proceedings on the issues of causal relationship or reasonableness and necessity of medical treatment as appropriate.

In contesting the award of temporary total disability benefits, Elcon asserts the Compensation Order fails to address Mr. Smentkowski's testimony regarding the requirements of his light duty job or the testimony of Mr. Hofbauer. We disagree.

During the first period of disability, Mr. Smentkowski was not working because he was unable to perform his job duties. At that same time, he was waiting for approval of an MRI recommended by his treating physician who declined to provide additional cortisone injections before providing additional treatment. We agree with the ALJ that Elcon's position is inconsistent with the record.

As to the second period of disability, the evidence supports the ALJ's ruling that the purportedly light-duty position offered by Elcon did not comport with Mr. Smentkowski's physical limitations and restrictions. The ALJ found Mr. Smentkowski's testimony credible (a ruling that is entitled to deference),[8] discredited Mr. Hofbauer's testimony because he was not personally informed as to Mr.

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[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 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 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] *Smentkowski*, *supra*, at p. 2. In addition, in a footnote, the ALJ did state that Elcon had raised the defense of voluntary limitation of income.

[7] *Id*. at p. 7.

[8] An ALJ's credibility determinations are entitled to deference. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985).

Smentkowski's tasks on a practical level, and credited the opinions of Mr. Smentkowski's treating physician over Elcon's independent medical examination physician:[9]

> Claimant has submitted testimonial and medical proof that he had lifting and reaching restrictions on performing his usual work duties. He has also adduced evidentiary substantiation to show the duties assigned to him exceeded those restrictions. Employer has not shown that Dr. Spatz' restrictions were not valid or that the positions given Claimant were, in fact, suitable for his physical condition. I credited Claimant's testimony that he tried to limit his lifting and other use of the right shoulder but that the nature of the work did not allow him to do that on a consistent basis. Noting that the weight of his tools alone exceeded his lifting restriction and that when working alone he had to overuse the right arm, the contention that his assignments were suitable is not supportable.
>
> Given the nature of Claimant's injury and the severity of symptoms described in Claimant's credible testimony, there is no substantive reason to reject the contention that Claimant has been physically incapable of performing the work duties assigned to him since September 16, 2011. Mr. Hofbauer's testimony regarding the nature of Claimant's assigned work duties was not persuasive, in that he had no opportunity to observe Claimant's tasks or activities throughout his work day.
>
> The record, including the testimony of Claimant and medical and physical therapy notes and reports from his treating medical providers, includes findings of significant physical impairment, related to the work injury, which affected Claimant's ability to perform his usual work duties. Employer has submitted no medical opinion to contradict or refute Claimant's claim. Further, Employer has not shown the availability of alternate work duties Claimant could perform during the period in dispute.
>
> When weighing competing medical opinions, there is generally a preference given to the opinions of the treating physician over those of physicians retained solely for the purpose of litigation. *Kralick v. District of Columbia Department of Employment Services*, 842 A.2d 705 (D.C. 2004). Dr. Spatz' medical opinions were persuasive in discussing Claimant's clinical complaints, treatment, and residual impairment. As such, they support Claimant's credible testimony that his right shoulder condition prevents his performance of his pre-injury duties and the post-injury assignments provided. I rejected Dr. Collins' 2009 IME report as not pertinent to the time period at issue. I rejected Dr. Danziger's 2012 IME report as inconsistent with the other medical evidence and with Claimant's credible description of his physical condition. It is only with respect to treating physicians that it is necessary to give specific reasons when rejecting a medical opinion. *Washington Hospital Center v. District of Columbia Department of Employment Services*, 821 A.2d 898 (D.C. 2003).

[9] When assessing the weight of competing medical testimony in workers' compensation cases, a treating physician ordinarily is preferred as a witness over a doctor who has been retained to examine the claimant solely for purposes of litigation. *Kralick v. DOES*, 842 A.2d 705, 712 (D.C. 2004).

> In sum, the most persuasive record evidence indicates Claimant has significant problems which affected his work performance and activities of daily living. In fact, Claimant's testimony, which has been deemed credible in all respects, indicates he overcame daily issues related to his work injury, to perform his assigned duties until he was incapable of doing so. Without sufficient persuasive evidence to the contrary, the Claimant has met his burden of proving entitlement to the relief sought.

All of these determinations are supported by both the record and the law.

Similarly, Elcon asserts that the Compensation Order fails to address its voluntary limitation of income defense. This defense was premised on Elcon's offers of light duty. The ruling that the positions offered did not comply with Mr. Smentkowski's physical limitations and restrictions by necessity resolves the question regarding any alleged voluntary limitation of income.

Elcon's remaining disagreements amount to a request to reweigh the evidence in its favor. Even if there is evidence in the record to support Elcon's position, the CRB lacks the authority to review the evidence *de novo* and rule in its favor.[10]

CONCLUSION AND ORDER

There is no error in awarding ongoing medical treatment, and the defense of voluntary limitation was addressed appropriately. The September 19, 2012 Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

December 19, 2012
DATE

[10] *Marriott*, *supra*.