

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-149

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
Mark H. Kopelman, Esquire, for the Employer-Carrier/Respondent

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL,¹ AND LAWRENCE D. TARR, *Administrative Appeals Judges*.

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

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

¹ 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).

OVERVIEW AND FACTS OF RECORD

This appeal follows the issuance on November 21, 2011 of a Compensation Order (CO) from the Hearings and Adjudication Section, Office of Hearings and Adjudication in the District of Columbia Department of Employment Services (DOES). In that CO, Claimant's request for temporary partial disability from August 2, 2010 to the present and continuing was denied.

On February 9, 2010, Claimant slipped and fell on ice outside Employer's building, breaking his left leg. Claimant worked full time as a server's assistant/food runner at Employer's Café du Parc and upon leaving that job worked the night shift as a food expeditor at Potenza restaurant. Both jobs required Claimant to be constantly on his feet, with the duties at Employer's café being more physically demanding than those at Potenza.

After hospitalization and surgical repair of the fracture, Claimant came under the care of orthopedist Dr. Warren Yu. As of June 22, 2010, Dr. Yu released Claimant to his regular work duties with no restrictions and discharged him from further care on August 3, 2010.

Claimant returned to Dr. Yu on April 5, 2011 where it was noted that he works two jobs that require a lot of walking and standing and that he continued to experience pain, particularly after walking for more than 40 minutes. Dr. Yu gave Claimant handicap parking approval and limited him to lifting no more than 20 pounds. Claimant returned to work and continues to work full time at Employer's café. Claimant also returned to work at Potenza but stopped working in July 2010 when the pain and swelling in his left leg became too much to bear.

Because he was only working one job and earning less than he did before his work injury, Claimant filed a claim for temporary partial disability benefits. After an evidentiary hearing, the presiding Administrative Law Judge (ALJ) denied the claim after determining Claimant voluntarily limited his income and therefore was not entitled to wage loss benefits.² Claimant has timely appealed with Employer filing in opposition.

Claimant argues on appeal that the CO is not in accordance with the law as the ALJ has misapplied the legal standard by requiring medical justification for his not continuing to work his second job. Employer argues to the contrary that the CO under review is supported by substantial evidence and should be affirmed.

ANALYSIS

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal

² *Fuentes v. Willard Intercontinental Hotel*, AHD No. 11-235, OWC No. 670513 (November 21, 2011).

conclusions drawn from those facts are in accordance with applicable law.³ See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In making his argument that the CO is not in accordance with the law, Claimant asserts that due to his inability to perform the duties of his pre-injury employment at the restaurant Potenza, which is due to his work injury, he has experienced a wage loss that is compensable under the Act. Claimant further argues that the ALJ's determination, that because he has not provided medical justification for voluntarily ceasing to work at Potenza he is not entitled to wage loss benefits, constitutes a misapplication of the legal standard because there is no statutory requirement that an injured worker provide medical evidence of disability.⁴ We disagree.

At issue at the formal hearing was the nature and extent of Claimant's disability and whether or not he had voluntarily limited his income.⁵ The issue of voluntary limitation of income is directly related to the issue of the nature and extent of disability in that an ALJ cannot determine if a claimant has voluntarily limited his income until there has been a determination as the claimant's work capacity.

Claimant sought temporary partial disability benefits for August 2, 2010 to the present and continuing. In assessing Claimant's pre-injury work duties, the ALJ found that he worked 40 hours per week at Employer's Café du Parc and was on his feet and in constant motion during the entire work shift. At his night job at Potenza, the ALJ found that he worked 32 hours per week where he checked food orders before they were served to restaurant patrons, occasionally helped in serving large orders, and was not required to lift more than 10 pounds. The ALJ found that Claimant's duties at Potenza were not as physically demanding as those at Employer's Café du Parc.⁶

The ALJ further found that Dr. Yu released Claimant to regular work duties, with no restrictions, as of June 22, 2010; that Claimant returned to work at both jobs on or after June 22, 2010; that Claimant voluntarily stopped working at Potenza in late July 2010 due to unbearable left

³ "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

⁴ *Memorandum of Points and Authorities in Support of Claimant's Application for Review*, unnumbered pp. 5-6.

⁵ Pursuant to D.C. Code § 32-1508 (5): In case of temporary partial disability, the compensation shall be 66 2/3% if the injured employee's wage loss.... Wage loss shall be the difference between the employee's average weekly wage before becoming disabled and the employee's actual wages after becoming disabled. If the employee voluntarily limits his income or fails to accept employment commensurate with his abilities, then his wages after becoming disabled shall be deemed to be the amount he would earn if he did not voluntarily limit his income or did not accept employment commensurate with his abilities.

⁶ *Fuentes, supra*, p. 3.

leg pain and swelling; and, that Dr. Yu discharged Claimant from his care on August 3, 2010. The ALJ found that Dr. Yu was aware that Claimant worked two jobs, the physical requirements of both jobs, and that post-injury he was experiencing pain after walking for more than 40 minutes.⁷ With specific regard to Claimant's work capacity, the ALJ found that Claimant's combined work duties at his current job at Café du Parc and his work duties at his former job at Potenza do not exceed the medical restrictions imposed by Dr. Yu.⁸

In determining that Claimant was not entitled to temporary partial disability benefits, the ALJ reasoned

In the case at bar, Fuentes was working two jobs before his February 9, 2010 injury occurred while he was working for the Willard. After the injury and lost time from both jobs, Fuentes was not able to continue working for Potenza due to left leg pain, reduced strength, and inability to endure long periods of standing. However, his treating physician did not provide medical restrictions which would preclude his performing the required duties of either job. Absent any medical justification for discontinuance of the employment which otherwise was available and consistent with the treating doctor's physical restrictions, Fuentes' departure from his second job at Potenza falls within the general principle of the statutory provision.⁹

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 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.

⁷ *Fuentes, supra*, p. 3.

⁸ *Id.*, p. 4.

⁹ *Id.*

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.

On this record, there is but one possible result, and that is that Claimant be granted ongoing temporary partial disability benefits based upon his lost earnings from the job at Potenza. However, as the District of Columbia Court of Appeals has held:

Although D.C. Code § 32-1521.01 provides that the CRB may amend a compensation order, this language does not authorize the CRB to reverse an order of an ALJ denying compensation and in its place issue an award of compensation. In cases where, as here, the CRB concludes that the ALJ's findings compel an award of compensation, it must remand the matter to the ALJ with instructions that the latter issue such an order. The decision by the CRB to award compensation must, therefore, be reversed and the matter must be remanded.

Washington Metropolitan Area Transit Authority v. DOES and Juni Browne, Intervenor, 926 A.2d 140 (D.C. 2007), at 148. Accordingly, we must remand the matter with instructions that an award be issued granting Claimant's claim.

CONCLUSION AND ORDER

The Compensation Order of November 21, 2011 is not supported by substantial evidence and is not in accordance with the law. Accordingly, the Compensation Order of November 21, 2011 is hereby VACATED. This matter is therefore REMANDED with the instruction to issue a CO awarding the claim for relief requested by Claimant.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

May 9, 2012

DATE