

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB No. 07-27

BETTY WILLIAMS,

Claimant – Respondent

v.

PIZZA HUT AND GALLAGHER BASSETT SERVICES,

Employer/Carrier – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
OHA No. 05-231A, OWC No. 602284

Anthony Zaccagnini, Esq. Petitioner

Jessica G.. Bhagan. Esquire, for the Respondent

Before: FLOYD LEWIS, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on December 8, 2006, the Administrative Law Judge (ALJ) ordered that Employer-Petitioner (Petitioner) pay Claimant-Respondent (Respondent) continuing temporary total disability benefits from August 10, 2004, along with causally related medical expenses incurred prior to August 10, 2004. Petitioner now appeals that Compensation Order.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, 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 conclusions drawn from those facts are in accordance with applicable law. D.C. Official Code §32-1522(d)(2). “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 Int’l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this scope 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.

Turning to the case under review herein, Petitioner alleges that the ALJ’s decision is erroneous, contending that the ALJ abused his discretion and committed an error of law in awarding Respondent temporary benefits from August 10, 2004, based on Respondent’s own admission that she had no intention of returning to work with Petitioner. Respondent counters that the Compensation Order should be affirmed in all respects.

In the instant matter, the ALJ concluded that Respondent’s lower back injury arose out of and in the course of her employment and was medically causally related to her accidental injury of February 24, 2004. The ALJ then determined that Respondent was temporarily totally disabled from August 10, 2004 to the present and continuing. In addition, the ALJ concluded that Respondent was fully able to return to her usual employment on August 10, 2004 and that Respondent’s pre-injury employment was no longer available to her as she had been laid off.

The ALJ stated:

The Court has held that “the burden is on the employer to prove that work for which the claimant is qualified was in fact available. *See Washington Post v. District of Columbia Department of Employment Services*, 675 A.2d 42 (D.C.

1996) quoting *Joyner v. District of Columbia Department of Employment Services*, 502 A.2d 1031 n.4 (D.C. 1986). In the instant case, employer did not dispute that claimant's pre-injury employment was no longer available to her and claimant would have returned to her position if she had not been laid off (HT 33). Accordingly, it is held that the work commensurate with claimant's ability was not available on August 10, 2004.

Compensation Order at 7.

On appeal, Petitioner asserts that the ALJ erred by stating that the burden was on Petitioner to prove that work for which Respondent was qualified was available. Petitioner contends that in this matter, it was not bound to offer Respondent suitable employment because Respondent stated that she would not return to work with Petitioner. Since Respondent testified that she had no intention of returning to work with Petitioner, Petitioner argues that the ALJ erred in awarding ongoing temporary total disability benefits, as Respondent voluntarily limited her income.

However, after carefully reviewing the record as a whole, this Panel must respectfully reject Petitioner's argument that because of her testimony that she would not return to work for Petitioner, the ALJ erred in awarding Respondent benefits. As the ALJ indicated, the burden on the employer to demonstrate the availability of a job that an employee is capable of performing. *Joyner v. Dist. of Columbia Dep't of Employment Servs.*, 502 A.2d 1027, 1031 n.4 (D.C. 1986). As such, Petitioner is not able to shift its burden of production concerning the availability of suitable employment to Respondent to warrant a finding that Respondent voluntarily limited her income.

A careful review of the record reveals that at the hearing, Petitioner was asked about being laid off by Petitioner and returning to work:

Q. If they hadn't laid you off, would you be willing to go back?

A. Yes.

Q. You don't think there is any reason you couldn't do the job there?

A. No.

Q. So you have no physical limitations that would cause you not to be able to do the job as a driver.

A. No. The only reason I wouldn't want to be a driver anymore, is because it's getting too dangerous.

Q. Understandably. . . .

Hearing transcript (HT) at 33.

Later, when the ALJ specifically asked Respondent if Petitioner offered her the job as a driver, could she work as a driver again, Respondent replied, “Yes, I could, but I’d prefer not to,” because of the risks involved in driving. When asked by the ALJ whether she was physically able to sustain the rigors of the job, Respondent indicated that yes, she was. HT at 42-43.

Despite Petitioner’s arguments to the contrary, this Panel does not believe that Respondent’s testimony at the hearing about a preference for not being a driver anymore because of the dangers associated with driving, removes the burden from Petitioner to demonstrate the availability of a job that Respondent was capable of performing. Petitioner had the obligation to locate and forward suitable employment opportunities to Respondent. There is no indication in the record, at all, that Petitioner officially offered Respondent her former job or any other suitable job, to shift Petitioner’s burden to Respondent on this issue. Thus, Petitioner failed to meet its burden of production concerning job availability under *Joyner*.

As such, the Panel must reject Petitioner’s argument that Respondent’s testimony indicated that she had no intention of ever returning to work for Petitioner, and thus, it was not obligated to offer Respondent suitable employment. Moreover, in addition to having questions about Petitioner’s characterization of Respondent’s testimony as indicating no intention of ever working for Petitioner, this Panel would like to note that after Respondent expressed her reservations about driving because driving is “getting too dangerous,” counsel for Petitioner replied, “Understandably.” HT at 33.

In this matter, the ALJ found, and the record reveals, that Respondent last worked for Petitioner on May 8, 2004 and after going to the emergency room on May 9, 2004. she was told by her physician not to work until August 10, 2004, when she would be capable of returning to work. During this time when she was off from work due to her work injury, she was laid off by Petitioner and as of August 10, 2004, Petitioner had not offered Respondent her usual or any alternative work which she could perform.

Accordingly, after a complete review of the record, this Panel can find no reason to disturb the ALJ’s conclusions in this matter.

CONCLUSION

The Compensation Order of December 8, 2006 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of December 8, 2006 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

March 14, 2007
DATE