

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-050

**CAROLYN J. BERGER,
Claimant-Petitioner,**

v.

**COMPASS GROUP USA, INC.,
Self-Insured Employer-Respondent.**

Appeal from a March 31, 2014 Compensation Order by
Administrative Law Judge Joan E. Knight
AHD No. 13-637, OWC No. 692761

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SERVICES
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2014 AUG 8 PM 12 10

David J. Kapson for Petitioner
Tony D. Villareal for Respondent

Before: JEFFREY P. RUSSELL, HEATHER C. LESLIE, *Administrative Appeals Judges*, and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

DECISION AND REMAND ORDER

BACKGROUND AND FACTS OF RECORD

In a Compensation Order issued March 21, 2014, an Administrative Law Judge (ALJ) in the Administrative Hearings Division of the Department of Employment Services, claimant Carolyn J. Berger's claim for medical care was granted, while her claim for temporary total disability was denied. Ms. Berger filed a timely Application for Review and Memorandum in support thereof (Ms. Berger's Memorandum), to which employer Compass Group USA, Inc. (Compass Group) filed an Opposition and Memorandum in support thereof (Compass's Memorandum).

The relevant facts are set forth in the following Discussion and Analysis.

DISCUSSION AND ANALYSIS¹

The parties stipulated that Ms. Berger sustained an injury to her back on May 4, 2012 when she was lifting a box of apples in the course of her employment as a food service worker. It is also undisputed that she sought medical treatment on one occasion between the time of the injury and her last date of working for Compass Group on June 16, 2012. That treatment was rendered at Howard University Hospital (HUH) on May 5, 2012.

It was only after her contract of employment with Compass Group ended that Ms. Berger sought additional medical care the first being a return to HUH on July 9, 2012 and then with her primary care physician Dr. Esmerando Juanitez on July 11, 2012, when he authored a disability slip placing Ms. Berger in an “off-duty” status as of June 15, 2012.

Thereafter, her care was taken over by Dr. Joel Fechter, Dr. Harvey Mininberg and Dr. Matthew Ammerman. Ultimately, an MRI revealed that Ms. Berger suffers from a herniated disc and lumbar radiculopathy secondary to the stipulated work injury. Dr. Fechter authored a light duty return to work slip on August 9, 2012.

Compass does not argue that the ALJ erred in application of the rules governing the presumption of compensability, and does not argue in this appeal the ALJ’s ultimate determination that Ms. Berger’s current back condition is causally related to the stipulated work injury is erroneous. It does not appeal that finding or the award of medical care that Ms. Berger is in continuing need of for that condition.

Compass argues that the denial of temporary total disability benefits ought to be affirmed, asserting that the fact that Ms. Berger did not present evidence that she had provided the disability or light duty slips to it, and that she returned to work for an extended period of time and only stopped work when the contract expired, are evidence supporting the ALJ’s denial of benefits.

While it might be so that these facts could support a conclusion that either her injury never was disabling as it concerns her pre-injury job, or that it has resolved sufficiently to permit her to return to that job, it is important to note that the ALJ did not base her decision upon the theory or conclusion that Ms. Berger’s injury had not been disabling, or had improved or resolved. Indeed, quite the opposite. The ALJ unequivocally determined that the work injury persists, that it involves a herniated disc, and that it requires ongoing medical care.

The basis of the denial was the ALJ’s perception that Ms. Berger had failed to demonstrate any wage loss, because “There is no evidence Claimant’s work assignment extended beyond June 15, 2012, the end of the academic school year” and that “There is no evidence of actual wage loss related to her work injury after June 15, 2012.” Compensation Order, *Findings of Fact*, p. 4. These findings and their application in denying the claim for temporary total disability benefits strongly suggests that the ALJ was under the impression that because Ms. Berger’s contract of employment ended, she is ineligible for benefits as a matter of law, and that is erroneous. As a general principle and subject to a few exceptions not germane here, a claimant who is unable to return to the capacity to perform the pre-injury job is deemed totally disabled. *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

¹ The CRB reviews a Compensation Order to determine whether the factual findings are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB will affirm 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.

Although the Compensation Order contains some generic descriptions of the duties required of a worker performing the pre-injury job, it contains no findings of fact concerning what the physical requirements of the pre-injury job were as they relate to the amount of bending or stooping required, the number of hours worked per day, the range of weights that such a worker is expected to handle, or any other specific information concerning what level of physical capacity such a worker must possess to perform the job. Further, there are no findings of fact concerning what Ms. Berger's capacities are with respect to the requirements of the pre-injury job.

The ALJ rejected the only medical opinion, that of IME doctor Dr. Louis Levitt, specifically asserting that Ms. Berger could return to her pre-injury job. Compensation Order, *Discussion*, p.6. That rejection was within the ALJ's discretion.

Rather, she found "The record is void as to Claimant's work status and work assignment after June 15, 2012".

This is in error. As Ms. Berger points out in her Memorandum, she testified that (1) she has not worked at Compass since June 15, 2012, and (2) she has earned no income from any other source since that date. She testified that her pre-injury job required her to lift boxes weighing up to 50 pounds (HT 34), and it is "her understanding" that Dr. Fechter has imposed restrictions including no repetitive lifting, stooping, or lifting over 20 pounds (HT 34). Dr. Fechter confirmed that understanding in his deposition (CE 7, p. 49).

Taken together with the ALJ's separate finding that Ms. Berger is a credible witness (Compensation Order, *Findings of Fact*, p. 2), it is apparent that the record contains evidence of "her work status", that is, not working, and evidence that subsequent to her last day of work she has undergone additional medical examinations by multiple doctors and objective testing, including an MRI demonstrating a herniated disc, and has been placed on restrictions by her doctors that on their face appear to preclude Ms. Berger from performing at least one aspect of her pre-injury job, i.e., lifting boxes heavy enough to cause the stipulated work injury.

There may be other items of record that would support the ultimate determination that Ms. Berger is not entitled to the claimed temporary total disability benefits. However, the record does not comport with the ALJ's description of it as being devoid of evidence sufficient to support the claim, if accepted and believed by the ALJ

The ALJ's finding that the record is devoid of evidence upon which Claimant's claim could be granted is not supported by the record. Therefore, we must remand this case to the ALJ for a new decision taking into account the record as a whole.

CONCLUSION AND ORDER

The determination that the record is devoid of evidence upon which Claimant-Petitioner's claim could be granted is unsupported by substantial evidence. The denial is vacated and the matter is remanded for further consideration of the claim taking into account the record as a whole.



JEFFREY P. RUSSELL
Administrative Appeals Judge

August 8, 2014

DATE