

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-011

**DARRELL BANKS,
Claimant-Respondent,**

v.

**CLARK CONSTRUCTION GROUP, LLC and
ZURICH NORTH AMERICA,
Employer-Petitioner.**

Appeal from a December 31, 2015 Compensation Order on Remand by
Administrative Law Judge Amelia G. Govan
AHD No. 14-507, OWC No. 702171

(Decided June 28, 2016)

David J. Kapson for Claimant
Zachary I. Shapiro for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This matter is an appeal by Employer of a Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia Department of Employment Services (DOES) in response to a Decision and Remand Order (DRO) issued by the Compensation Review Board (CRB) in *Banks v. Clark Construction*, CRB No. 15-071 (September 30, 2015).

The factual background material is somewhat complex and repetition of that material is not necessary for our review of the COR. This is because, as will be discussed below, the ALJ followed the mandate of the CRB in the DRO, and this appeal appears to merely be a repetition by Employer of the arguments made in the prior appeal which were rejected by the CRB at that time.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JUN 28 PM 11 03

Suffice it to say that the “Facts of Record and Procedural Background”, the “Analysis”, and the “Conclusion and Order” as set forth in the DRO of September 30, 2015 are adopted and incorporated as if fully set forth herein.

We shall set forth once again the “Conclusion and Order” as it appears in the DRO for ease of reference:

Because the rejection of Dr. Hinkes’s opinions and the UR report’s conclusions are supported by substantial evidence, the conclusion that Claimant’s lumbar condition is medically causally related to the work injury and the award of causally related medical care to the lumbar spine as provided and recommended by Dr. Batipps is **AFFIRMED**.

Because there is no dispute that Claimant adduced evidence sufficient to invoke the presumption that his cervical condition is causally related to the work injury, and because the evidence relied upon by the ALJ to find the presumption to have been rebutted is insufficient for that purpose, the conclusion that Claimant’s cervical condition is not causally related to the work injury is **REVERSED** and the denial of causally related medical care is **VACATED**.

Because the CO did not properly assess the nature and extent of Claimant’s disability, the finding that Claimant is not entitled to temporary total disability is **REVERSED** and the denial of the claim temporary total disability is **VACATED**.

The matter is **REMANDED** to AHD for further findings of fact, through either stipulation, resort to the existing record, or the conduct of further proceedings, concerning the dates of the intermittent employment with Berkel and the wages paid during that employment, and entry of an award of temporary total disability for any period since the date of the layoff from Employer that Claimant was not working, and any temporary partial disability to which Claimant may be entitled due to any diminution of wages sustained if there was a wage differential between Claimant’s average weekly wage and the wages earned from Berkel, subject to a credit for any unemployment benefits received during the period of disability.

DRO at 7.

Upon remand, the COR states that on October 23, 2015 the ALJ issued an order which she describes in the COR (with words bolded and italicized as they appear in the COR) to which Employer responded on November 9, 2015 and to which Claimant responded on November 12, 2015, as follows:

On October 23, 2015, the parties were ordered to submit the following, consistent with the Board’s directive, within fifteen business days of service of this order:

1. The dates of Claimant's intermittent employment with Berkel and the wages paid during that employment;
2. Dates of any period since the date of Claimant's layoff from Employer that Claimant was not working;
3. Information regarding any diminution of wages sustained if there was a wage differential between Claimant's average weekly wage and the wages earned from Berkel;
4. Information regarding any unemployment benefits received during the period of disability.

The October 23, 2015 Order included the following admonition:

THE ABOVE-DESCRIBED SUBMISSION MAY BE PROVIDED BY STIPULATION OF THE PARTIES AND/OR RESORT TO THE EXISTING EVIDENTIARY RECORD. ANY ITEM ON WHICH THERE IS A FAILURE TO STIPULATE OR TO SUBSTANTIATE THE BOARD'S REQUEST WILL BE CONSIDERED WAIVED. ANY DISCREPANCY OR OMISSION WILL BE RESOLVED BY THE UNDERSIGNED. UPON RECEIPT OF THE ABOVE, A COMPENSATION ORDER ON REMAND WILL ISSUE.

On November 9, 2015, Employer responded as follows:

In response to your Order dated October 23, 2015, the Claim for Relief made by Claimant at the Formal Hearing was for temporary total disability from February 4, 2014 to the present and continuing. The start dates for the benefits requested by the Claimant was subsequent to his lay off from the Employer as well as from Berkel. As such, the Employer and Carrier contend any information regarding the Claimant's wages for the Employer and Berkel are neither relevant nor encompassed by the Claim for Relief made by the Claimant.

Employer is correct with regard to Claimant's actual Claim for Relief, which begins on February 4, 2014. However, said response must be considered in tandem with the Board's decision, which states:

The ALJ's finding that Claimant cannot return to his pre-injury job is supported by substantial evidence, and is affirmed. The finding that he is not entitled to wage loss benefits because of the supposed layoffs does not flow rationally or legally from that finding. There has been no showing that Employer has offered Claimant employment within his physical capacity since it laid Claimant off. There is no finding that Claimant had returned to suitable alternative employment when he worked for short time,

intermittently, at Berkel. There is but one conclusion that can flow from these facts: except for the “intermittent” periods of light duty work at Berkel, Claimant has been and remains temporarily totally disabled from the date of the layoff from Employer to the present and continuing. DRO p. 6 – 7.

On November 12, 2015, Claimant responded to the October 23, 2015 Order as follows:

.... Mr. Banks worked for intermittent dates ranging from October 2013 and early January 2014. Mr. Banks has not worked for any employer, nor earned any wages since his last date of employment with Berkel in January 2014. Mr. Banks is a union member, as such, he was earning union pay scale while employed by both Clark and Berkel. This union scale was the same for both employers. Mr. Banks did receive unemployment benefits at the rate of \$358.00 per week commencing January 2014 through October 2014.

Claimant’s response is pertinent only to the extent that it addresses the receipt of unemployment benefits for some of the time frame applicable to the Claim for Relief. The parties stipulated, at the January 15, 2015 Formal Hearing, that Claimant’s average weekly wage is \$952.61.

COR at 2 – 3.

The ALJ issued the following Order in the COR:

ORDER

It is **ORDERED** that Claimant’s claim for relief be, and hereby is, **GRANTED**. Claimant is awarded medical benefits, which include continuing treatment with Michael Batipps, M.D., physical therapy, EMG and MRI testing as well as payment of outstanding medical bills for medical testing and/or treatment causally related to the lumbar impairment and cervical complaints. The claim for temporary total disability benefits, with interest, from February 4, 2014 through the present and continuing is **GRANTED**. Employer is entitled to a credit, against outstanding benefits, for unemployment benefits of \$358.00 per week beginning February 4, 2014 and ending in October of 2014.

COR at 5.

ANALYSIS

The ALJ carried out the mandate of the CRB, no argument is made that she did not do so, and the COR is therefore in accordance with the law.

We note that the ALJ limited the award to the dates of the original claim for relief, which is the correct award and is consistent with the CRB's mandate. It was not the intention of the CRB to direct that any award in excess of the claim for relief be made.

CONCLUSION AND ORDER

The Compensation Order of December 31, 2015 is in accordance with the CRB's Decision and Remand Order of September 30, 2015, and is affirmed.

So ordered.