

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
ACTING DIRECTOR

**CRB No. 14-110**

**REINA CEDILLO,  
Claimant-Respondent,**

**v.**

**MAGGIANO'S/BRINKER'S INTERNATIONAL, INC. and  
LIBERTY MUTUAL INSURANCE COMPANY,  
Employer/Insurer-Petitioner.**

Appeal from an August 27, 2014 Compensation Order by  
Administrative Law Judge Linda F. Jory  
AHD No. 12-542, OWC No. 685473

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 FEB 26 PM 12 33

Barry Leibowitz for the Claimant  
Robin Cole for the Employer/Insurer

Before HEATHER C. LESLIE, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

The Claimant was working as a pantry cook on October 26, 2011 when she sustained an injury to her back when she slipped and fell on an oily floor.

Claimant sought treatment and came under the care of Dr. Robert Buber who then referred Claimant to Dr. Ira D. Fisch. An MRI revealed a disc protrusion and degenerative disc disease. Dr. Fisch released Claimant to light duty work with a restriction of no lifting above 15 pounds in January of 2012. Claimant returned to work for a period of time but was put back on a total disability status by Dr. Fisch on March 12, 2012. Claimant was again released to light duty status. Claimant went to her supervisor, Mr. John Revas to inquire about light duty work. The Employer did not offer Claimant light duty work.

A full evidentiary hearing was held on May 8, 2013. At that hearing, Claimant sought temporary partial disability from February 24, 2012 to February 25, 2012, temporary total disability benefits from March 24, 2012 to the present and continuing, and causally related medical expenses. The issues presented were the nature and extent of Claimant's disability and whether Claimant had

voluntarily limited her income. A Compensation Order (CO) was issued on August 27, 2014 which granted Claimant's claim for relief.

Employer timely appealed. Employer argues the CO is not supported by substantial evidence as Claimant failed to sustain her burden of proving nature and extent, and that Claimant is not entitled to disability benefits as her wage loss is not caused by her work injury.

Claimant opposes Employer's appeal, arguing the CO is supported by the substantial evidence in the record and is in accordance with the law.

#### STANDARD OF REVIEW

The scope of review by the CRB is generally 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. *See*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must 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, and even where this panel might have reached a contrary conclusion. *Id.*, at 885.

#### ANALYSIS

The Employer first argues that Claimant was able to perform her regular job duties even with the restrictions Dr. Fisch placed upon her. Thus Employer argues, the ALJ's conclusion that Claimant was unable to perform her pre-injury work duties is not supported by the substantial evidence in the record.

On this point the ALJ states:

Employer does not contend that claimant was able to perform her pre-injury duties of a pantry worker with no lifting restrictions. The medical evidence also supports a determination that claimant is unable to perform her pre-injury duties. Thus, pursuant to *Logan* the burden shifts to employer to demonstrate the availability of other employment which claimant can perform.

CO at 4.

A review of the hearing transcript supports the ALJ's conclusion above. In opening statement, Employer's counsel stated:

What you're going to hear testimony to is that Ms. Cedillo did receive treatment and she was eventually returned to light duty back in January of 2012 and she did go back to work. She was offered a position at Maggiano's and she was able to work for a few months.

Unfortunately, while she was working and the employer was accommodating her restrictions, she made it difficult to work with her. And eventually on March 25, 2012 she was terminated not because of her injury, but because of personality disputes and her inability to work within the restrictions at Maggiano's, unable to get along with her co-workers [sic].

Hearing transcript at 26-27.

The Employer never argued at the Formal Hearing that Claimant was able to perform her pre-injury job. Moreover, while Claimant returned to her pre-injury job with restrictions, Employer's witness testified that Claimant did require assistance to lift heavy items. The ALJ noted:

Employer asserts that claimant's employment was terminated on March 12, 2012 due to employer's assertion that claimant created a hostile work environment and that a termination "for cause" relieves employer from any liability for claimant's wage loss. In support of its position, employer provided the testimony of Bruce Paine, the General Manager of employer's Chevy Chase location. Mr. Paine testified that claimant's duties involved preparing salads and desserts and that she was responsible for mopping floors using a 4 gallon bucket. With regard to the light duty, Mr. Paine testified that claimant did initially return to light duty which involved most of her regular duties except lifting heavy trays and that he was aware that claimant asked for help with lifting heavy items. HT at 92, 93.

CO at 4.

A review of the hearing transcript supports the ALJ's conclusion. Thus, contrary to Employer's argument, Claimant was not able to perform all her pre-injury duties and required assistance with tasks outside of her restrictions. We reject Employer's arguments.

As the ALJ stated, under *Logan v. DOES*, 805 A.2d 237 (D.C. 2002), as Claimant had demonstrated an inability to perform her pre-injury job thus establishing a *prima facie* case of total disability, the burden then shifted to Employer to establish the availability of other jobs which Claimant could perform. The Employer did not establish the availability of other jobs. Instead, the Employer argued at the Formal Hearing, as before the CRB now, that Claimant's wage loss is not caused by her injury, but because she was fired for unsatisfactory job performance and for creating a hostile work environment. Employer's argument, unnumbered at 5.

The ALJ addressed this argument, stating:

The undersigned finds employer's attempt to establish that claimant voluntarily limited her income because she was a "lousy employee", HT at 182, to be disingenuous at best. If claimant had in fact had an extensive history of complaints about her work, the undersigned agrees with claimant's counsel that the best evidence to establish her work quality would be her personnel file or

testimony from her supervisor as opposed to the hearsay evidence from the general manager. Claimant's supervisor, Mr. Revas would be responsible for the work environment of the pantry and would have first hand knowledge of claimant's conduct or complaints made by other employees.

Under cross-examination, Mr. Paine conceded that he did not know if claimant's personal [sic] file contained anything signed by claimant indicating that she knew she was being terminated. HT at 116. Mr. Paine also acknowledged that claimant came back to employer's location on more than one occasion after the alleged termination and that she brought disability slips when she did. HT at 118. Also on cross-examination, counsel for claimant asked the same question the undersigned raises--why would Dr. Fisch be presented with a list of possible light duty jobs in July by a workers compensation representative is [sic] claimant had in fact been terminated?. HT at 119, 120. Mr. Paine responded that he did not know why that would happen. HT at 120. Mr. Fisch's inability to answer questions with specificity was challenged by the presiding Administrative Law Judge at the formal hearing. See HT at 158, 160.

CO at 4-5

A review of the record supports the ALJ's conclusion. What the Employer is asking this panel to do is to reweigh the evidence in Employer's favor, a task we cannot do. As stated above, the CRB and this review panel must 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, and even where this panel might have reached a contrary conclusion.

#### CONCLUSION AND ORDER

The August 27, 2014 Compensation Order is supported by the substantial evidence in the record and in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Heather C. Leslie

HEATHER C. LESLIE

*Administrative Appeals Judge*

February 26, 2015

DATE