

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-145

PEGGY ENEVOLDSEN,
Claimant-Respondent,

v.

GEORGE WASHINGTON UNIVERSITY
Self-Insured Employer.

Appeal from an November 13, 2014 Compensation Order by
Administrative Law Judge Joan E. Knight
AHD No. 14-110A, OWC No. 705878

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 APR 8 PM 10 51

David M. Snyder for Claimant
Lisa A. Zelenak for Employer

Before JEFFREY P. RUSSELL, and LINDA F. JORY, *Administrative Appeals Judges*, and LAWRENCE
D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On an otherwise unstated date in 2010 and under circumstances not disclosed in the Compensation Order before us, Claimant sustained an injury to her left knee.

Subsequent to that date, on May 24, 2013, Claimant sustained injuries to her back while at work in Employer's library. The injury occurred while she was moving heavy, upholstered chairs, when a chair leg got caught in a carpet seam. Claimant was treated by Dr. Patrick McManus, and Employer made voluntary payments of temporary total disability benefits under the Act from May 25, 2013 until July 7, 2013. Claimant was released by Dr. McManus, and returned to work

on July 29, 2013, but returned to Dr. McManus on August 9, 2013, complaining of increased and persisting low back pain. Dr. McManus again advised Claimant to stop working.

Dr. McManus referred Claimant to an orthopedic specialist, Dr. Raymond Kirchmier, who saw Claimant on August 28, 2013. He had an MRI performed on Claimant's lumbar spine, which revealed mild L2-3 right sided stenosis, disc protrusion and diffuse lumbar spondylosis. Dr. Kirchmier left work-status decisions to Dr. McManus. He also recommended conservative care and referred Claimant to Dr. Dev Sen, a pain management specialist, who Claimant first saw on October 7, 2013.

While treating with Dr. Sen, Claimant underwent knee replacement surgery performed by Dr. Erik Krushinski in November 2013 for the pre-existing knee condition. Dr. Krushinski put Claimant in an off-work status from the date of surgery to February 4, 2014. Claimant received short term disability (STD) and long term disability (LTD) benefits during the time she was recovering from the knee surgery.

Claimant was evaluated by Dr. Marc Danziger at Employer's request for the purpose of an independent medical evaluation (IME) on January 27, 2014. Dr. Danziger opined that based upon his examination, Claimant had sustained a low back strain which had resolved and was, in his opinion, most likely resolved no later than the first week of July 2013. Her inability to work, he concluded, was solely due to her recovery from knee surgery.

On February 24, 2014, Dr. Sen indicated that Claimant could return to work in a sedentary, restricted duty capacity. On February 28, 2014, Dr. McManus authored a report in which he opined that Claimant was "significantly disabled" since the date of the accident at work as a result of low back discomfort, which had caused "the distal musculature to become extremely deconditioned".

Claimant returned to work under the restrictions imposed by Dr. Sen on March 18, 2014. At that time, Employer accommodated her restrictions, primarily by providing her with a motorized wheelchair.

At a formal hearing conducted before an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES), Claimant sought an award for temporary total disability benefits from July 7, 2013 to March 17, 2014. Employer contested the claim on the grounds that (1) Claimant was no longer disabled due to the back injury after July 7, 2013, and (2) even if she was disabled, she sustained no wage loss during the time she was receiving STD and LTD payments.

In a Compensation Order issued November 13, 2014, the ALJ granted Claimant's claim for relief. Employer appealed the Compensation Order to the Compensation Review Board (CRB), and Claimant filed an opposition to that appeal.

Employer argues that the award is erroneous because (1) Claimant's was not disabled from the work injury to her back beyond July 7, 2013, per Dr. Danziger's IME; (2) part of the award included dates when Claimant was working and received wages; (3) any disability from and after the knee surgery is unrelated to the work injury; (4) Claimant's intervening knee surgery would have prevented her from working in any event, and thus Claimant would not have earned wages during that period even absent the alleged back injury; and (5) Employer should not be obliged to make payments of temporary total disability during the periods Claimant received STD and LTD payments because such a scenario would be inequitably "punitive" and would unjustly enrich Claimant by providing her with double recovery.

Claimant opposes the appeal, arguing that Claimant's credible testimony and the collective opinions of Dr. Sen and Dr. McManus, two of her treating physicians, constitute substantial evidence in support of the proposition that Claimant has not been able to return to her pre-injury duties since the date of the back injury, that there is no evidence in the record that Employer offered Claimant suitable alternative employment or work place accommodations until her return to work with the use of an Employer-provided motorized wheelchair, and that Employer should not be entitled to take credit for STD and LTD payments because it produced no evidence that those benefits were "Employer funded". Claimant also asserts that the sole issue at the hearing was nature and extent, and therefore Employer cannot now argue that any period of the claimed disability was not caused by the work injury.

Because the record contains substantial evidence that Claimant was unable to perform her pre-injury duties from the date of injury, despite there being a short period in which she attempted to return work but was unable to continue, the ALJ's determination that Claimant was disabled under the Act until such time as she returned to work in a modified position with accommodation in the form of a motorized wheelchair is supported by substantial evidence, and is affirmed.

Because the record contains no evidence that Employer offered work accommodations prior to Claimant's return to employment on March 17, 2014, the finding that Claimant was disabled when she received no wages during that time is affirmed.

Because Employer provided no evidence that the STD or LTD payments were fully funded by Employer, Employer has failed to demonstrate that there are any equitable reasons why Claimant should not receive wage loss compensation benefits.

Because the award as made includes dates when it is undisputed that Claimant performed work and was paid wages, the award is vacated and the matter is remanded for further consideration and modification of the to conform with the dates that Claimant was found to be unable to work and was not paid wages due to the low back injury.

ANALYSIS

Regarding Employer's argument that Claimant's inability to work while undergoing and recovering from the knee surgery rendered any wage loss unrelated to the stipulated work-related back injury, the ALJ made a factual finding that Claimant was unable to perform her pre-injury job due in part to the work injury to her back¹. This finding is based upon the opinions of her treating physicians and the testimony of Claimant, which the ALJ credited. Employer asks that we substitute our judgment for that of the ALJ on this factual issue, something that we are not empowered or inclined to do. The ALJ's finding that the time missed from work upon which the claim is based was lost, at least in part, due to the back injury, is supported by substantial evidence, and we will not disturb it.

This does not resolve the more complex question regarding the level of benefits to which Claimant is entitled while disabled in part from the work injury.

There is no question that employers are entitled to a credit where an employee receives wage replacement benefits under an employer sponsored disability policy due to a work related injury, under the concept that such payments constitute "advance payments of compensation" for that injury under D.C. Code § 32-1515 (j). That section provides:

If the employer has made advance payments of compensation, he shall be reimbursed out of any unpaid installment or installments of compensation due. All payments prior to an award, to an employee who is injured in the course and scope of employment, shall be considered advance payments of compensation.

See Felder v. DOES, 97 A.3d 86 (D.C. 2014). The claimant is still losing wages, but the employer is given credit for advance payments of wage loss benefits.

In *Felder* it was undisputed that the STD payments made to the claimant and for which the court affirmed the CRB's determination that they constituted advance payments of compensation, were

¹ Although the Compensation Order identifies but one issue, nature and extent of disability, review of the hearing transcript confirms that Employer asserted that at least part of the period off work was not related to the back injury at issue in this case, but was solely due to the unrelated left knee surgery. See, HT 19 – 21. Claimant raised no objection to Employer's identifying the issue as being in contest. Thus, causal relationship should have been identified as an issue. Although the Compensation Order never directly acknowledges the issue, the ALJ's analysis discusses the effect of the back injury on Claimant's ability to perform her pre-injury job and concludes that, except for the brief period from July 29, 2013 to August 9, 2013, Claimant's back injury contributed to her inability to work.

paid pursuant to an employer-funded disability policy or program. Also, the dates and amounts of the payments were made part of the record.

In contrast, the Compensation Order in this case lacks specificity regarding the dates and amounts of the STD and LTD payments made, or the terms of the policies or programs². Most notably, the record contains no information concerning whether Claimant purchased or contributed to the cost of the coverage which provided the benefits, or whether it was fully funded by Employer. These are significant issues that could have an effect upon whether Employer's equitable arguments have merit.

In this appeal, acknowledging that the disability payments were made for the left knee injury, Employer disclaims reliance upon the theory that the payments made were "advance payments of compensation", which perhaps explains why the evidence that is not in the record was not offered. Nonetheless, we feel it useful to point out that, as with a claim that an employer is entitled to a credit under § 32-1515(j), it is an employer's burden to establish entitlement to a credit against benefits otherwise payable under the Act.

The equitable argument put forth is two-fold: first, Employer posits that being required to pay the wage loss benefits related to the work injury constitutes a "punitive" action against Employer (Employer's Brief, page 11), and second, that awarding wage loss benefits under the Act constitutes "double recovery" by Claimant.

Regarding the punitive claim, we disagree. How being required to pay wage loss benefits for a work related injury is "punitive" escapes our understanding. The Act requires that an employer pay wage replacement benefits for work related injuries for many purposes: to promote "humanitarian" concerns about the welfare of injured workers and their dependents (*see Parodi v. DOES*, 560 A.2d 524 (D.C. 1989)), to insure that the cost of workplace injuries are reflected in the cost of the goods or services produced which caused the injuries, and to avoid shifting the cost of workplace injuries to the state, among others. See 1-1-, Lex K. Larson, Larson's Workers' Compensation Law §§ 1.04[1], 1.04[2] (2014). None of the purposes are "punitive".

The policy-based argument and the second equitable argument are in a sense the same: that awarding wage loss benefits for the work injury incentivizes malingering and runs counter to the principal that "no man is ever more than 100% disabled". This is the principle behind the rule that unemployment benefits constitute "advance payments of compensation". *See Beckwith v. Providence Hospital*, CRB No. 07-138, AHD No. 06-139, OWC No. 615744 (September 7, 2007). But, because the award and the disability payments were for separate and distinct injuries, they are not "double recovery", in the sense that double recovery implies getting paid twice for the same loss.

² Although Employer submitted records concerning some details concerning dates and amounts of payments post-hearing, the Compensation Order does not discuss their substance. Further, they are merely printouts of the dates and amount of the payments, and contain no information concerning the nature of the policies. *See* unidentified Employer's Exhibits submitted July 16, 2014 via correspondence from Employer's Counsel; see also HT 69.

Neither the record nor the briefs of the parties shed any light on why it is Claimant was receiving disability payments but not compensation payments for the left knee injury, and we are not in a position to speculate.

Inasmuch as Employer is arguably entitled to a credit or offset for these disability payments if they were in some sense made by Employer, it was Employer's burden to present sufficient evidence for a determination to be made on the central question of who, financially, provided the disability insurance. Thus, even assuming the validity of the premise, Employer in this case did not meet its burden of proof concerning the nature of the policy.

Regarding the final argument, the claim for relief, which was granted in full, was for temporary total disability from July 7, 2013 through March 17, 2014. Yet, it was stipulated that Employer made voluntary payments until July 7, 2013. We are unable to discern whether the stipulation was meant to indicate that Claimant did or did not receive voluntary payment for July 7, 2013, in which case the claim for relief should have commenced July 8, 2013. More significantly, though, the ALJ made a specific factual finding that Claimant returned to work on July 29, 2013, and implies that she continued to work until August 9, 2013, when she was taken off work again by Dr. McManus. Presumably, Claimant was paid wages for the period of the return to work, and thus the award appears to include an award for a period when Claimant was working and received wages for that work. Therefore, we must vacate the award and remand for further consideration of the extent of the wage loss, taking into consideration the fact that the record appears to demonstrate that part of the award includes dates when Claimant worked and was paid wages.

Because the District of Columbia Court of Appeals has held that we are without power to make substantive amendments to compensation orders and awards we must remand this matter to the ALJ for entry of an award consistent with the evidence concerning the days Claimant did not work during her period of temporary total disability. *Washington Metropolitan Area Transit Authority v. DOES (Juni Browne, Intervenor)*, 926 A.2d 140 (D.C. 2007).

CONCLUSION AND ORDER

The award of temporary total disability benefits granting Claimant's claim for temporary total disability for the periods in which she did not work and was not paid wages is affirmed. The specific award of benefits from July 7, 2013 through March 17, 2014 contains dates during which Claimant performed work duties for which she was paid wages, and thus any award for such dates is unsupported by substantial evidence, is not in accordance with law, and is vacated. The matter is remanded for further consideration and issuance of an award consistent with the foregoing Decision and Remand Order regarding eliminating from the award any payments for dates Claimant worked and was paid wages.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL

Administrative Appeals Judge

April 8, 2015

DATE