GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-034

JANNIE WHITE,

Claimant–Respondent,

v.

HOWARD UNIVERSITY HOSPITAL and SEDGWICK CMS,

Employer and Third-Party Administrator - Petitioner.

Appeal from a Compensation Order issued by
The Honorable Karen R. Calmeise
AHD No. 11-300, OWC No. 593801

William Schladt, Esquire for the Petitioner
Rebekah Miller, Esquire for the Respondent

Before HEATHER C. LESLIE,[1] LAWRENCE D. TARR, and MELISSA LIN JONES *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the January 30, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted the Claimant's request for temporary total disability from April 30, 2011 to the present and continuing. We AFFIRM.

[1] Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

FACTS OF RECORD AND PROCEDURAL HISTORY

On September 2, 2003 the Claimant, who is a registered nurse for the Employer, was lifting a patient when she felt a sharp pain in her shoulders. The Claimant sought medical treatment and came under the care and treatment of Dr. Edward Rankin and Dr. Marc Rankin. The Claimant was diagnosed with bilateral rotator cuff tears and underwent surgeries on both shoulders. The Claimant was placed under restrictions by Dr. Edward Rankin which affected her ability to return to her pre-injury job. The Claimant, as a result of her injuries, has not returned to work.

On or about April 30, 2011, a dispute arose as to whether or not the Claimant had voluntarily limited her income by failing to accept a job, a respirator fit tester, which was purportedly within her restrictions.

A Formal Hearing proceeded on November 30, 2011. The Claimant sought a finding that her current neck symptoms were medically causally related to the September 2, 2003 work injury and an award of temporary total disability from April 30, 2011 to the present and continuing. The Employer argued the neck condition was not medically causally related to the work injury and that the Claimant had voluntarily limited her income. The Claimant testified on her own behalf and the Employer introduced the testimony of Dr. Elisabeth Nolte.

A Compensation Order was issued on January 30, 2012. In that order, the ALJ found the neck condition was not medically causally related to the work injury. The ALJ did find that the Claimant had not voluntarily limited her income as the Claimant was not offered a position within her restrictions. The Employer timely appealed.[2]

On appeal the Employer argues that the ALJ misapplied the standard enunciated in *Joyner v. DOES*, 502 A.2d 1027 (D.C. 1986). The Claimant argues that the CO is supported by the substantial evidence in the record.

THE STANDARD OF REVIEW

The scope of review by the Compensation Review Board (CRB) 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. *See* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*., at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id*. at 885.

[2]The finding that the neck condition is not causally related to the September 2, 2003 injury was not appealed. As such, it will not be addressed by this panel.

DISCUSSION AND ANALYSIS

The Employer argues that the ALJ was in error in finding that the Employer failed to show that an offer of suitable employment was made to the Claimant and that the ALJ failed to , properly apply the rationale enunciated in *Joyner, supra.* The Claimant, in opposition, argues that the ALJ correctly applied the standard, quoting *Logan v. DOES*, 805 A.2d 237, 242-243 (D.C. 2002). We agree with Claimant.

It is well established, as correctly noted by the Claimant, that under *Logan*, the District of Columbia Court of Appeals had laid out a burden shifting analysis to be followed when considering the issue of nature and extent of disability within the context of a claim for wage loss benefits. Specifically,

> Once the claimant demonstrates inability to perform his or her usual job, a *prima facie* case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform." *Id*. This scheme is consistent with this court's holding that "the burden is on the employer to prove that work for which the claimant was qualified was in fact available." *Washington Post*, 675 A.2d at 41 (quoting *Joyner v. District of Columbia Dep't of Employment Servs.*, 502 A.2d 1027, 1031 n.4 (D.C. 1986)). We went on to explain in *Washington Post* "that the employer can meet this burden 'by proof short of offering the claimant a specific job or proving that some employer specifically offered claimant a job.'" *Id.* (quoting *Joyner*, 502 A.2d at 1031 n.4). Rather, as we had said in *Joyner*, quoting with approval decisions interpreting the federal act, see note 4, *infra*, "job availability should incorporate the answer to two [substantive] questions":
>
> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? 2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.
>
> 502 A.2d at 1031 n.4 (citations omitted).

Logan, supra at 242-243.

If the Employer satisfies such a showing, the burden reverts back to the Claimant to overcome the Employer's evidence.

There is no dispute that the Claimant cannot return to her pre-injury job. Thus, the burden was on the Employer to refute the Claimant's claim for total disability by showing either that it offered suitable modified employment to the Claimant which was refused, or that there exists jobs in the relevant labor market that the Claimant could compete for and likely obtain. *Logan, id.*.

A review of the CO reveals the ALJ found persuasive the testimony of the Employer's witness, Ms. Nolte. Specifically,

At the Formal Hearing, Ms. Nolte testified that she told the Claimant that the phone conversation what the job duties entailed however, she did not recall what job duties she explained or what details about the position. (HT 74) Ms. Nolte also testified that the phone conversation was not a formal interview; she was calling the Claimant to let her know that a position was going to be available. (HT 80) Ms. Nolte followed the phone conversation with a written job description dated April 15, 2011 but she admits that the letter was not a job offer but an inquiry as to whether the [applicant] could do the job. (HT 81).

> Q. Okay. So you basically offered the job to three other individuals.
>
> A. To two other individuals.
>
> Q. Two other individuals, so you were going to hire all three of them if they could to it?
>
> A. No. I just wanted to know who was able to do the job.

Ms. Nolte further testified that after she received Claimant's response with a listing of her physical restrictions, she did not contact the Claimant to let her know that her physical restrictions could be met in the "fit-testing" job.

> Q. And so you sent her a letter saying that if you can do this job you can have the job?
>
> A. Right
>
> Q. but she was required to come back and say, "Yes, I can, or No I can't?
>
> A. That's correct. . .
>
> Q. And she's come back and said "No, I can't", based on the information you have presented?
>
> A. That's correct. . .
>
> Q. And this letter went to Mr. Schladt and to the Claims Examiners, but did you ever call the Claimant back and let her know that [her limitations] shouldn't be a problem?
>
> A. No, I did not.

(HT 84, 85, 86).

Although Claimant may have been able to perform the mechanics of the job; from the testimony presented, Employer has [not][3] shown that an offer of suitable

[3] We do note that the word "not" is missing from the ALJ's conclusion in the CO. However, we will treat this as an administrative oversight as taken together with the other conclusions, notably the ALJ stating that Ms. Nolte "admits the letter was not a job offer" on page 7 of the CO, it is clear that the ALJ erroneously left out "not" in the sentence

> alternative employment was made to the Claimant. Claimant did not voluntarily limit her income therefore; she remains temporarily totally disabled as a result of the September 2, 2003 work injury.

CO at 7-8.

We find no error in the above analysis and reject the Employer's argument that "to require additional communications from the Employer in order to show an offer of suitable alternative employment would be inconsistent with the Claimant's obligation to show she diligently pursued the light duty jobs available to her for which she is qualified." Employer's Argument unnumbered. The record evidence supports the ALJ"s finding that the Employer failed to *offer* suitable alternative employment that the Claimant then rejected. Moreover, other than the one job that the Employer potentially had for the Claimant, which was not offered, the Employer failed to put forth any evidence that there existed jobs in the relevant labor market that the Claimant could compete for and likely obtain, pursuant to *Logan, supra*. Only until such time that the Employer satisfied this burden, would the Claimant then be required to overcome the Employer's evidence by attacking the suitability of the job offered or by showing that other suitable jobs are not available. The Employer simply failed in this burden.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the January 30, 2012 Compensation Order is supported by substantial evidence in the record. It is **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

April 24, 2012
DATE

above, and did not mean for the sentence to convey in the affirmative the Employer offered suitable alternative employment.