

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau**

**Office of Hearings and Adjudication
Compensation Review Board**

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CRB No. 06-88

JEROME SIMMONS,

Claimant – Petitioner,

v.

UNITED PARCEL SERVICE AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
OHA No. 03-365, OWC No. 560258

Benjamin T. Boscolo, Esq., for the Petitioner

Jennifer Watkins, Esq., for the Respondent

Before FLOYD LEWIS, LINDA F. JORY and SHARMAN J. MONROE, *Administrative Appeals Judges.*

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on August 8, 2006, the Administrative Law Judge (ALJ) awarded permanent partial disability benefits continuing from March 11, 2002 based upon a wage loss pursuant to an election under D.C. Official Code § 32-1508(V)(i)(ii)(I) or (II), but denied schedule permanent partial disability benefits. The Claimant-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the Compensation Order is not supported by substantial evidence and not in accordance with the law.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, 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. D.C. Official Code § 32-1521.01 (d)(2)(A). “Substantial evidence,” as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int’l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, the Petitioner alleges that the ALJ failed to make findings of fact on his average weekly wage with his subsequent employer, TruGreen ChemLawn as required under the Act so that the parties can calculate the benefits to which he is entitled. Moreover, the Petitioner alleges that the ALJ stated a formula for calculating his permanent partial disability benefits based upon a wage loss which is inconsistent with the Act and the holding of *Echeverria v. Marriott*, CRB No. 05-243, OHA No. 02-005B, OWC No. 517977 (September 23, 2005).² With respect to his request for a schedule award based upon a disability to the right lower extremity, which was denied, the Petitioner argues that the opinion of Dr. William Tham, the treating physician, that he sustained a 40% permanent partial disability to

Support Act of 2004, Title J, the D.C. Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director’s Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers’ and disability compensation claims arising under the D.C. Workers’ Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

² The correct case name for this citation is *Echeverria v. Ritz-Carlton Hotel*.

his right lower extremity as a result of his work-related back injury is the only remaining medical evidence in the record after the rejection of the opinion of Dr. James Callan, the independent medical examiner, and that he is, therefore entitled to such an award.

In adjudicating a case, an ALJ is required to make findings of fact and conclusions of law on each materially contested issue presented for resolution. *See Fontenot v. D.C. Department of Employment Services*, 804 A.2d 1104, 1107 (D.C. 2002); D.C. Official Code § 2-509. Failure of an ALJ to do so will result in a remand as a reviewing body is not permitted to make its own findings on any issue. *See Georgetown University v. D.C. Department of Employment Services*, 862 A.2d 387, 391 (D.C. 2004).

In the instant matter, the issues identified and acknowledged for adjudication at the formal hearing were: 1) whether the claimant's current condition arose out of and in the course of his employment and is causally related to his March 13, 2000 work injury, and 2) the nature and extent of his disability, if any. *See* Hearing Transcript (HT) at p. 5; Compensation Order at p. 2. Although the parties presented views on the amount of wage loss benefits payable to the Petitioner under D.C. Official Code § 32-1508(V)(i) in their opening statements, neither party requested that the amount payable be heard as an issue and the ALJ did not add it as an issue. The Panel notes that in his claim for relief, the Petitioner did not request a specified amount in wage loss benefits. HT at p. 14. Therefore, the calculation of the Petitioner's average weekly wage was not an issue in this case and the ALJ was not required to make findings of fact and conclusions of law on the amount of wage loss benefits payable to the Petitioner.

With respect to the wage loss formula, the ALJ found that the Petitioner sustained a permanent partial disability as a result of his back injury. The ALJ then found, “. . . based upon the claimant's partial wage loss, that he [Petitioner] is entitled to elect to be paid permanent partial disability compensation benefits at the 66 2/3% of the greater of his wage loss based upon the formula set forth pursuant to D.C. Code § 32-1508(V)(i)(ii)(I) or (II).” Compensation Order at p. 12. A review of the Act reveals that the ALJ correctly stated the formula for calculating the Petitioner's wage loss benefits. In this appeal, the Petitioner asserts that the ALJ enunciated a new formula requiring the comparison of the average weekly wage of his post-injury job at the time of his injury with the average weekly wage of his pre-injury job at the time of his injury. This assertion is based upon footnote 3 in the Compensation Order. Footnote 3 states:

The employer submitted into evidence pay stubs of the claimant for the period from March 16, 2002 though June 14, 2003 representing his earnings with his new employer and wage loss for that period from his prior earnings. Pursuant to the formula set forth in D.C. Code § 32-1508 (V)(i)(ii)(I)(II) [sic] these records of earnings are the basis upon which the claimant shall make his election. EE 3.

Compensation Order at p. 12

There is no language in this footnote directing a comparison of average weekly wages. The footnote merely states that the Respondent presented evidence of the Petitioner's post-injury wages which are the basis for his election pursuant to D.C. Official Code § 32-1508 (V)(i) and

(ii).³ This statement is accurate. The proffered wage information can be used to calculate the actual wage of the job the Petitioner held when he returned to work, *i.e.*, post-injury wage, under D.C. Official Code § 32-1508 (V)(i)(ii)(II).

After a review of the record, the Panel determines that the Petitioner's arguments on the failure to calculate, or calculation of, the specific amount of his permanent partial wage loss benefits payable are without merit as the calculation was not at issue.

In addition to a permanent partial wage loss award based upon his March 13, 2000 back injury, the Petitioner was also seeking a permanent partial schedule award for his right leg, asserting that he also sustained a distinct and separable to his right leg and pursuant to *Sullivan v. Boatman & Magnani*, CRB No. 03-74, OHA No. 90-597E, OWC No. 088187 (August 31, 2005), was entitled to a schedule award for his leg. In denying the Petitioner's claim for a schedule award, the ALJ rejected the opinion of Dr. Callan as the Petitioner argues on appeal. However, contrary to the Petitioner's argument, this rejection did not make Dr. Tham's opinion of a 40% disability to the right lower extremity the only viable opinion of record, thereby forcing an acceptance of his rating. The Petitioner's argument fails to take into consideration that he may not be entitled to an additional schedule award as a result of his back injury.

Herein, the ALJ found that the Petitioner did not sustain "an independent, separate, clearly identifiable loss of function or disability of the right leg from the back injury." Compensation Order at p. 3. After reviewing all the medical evidence, the Panel determines that the ALJ's finding is supported by substantial evidence in the record and will not set it aside.

CONCLUSION

The Compensation Order of August 8, 2006 is supported by substantial evidence in the record and is in accordance with the law.

³ In the decision, the ALJ found, consistent with the law, that the Petitioner was entitled to elect to be paid wage loss benefits under D.C. Official Code § 32-1508 (V)(i)(ii)(I) or D.C. Official Code § 32-1508 (V)(i)(ii)(II). *See* Compensation Order at p. 12.

ORDER

The Compensation Order of August 8, 2006 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

November 14, 2006
DATE