

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-045**

**AIESHA R. NICKENS,  
Claimant-Petitioner,**

v.

**FORT MYER CONSTRUCTION COMPANY  
and LIBERTY MUTUAL INSURANCE,  
Employer and Insurer-Respondent.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
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Appeal from a March 26, 2014 Compensation Order on Remand  
by Administrative Law Judge Linda F. Jory  
AHD No. 12-455, OWC No. 687767

Eric M. May for Petitioner  
Gerard M. Emig for the Respondent

Before: JEFFREY P. RUSSELL and MELISSA LIN JONES, *Administrative Appeals Judges* and  
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION AND ORDER**

**BACKGROUND AND FACTS OF RECORD**

On March 30, 2011, the claimant, Aiesha Nickens, was employed as an apprentice with the Laborers' Union, having been so employed for about four months with this employer. She also was employed as a waitress during this time.

On March 30, 2011, Ms. Nickens injured her right leg and knee when she was struck by a Bobcat machine at work. She was taken to Howard University Hospital where her fractured right tibia was surgically repaired. About a month later she underwent a second surgery because the surgical site had become infected.

The claimant underwent a period of recuperation and was authorized to return to light duty work on November 27, 2011. No light duty work was available. After remaining unemployed for about a year, she obtained employment as a stock clerk working 30 hours per week in a grocery

store.<sup>1</sup> After the accident, Ms. Nickens also enrolled as a full-time student at the University of the District of Columbia.

She was evaluated by two physicians for the purpose of independent medical examinations (IMEs). Dr. Jeffrey Phillips, hired by the claimant, opined that under the American Medical Association Guides to the Evaluation of Permanent Impairment (the Guides) Ms. Nickens has sustained a 10% right leg impairment, and an additional 8% for lost function and decreased endurance, for a total of 18% permanent partial impairment to the right leg.

Dr. Samuel Matz, hired by the employer, opined that Ms. Nickens had sustained a 25% permanent partial impairment to the right ankle, which he also opined is equivalent to 17.5% impairment to the right leg.

In a Compensation Order issued April 30, 2013 (CO 1), an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES) found “that the claimant has suffered an 18% rating [sic] to her right leg.” The ALJ awarded disability benefits for the 18% permanent partial disability to her right leg. No date of having obtained that status was included in the Compensation Order.

Ms. Nickens timely appealed the award to the Compensation Review Board (CRB), arguing that the award should be greater because the ALJ failed to take into account the degree to which the injury resulted in a probable loss of future earnings, citing *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012) and *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007).

Fort Myer Construction (Fort Myer) filed an opposition, arguing that there was no basis to award anything more than 18% because Ms. Nickens was, at the time of the formal hearing, earning more working in the grocery store than she did during some weeks while working as an apprentice, that any future wage losses from construction labor are speculative because they assume that Ms. Nickens would successfully complete an additional year of apprenticeship and become a higher skilled laborer, and that Ms. Nickens voluntarily changed career paths, in that she was pursuing a business management degree at the time of the formal hearing and planned to open a restaurant.

On August 6, 2013, the CRB issued a Decision and Remand Order (DRO), in which the following was written:

We note that claimant’s argument implicitly acknowledges the difficulty in making an award that includes a rational, record-based prediction of the effect the medical impairment will have upon her future earnings, if any, in that nowhere in her memorandum or in the transcript of the formal hearing did the claimant

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<sup>1</sup> CO 1 stated that Ms. Nickens received unemployment benefits during the year that she was unable to work in her pre-injury job. The parties also stipulated that Fort Myer is entitled to a credit of \$6,433.00 against any permanency award. The CO 1 did not explain the basis of the credit, nor did it address whether the claimant received temporary total disability benefits during this time.

Moreover, although the ALJ stated the claimant took “a significant pay decrease”, the amount of that decrease was not subject to a finding of fact, nor did the CO 1 indicate whether the decrease included wages lost from her waitress position, or whether anything prevented her from returning to that job.

CO 1 also stated that the claimant testified that she is unable to return to her pre-injury job as a Labor Union apprentice. However, there was no finding of fact with respect to this testimony.

identify what the appropriate award is nor did she suggest any method for calculating the award on the record evidence. Rather, claimant merely argues that the award should be “substantially higher” than 18%.

It should also be noted that the claimant failed to present any expert testimony from a labor market or occupational economist, expressing an opinion as to what the appropriate award should be or the method of calculating an appropriate award. Rather, it appears that the error about which the claimant complains in this appeal is that the medical impairment rating that she herself proffered was accepted by the ALJ as a fair representation of the degree of disability.

It would be proper for the ALJ to make a determination as to the degree of medical impairment as one step in analyzing the extent of the claimant’s disability. However, it is incumbent upon the ALJ to consider whether the record contains sufficient specific, non-speculative evidence upon which to assess whether the impairment sustained is such that the medical impairment overstates, understates, or fairly represents the effect of the impairment on future earnings.

In this case, the ALJ asserted that there is such an effect demonstrated, but she made no specific findings of fact to support her assertion. The ALJ made general conclusory statements concerning the fact that the injury has caused a wage earning capacity loss, but has not identified specifically what degree of vocational impairment the evidence demonstrates. We must remand this case because we are unable to discern whether the award is premised solely upon a finding of an 18% medical impairment, which is suggested by the lack of any specific non-medical findings of a vocational variety.

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The statute permits considering the Guides when assessing the extent of a schedule disability. The court in *Jones* prohibits disability awards that are not of a numerical value derived from identifiable record evidence through some method that can be explained, not merely in principle, but in sufficient detail so as to allow one to understand why an ALJ awarded “7% -- and not for example 1%, 10% or 30%.” The court posed this query despite the fact that the court believed that the ALJ had made a finding of a 6% medical impairment to the relevant body part. In the *Jones* case, the court faulted the ALJ for not stating the reason for going from a 6% medical impairment to a 7% permanency award.

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In light of this required specificity, the Act’s embrace of the Guides takes on greater significance. The Guides result in a number expressed as a percentage; the schedule requires an award expressed as a percentage. Thus, the schedule in the statute impliedly permits the use of the degree of medical impairment as a baseline for the extent of disability.

It would not be error for an ALJ to make a finding as to the degree of medical impairment if the finding is supported by substantial evidence, and it would not be error to accept the degree of medical impairment as fairly representing the extent of disability under the schedule if the record fails to contain specific, identifiable,

calculable and non-speculative evidence to the contrary. A disability award may be composed of a medical impairment rating to which may be added or subtracted an amount representing future wage earning loss.

In the present case, the ALJ might have applied the correct calculation and found that 18% is the extent of disability because the claimant did not present specific evidence of the effect of her injury on her future wage impairment. However, the CRB must vacate the ALJ's award because the Compensation Order did not state this nor did it identify the basis for the ALJ's award.

### **Conclusion and Order**

The Compensation Order contains incomplete findings concerning the vocational impact of the injury on the claimant's future earnings and is therefore not in accordance with the law as set forth in *Jones, supra.* Accordingly, the award is vacated and the matter remanded for further consideration, including specific findings of fact on the issues identified in the above Decision and Remand Order as having been omitted from fact finding and consideration.

DRO, pp. 2 – 5.

The original ALJ left employment at DOES without issuing a Compensation Order on Remand. AHD issued an order directing the parties to show cause why the matter should not be assigned to a different ALJ to carry out the CRB's directive based upon the record already developed. Both parties consented to such re-assignment.

On March 26, 2014, a new ALJ issued a Compensation Order on Remand (COR), in which the claimant was awarded 18% permanent partial disability (ppd) under the schedule. The claimant appealed the COR to the CRB, to which appeal the employer filed an opposition.

Because the COR follows the directive of the CRB as contained in the DRO, and because the award is supported by substantial evidence, we affirm the COR.

### **DISCUSSION AND ANALYSIS<sup>2</sup>**

In the COR, the ALJ first undertook a thorough review of the medical evidence, including the opinions of both independent medical examiners, one of which (proffered by claimant) opined that claimant had sustained a 10% permanent partial impairment to the right leg under the Guides, and an additional 8% for "loss of function and endurance", for a total impairment rating of 18%, and the other of which (proffered by employer) opined that claimant had sustained a 17 to 17 ½ % impairment to the right leg. The ALJ concluded that these medical opinions were not in significant conflict, and she found that the claimant has been left with an 18% permanent partial impairment to the right leg.

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<sup>2</sup> The CRB reviews a Compensation Order to determine whether the factual findings are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB will 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.

The ALJ then proceeded to consider whether there was anything “in the instant record which would warrant deviation from 18% as a baseline” before “assessing the likelihood (or lack thereof) of an effect upon future earnings as the Court of Appeals in *Jones* suggests.” COR, pp. 5 – 6.

The ALJ considered the arguments asserted by claimant for an upward deviation from the 18% baseline, being: (1) the claimant’s average weekly wage at the time of the accident is not a true representation of her likely future earnings in the construction field, because the injury occurred in March, and if it had occurred in the summer months she would have earned significantly more in overtime; (2) at the time of the injury, claimant was in training to become a journeyman, which pays more than her laborer position; (3) claimant is unable to return to the “heavy work” of her former position or tolerate the amount of standing and walking required in her waitress position; (4) her current wages in the grocery store are less than her pre-injury wage and less than they would have been had she achieved journeyman status; and (5) it is too speculative to postulate that claimant will recoup her lost earnings by opening a restaurant.

The ALJ also considered employer’s argument that claimant has voluntarily chosen to pursue a new career path by seeking a degree in business management, and there is nothing in the record to justify any additional ppd award, beyond the 18% medical impairment figure.

The ALJ then reasoned:

While the undersigned is mindful that in order to determine the vocational impact of the injury on claimant’s future earnings some level of estimation if not speculation is needed. However, in order to even begin to estimate the impact on future earnings, there must be some evidence of an inability to perform the pre-injury work claimant was performing when she was injured. While counsel baldly asserts that claimant’s injury prohibits her from returning to the type of heavy duty work she was previously doing, there is no opinion from her treating surgeon or her IME physician that she is unable to perform the duties she was performing while working towards her journeyman classification. Similarly, claimant testified that she was medically cleared to return to work on the 27<sup>th</sup> of November by her treating surgeon and when she called employer she was told she was laid off as employer did not have any work available. HT at 42. Although counsel attempted to classify the release to return to work as a light duty release at the hearing, there simply [sic] no evidence to support this assertion. HT at 42. The last report from Dr. Onyike in the instant record is dated September 13, 2011 which indicates that Dr. Onyike thought claimant would be able return to return to work in one month. There is nothing in the record from any physician dated November 27, 2011 or any indication whatsoever that claimant had physical restrictions placed on her by her physician. Indeed, there is no indication that claimant ever returned to Dr. Onyike after September 13, 2011.

The undersigned further notes there is no indication [sic] the record nor was there any testimony by claimant that she elected to change her profession and attend school due to the work injury. Nevertheless, it is clear claimant made a voluntary

decision to change professions and she testified the reason she wanted to obtain a degree in business management was because she wanted to become an entrepreneur. Claimant's suggestion that the undersigned speculate whether she would be successful [in her journeyman apprenticeship] or that she would have earned more had she been injured in the summer work months is not a reasonable request in light of the evidence presented.

It is concluded that claimant did not present specific evidence of the effect of her injury on her future wage impairment and claimant is accordingly not entitled to any additional permanent impairment percentage over the 18% the undersigned has concluded claimant is entitled to receive.

COR, pp. 6 – 7.

Claimant argues before us that her testimony concerning her own view as to whether or not she can return to work as an apprentice laborer compels the ALJ to reach that same conclusion. However, a reasonable person relying upon the medical records before the ALJ and the testimony cited by the ALJ concerning claimant's reasons for returning to school could conclude otherwise. While the claimant's testimony *could* be read as claimant argues, it could also be read as the ALJ interpreted it. Such a determination is the province of the fact-finder, and we will not substitute our judgment for that of the ALJ. This particularly true where, as here, the claimant bears the burden of proof. *See Dunston v. DOES*, 509 A.2d 109 (D.C. 1986).

#### CONCLUSION AND ORDER

The ALJ considered the evidence in the manner that was consistent with the remand instructions in the DRO, and the CRB is persuaded that the ALJ's conclusions rationally flow from the record evidence cited. The Compensation Order on Remand of March 26, 2014 is supported by substantial evidence and in accordance with the law. It is affirmed.



JEFFREY P. RUSSELL  
*Administrative Appeals Judge*

August 19, 2014  
DATE