

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 11-081**

**BESSIE HILL,**

**Claimant- Petitioner,**

**v.**

**HOWARD UNIVERSITY,**

**AND**

**SEDGWICK CMS.**

**Employer/Carrier - Respondent.**

Appeal from a Compensation Order of  
Administrative Law Anand K. Verma  
AHD No. 10-117A, OWC No. 657973

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2011 DEC 22 AM 11 47

Jason C. Zappasodi, Esquire, for the Claimant  
William H. Schladt, Esquire, for the Employer

Before HEATHER C. LESLIE,<sup>1</sup> LAWRENCE D. TARR, and JEFFREY P. RUSSELL,<sup>2</sup> *Administrative Appeals Judges.*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board;  
JEFFREY P. RUSSELL, *Administrative Appeals Judge*, concurring.

**DECISION AND REMAND ORDER**

**OVERVIEW**

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the July 21, 2011, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section<sup>3</sup> of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted, in part, the Claimant's request for permanent partial disability benefits to the Claimant's left lower

<sup>1</sup> 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).

<sup>2</sup> Judge Russell has been appointed by the Director of the DOES as a interim CRB Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

<sup>3</sup> Formerly known as the Administrative Hearings Division.

extremity but denied permanent partial disability to her right lower extremity. We VACATE and REMAND.

### **BACKGROUND AND FACTS OF RECORD**

On March 6, 2009 the Claimant, an Administrative Assistant for the Employer, injured both her lower and upper extremities at work while exiting a bus. The Claimant sought treatment for this injury, ultimately coming under the care and treatment of Dr. Timothy Bhattacharyya. The Claimant underwent surgery to her left quadriceps tendon as a result of her work injury and as a result of this surgery, was out of work for several weeks. Dr. Bhattacharyya, after treating the Claimant, stated that as a result of her work injury, the Claimant suffered from a 12% permanent impairment to her left leg. Dr. Bhattacharyya did not render an opinion on what, if any, permanent impairment the Claimant sustained as a result of the work injury to her right leg.

Of her own volition, the Claimant underwent an independent medical evaluation (IME) on October 5, 2010 with Dr. Jeffrey Phillips. Dr. Phillips opined the Claimant suffered from a 29% permanent impairment to the left leg and a 7% permanent impairment to the right leg. The Claimant pursued permanent partial disability benefits based upon Dr. Phillips rating.

A full evidentiary proceeded on June 21, 2011 with the nature and extent of disability the sole issue to be adjudicated. The Claimant relied upon the opinion of Dr. Phillips while the Employer relied upon the opinion of the Claimant's treating physician, Dr. Bhattacharyya. A CO was issued on July 21, 2011 which granted, in part, the Claimant request for permanent partial disability to her left leg. The ALJ denied any award of permanency to the right leg. The ALJ found persuasive the opinion Dr. Bhattacharyya over that of Dr. Phillips.

The Claimant timely appealed. On appeal, the Claimant argues that 1) the ALJ was in error by not considering the five factors enunciated under D.C. Official Code § 32-1508(U-i) (the "Maryland factors") when determining permanent partial disability; 2) the ALJ was in error by considering actual wage loss; 3) the ALJ erred by not finding a causal relationship between the right leg and the work accident, a stipulated issue; and, 4) the ALJ's reliance on the treating physician's opinion was in error.

The Employer responds by arguing that the evidence in the record supports that ALJ's conclusions and that as a matter of law, there is no basis to reverse the CO.

### **THE STANDARD OF REVIEW**

The scope of review by the 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.

### DISCUSSION AND ANALYSIS

The Claimant's first argument is that as the CO failed to consider the five factors enunciated in D.C. Official Code § 32-1508(U-i) when determining permanent partial disability, the CO should be reversed and remanded. Specifically, the Claimant argues, "the Compensation Order could not have considered the Maryland factors as required under *Wormack*<sup>4</sup> because they are never mentioned in its analysis." Claimant's argument at 5. We disagree.

*Wormack* does not mandate specific findings be made with regard to the factors listed in D.C. Official Code § 32-1508(U-i), commonly referred to as the "Maryland five factors." In *Kane v. WMATA*,<sup>5</sup> when addressing virtually the same argument, the CRB stated,

Nothing in the APA or Agency precedent requires that an ALJ make specific findings on every potential factual scenario or criteria that might have had a potential effect on a determination. They require that the record be considered as a whole, and that findings of fact be made based thereon. If there is substantial evidence in that record upon which the ALJ relies and which a reasonable mind might accept to support the factual findings, and if the legal conclusion reached by the ALJ flows rationally from those facts, the decision must be affirmed.

*Kane*, *supra* at 3.

Moreover, nothing in the Act requires the ALJ to consider the "Maryland five factors," or even the AMA Guides. D.C. Official Code § 32-1508(U-i) states, in pertinent part,

In determining disability ... [under the schedule], the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment *may* be utilized, along with the following 5 factors: (i) Pain; (ii) Weakness; (iii) Atrophy; (iv) Loss of endurance; and (v) Loss of function." (Emphasis added.)

The statute clearly utilizes the term "may" to allow the ALJ the discretion to determine what factors, if any, ultimately to use in coming to a conclusion on what permanent partial disability the Claimant may, or may not be, entitled to. We decline to follow the argument put forth by the Claimant.

The Claimant's next argument is that the ALJ was in error when actual wage loss was considered when analyzing the Claimant's entitlement to permanent partial disability. A review of the CO reveals the ALJ first correctly noted the burden of proof when nature and extent is at issue as the preponderance of the evidence standard. Moreover, as the CO correctly noted, the claim for relief sought is a scheduled award governed by D.C. Code § 32-1508(3)(A-U).

However, after quoting the correct standard, the ALJ quoted D.C. Code § 32-1508(3)(V), applicable to non scheduled injuries which does allow for a wage loss recovery. This is in error. As the claim for relief is for a scheduled member governed by D.C. Code § 32-1508(3)(B), wage

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<sup>4</sup> *Wormack v. Fishback and Moore*, CRB No. 03-159, AHD No. 03-151 (July 22, 2005).

<sup>5</sup> CRB No. 10-071, AHD No. 09-483 (November 8, 2011).

loss is not a consideration. It is clear, however, that the ALJ did take into consideration wage loss in the ultimate conclusion. The CO states,

Furthermore, it has not been alleged nor made apparent from the proffered evidence that after resuming her pre-injury employment claimant suffered any loss of wages in comparison to what she earned prior to her injury. "Disability is an economic and not a medical concept and any injury that does not result in loss of wage earning capacity cannot be the foundation for a finding of disability. See *Upchurch v. District of Columbia Department of Employment Services*, 783 A. 2d 623, 627 (D.C. 2001)(quoting *Washington Post v. District of Columbia Department of Employment Services*, 675 A. 2d 37, 40-41(D.C. 1996)). Schedule award is intended to compensate only for economic, not physical impairment" *Smith, supra*, 548 A. 2d at 101. It has been held that there is nothing in the plain words of statutory provisions stating explicitly, or even implicitly, that the determination of disability is the sole function of a medical doctor. And, the legislative history of the D.C. Code provision cautions against the notion that only doctors may determine disability, as defined in the statute. See Council of the District of Columbia, Committee on Government Operations, Report on Bill 12-192, the "Workers" Compensation Act of 1988," October 29, 1998 ("Committee Report"), at page 5 of the original bill.

The D.C. Court of Appeals has held that "ALJs have discretion in determining disability percentage ratings and disability awards without having "to choose a disability percentage rating provided either by the claimant's or the employer's medical examiner." See *Negussie v. District of Columbia Department of Employment Services*, 915 A. 2d 391 (2007).

*Hill, supra* at 6-7.

As this passage shows, the ALJ erroneously considered wage loss when awarding permanent partial disability to the left and right leg.<sup>6</sup> This error requires the CO to be remanded to the ALJ for reconsideration of the Claimant's entitlement to permanent partial disability regardless of any wage loss the Claimant may, or may not have suffered.

We remind the ALJ the rationale enunciated in *Corrigan v. Georgetown University*.<sup>7</sup> The panel in *Corrigan*, after an exhaustive discussion regarding relevant cases to wage loss and scheduled awards found,

We thus find nothing in the case law, let alone in the Act itself, that supports the proposition that wage loss may be taken into consideration in assessing the degree of disability for a schedule award. In the words of Administrative Appeals Judge Lewis, "In contrast to the Act's wage loss provisions, an injured employee is

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<sup>6</sup> We are aware of the Decision and Remand Order issued in *Parran v. Cash Management Solutions*, CRB No. 11-080, AHD No. 11-053, OWC No. 669891 (December 22, 2011) where another panel found the same ALJ not in error when mentioning the Claimant (in *Parran*) returned to work making the same wages. This case is distinguishable from *Parran* as the CRB in that case determined the mention of wages was in the context of the Claimant's work capacity, not actual earnings. Such is not the case here where the ALJ considered wage loss, as explained above.

<sup>7</sup> CRB No. 06-094, AHD No. 06-256 (September 14, 2007).

eligible for a schedule award in spite of whether he or she actually suffers a wage loss due to the disability." *Sullivan v. Boatman & Magnani, et al.*, CRB No. 03-74, OHA No. 90-597E (August 31, 2005). Indeed, to incorporate consideration of wage loss into schedule award disability determinations would be to undermine the two principle justifications for this category of permanent partial disability awards. *i.e.* that by limiting schedule awards "to obvious and easily-provable losses of members . . . the gravity of the impairment support[s] a conclusive presumption that actual wage loss [will] sooner or later result; and the conspicuousness of the loss guarantee[s] that awards [can] be made with no controversy whatsoever." 2 LARSON § 57.15(c), at 10-54. To incorporate consideration of wage loss into schedule award disability determinations would also undermine the mutually exclusive nature of the Act's schedule award provisions and the "wage-loss" provision at § 32-1508(3)(V), recognized by the Court in *Lenaerts v. D.C. Dept. of Employment Services*, 545 A.2d 1234 (D.C. 1988), that precludes a claimant from electing to recover actual wage loss benefits in lieu of the fixed amount of compensation awarded pursuant to a schedule award for the same disability. Notwithstanding the ALJ's possible suggestion in the instant case that a claimant entitled to a schedule award may instead elect to receive compensation pursuant to D.C. Official Code § 32-1508(3)(V), it is by now axiomatic within this jurisdiction that an injured worker is not entitled to elect to receive wage loss benefits for an injury to a schedule member. If the determination of the extent of disability to a schedule member was intended by the Act to include consideration of any resulting wage loss, the distinction between the provisions of § 32-1508(3)(A)-(S) and § 32-1508(3)(V) would be unnecessary. If, contrary to the express language of these provisions of the Act and the decisions interpreting them, the CRB were nevertheless to hold that the determination of the extent of permanent disability benefits for an injury to a scheduled member hinged upon the presence or absence of the injured employee's resulting wage loss, our doing so would constitute administrative repeal of the distinction the Act has drawn, action which we are not prepared to countenance nor believe that we have the authority to effect.

Upon remand the ALJ is directed to reconsider the Claimant's request for permanent partial disability benefits without any consideration of wage loss.

The Claimant's third argument is that the ALJ "erroneously found causal relationship of Ms. Hill's right leg to be contested." Claimant's argument at 7. A review of the CO reveals the following passage:

Claimant argues that Dr. Bhattacharyya did not rate the right knee and, therefore, his rating should be "discarded." A careful scrutiny of the adduced at the hearing demonstrates claimant's complaint in the right leg did not surface until March 31, 2010, more than a year after the work injury of March 6, 2009. Superficial tenderness about the right knee coupled with achilles tendinopathy was first noted by Dr. Bhattacharyya in his follow up examination on November 12, 2010; it was not manifested at the time of March 6, 2009 injury. Hence, absent any causal connection between the right knee symptoms and the original injury, Dr.

Bhattacharyya most likely did not think prudent to apportion any impairment of the right knee.

*Hill, supra* at 6.

We agree that the ALJ does seem to revisit the issue of medical causation, which was stipulated to by the parties and was not a contested issue. The only issue for the ALJ to consider was the nature and extent of the Claimant's right and left leg and whether or not the Claimant had proven, by a preponderance of the evidence, whether he suffered a permanent partial disability in one or both legs in the amount claimed. We also agree with the Claimant that the ALJ's erred when he stated the treating physician "most likely did not think prudent to apportion any impairment of the right knee" because an award, or the denial of an award, cannot be based on conjecture or surmise. *Id.* If the ALJ believes that Dr. Bhattacharyya February 7, 2011 opinion should be interpreted as providing a 0 % permanent partial disability rating to the claimant's right knee, the ALJ, on remand should state the reasons for his opinion, and not speculate as to what the doctor "most likely" did.

As the ALJ is directed to reconsider the evidence in total when considering the nature and extent of the Claimant's claimed disability, the only contested issue, the Claimant's other arguments are rendered premature and will not be addressed.

#### CONCLUSION

The ALJ's reliance upon wage loss in determining what permanent partial disability benefits to award is in error. The ALJ was also in error in raising the issue of medical causal relationship, a stipulated issue. The ALJ is to reconsider the evidence in total, addressing solely the contested issue before him, nature and extent without taking into consideration wage loss.

#### ORDER

The COR of October 20, 2011 is **VACATED** and **REMANDED** to the Office of Hearings and Adjudications for further proceedings consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

  
HEATHER C. LESLIE  
*Administrative Appeals Judge*

December 22, 2011

DATE

JEFFREY P. RUSSELL, *concurring*.

I join in the preceding decision, but will note briefly that, while *Corrigan* represents the current majority CRB view and it undoubtedly prohibits consideration of whether or not a claimant has sustained an actual wage loss when the issue is the extent of a schedule disability, I disagreed with *Corrigan* then and I disagree with it now. See, *Corrigan, supra*, Jeffrey P. Russell, *dissenting*. "II. The decision in this case is wrong, as it runs counter to established precedent of the CRB and the Court of Appeals, and represents a fundamental misunderstanding of the theory behind schedule awards."



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JEFFREY P. RUSSELL  
*Administrative Appeals Judge*

December 22, 2011

DATE