

**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. 06-094**

**CAROL CORRIGAN,**

**Claimant–Petitioner,**

**v.**

**GEORGETOWN UNIVERSITY AND GALLAGHER-BASSETT SERVICES,**

**Employer/Carrier–Respondent.**

Appeal from a Compensation Order of  
Administrative Law Judge Terri Thompson Mallett  
AHD No. 06-256, OWC No. 604612

George E. Swegman, Esquire, for the Petitioner

Jeffrey W. Ochsman, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, and JEFFREY P. RUSSELL, LINDA F. JORY, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*

E. COOPER BROWN, *Chief Administrative Appeals Judge*, on behalf of the Compensation Review Board *presiding En Banc*; JEFFREY P. RUSSELL, *Administrative Appeals Judges*, dissenting.

**DECISION AND REMAND 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 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).<sup>1</sup>

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<sup>1</sup> 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 Support Act of 20024, Title J, the 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, 32-1522 (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. Official Code §§ 1-623.1 to 1.643.7 (2005),

Pursuant to 7 D.C.M.R § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

#### BACKGROUND

This appeal follows the issuance on September 1, 2006 of a Compensation Order by the Administrative Hearings Division of the Office of Hearings and Adjudication, Department of Employment Services. At issue is the ALJ's award of permanent partial disability schedule award of 18% for loss of use of Claimant-Petitioner's right hand.

Given the importance of the issue raised on appeal, *i.e.* whether wage-loss is to be taken into consideration in a claim for a schedule award, this matter was assigned for consideration *en banc* by the full Compensation Review Board pursuant to CRB Regulations 7 DCMR §§ 255.3 and 255.8.

#### ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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 D.C. 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 scope of review, the CRB and this panel are bound 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.

At issue in the instant case is AHD's permanent partial disability schedule award of 18% for loss of use of Petitioner's right hand. In determining the disability percentage rating, the ALJ invoked a two-step process for determining the extent of Petitioner's schedule disability, *i.e.* an assessment of the degree of physical impairment based upon the medical evidence, followed by an assessment of the economic impact of Petitioner's physical impairment. Initially, the ALJ found that Petitioner suffered an impairment rating of 33% to Petitioner's right hand based upon the opinion of her treating physician, which the ALJ credited over Respondent's IME medical impairment rating of 14%. Compensation Order (CO), at 7. The ALJ then turned to what she labeled "the second component of the disability rating," *i.e.* "the economic impact of Claimant's physical impairment." CO, at 7-8. Finding "little in the way of an economic impact on

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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.

Claimant” as a result of her physical impairment, aside from some residual pain in her right hand that might potentially affect Petitioner’s work capacity, and thus her ability to earn wages, the ALJ discounted the 33% medical impairment rating of her hand to a disability rating of 18%. CO, at 8.

On appeal, Petitioner challenges the ALJ’s ruling asserting that in determining the degree of her schedule disability the ALJ impermissibly took into consideration the impact Petitioner’s physical impairment had, or potentially would have, upon her actual and/or potential wage loss. More specifically, Petitioner’s attorney argues that, “For 77 years,<sup>2</sup> it has been the rule in the workers’ compensation scheme in this jurisdiction that wage loss is immaterial to the receipt of permanent disability awards under the schedule” and that, “without citing any authority for so doing, this [Compensation] Order has turned decades of legal precedent in Federal and District of Columbia courts on its head by arbitrarily reducing the Claimant’s schedule award by an amount, chosen, apparently at random, which supposedly reflected the Claimant’s actual and/or potential wage loss.” Claimant’s Memorandum of Points and Authorities, pp. 4-5.

In support of the Compensation Order, Respondent argues that the ALJ’s consideration of the economic impact of Claimant’s injury is consistent with the CRB’s recognition in *Wormack v. Fischback & Moore Electric, Inc.*, CRB No. 03-159, OHA No. 03-151 (July 22, 2005), 2005 DC Wrk. Comp. LEXIS 166, of the ALJ’s broad discretion to consider non-medical factors in determining the degree of disability with respect to claims for a schedule award under the Act.

In *Wormack* the CRB rejected prior Agency decisions insisting that an ALJ has no discretion to determine schedule award disability percentage ratings but is bound by a physicians’ impairment rating,<sup>3</sup> holding instead that an ALJ has broad discretion to consider both medical and non-medical evidence in determining the nature and extent of a claimed permanent partial disability under the schedule award provisions of the Act, D.C. Official Code § 32-1508(3)(A)-(U-i). In light of the D.C. Court of Appeals recent decision in *Solomon Negussie v. Dept. of Employment Services*, 915 A.2d 391 (D.C. 2007), there can be no doubt about the ALJ’s authority to determine the degree of disability for claims of schedule loss under the Act, and the ALJ’s inherent discretion in exercising that authority to consider both medical and non-medical evidence. There is nothing, the Court in *Negussie* concluded, either in the plain language of the statutory provisions governing the award of schedule benefits or in the legislative history, that suggests “explicitly, or even implicitly, that the determination of disability is the sole function of a medical doctor.” 915 A.2d at 396.

The D.C. City Council’s enactment in 1998 of Section 32-1508(3)(U-i)<sup>4</sup> constituted the formal adoption of the Maryland approach to determining schedule award disabilities. *Negussie*, 915

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<sup>2</sup> Presumably Petitioner here references the Longshoremen’s and Harbor Workers’ Compensation Act, 33 USC §908 *et seq.*

<sup>3</sup> *I.e.*, *Deguzman v. Bell Atlantic*, Dir. Dkt. No. 99-73, OHA No. 99-231 (May 31, 2002), and *Amaya v. Ft. Myers Construction Co.*, Dir. Dkt. No. 03-15, OHA no. 01-80 (April 29, 2003).

<sup>4</sup> D.C. Official Code § 32-1508(3)(U-i) reads in its entirety: “In determining disability pursuant to subparagraphs (A) through (S) of this subsection, the most recent edition of the American Medical Association’s Guides to the

A.2d at 397; *Wormack, supra*. Contemplated thereunder is an initial assessment, by way of medical evaluation utilizing the most recent edition of the AMA's *Guides to the Evaluation of Permanent Impairment* (hereinafter "*AMA Guides*"), of the anatomical loss or impairment of an individual's injured appendage or other statutorily identified body part. However, the medical assessment of a claimant's physical *impairment*, while significant, does not necessarily answer the ultimate question that the ALJ, as the trier of fact, must resolve with respect to a schedule award, *i.e.* the degree of the claimant's *disability*. *Wormack, supra*. As the Court in *Negussie* noted, the *AMA Guides* clearly differentiate between medical and legal roles in determining medical impairment and degree of disability:

The *AMA Guides* themselves warn that the impairment ratings derived from the *AMA Guides* are not substitutes for the legal determination of disability. "As used in the *Guides*, 'impairment' means an alteration of an individual's health status that is *assessed by medical means*; 'disability,' which is *assessed by nonmedical means*, means an alteration of an individual's capacity to meet personal, social, or occupational demands, or to meet statutory or regulatory requirements." . . . . The Commission must do more than merely adopt medical evaluations of anatomical impairment; the Commission must assess the extent of the loss of use by considering how the injury has affected the employee's ability to do his or her job. An evaluating physician provides the Commission with an assessment of medical impairment; the finder of fact, however, must determine the degree of disability. (Emphasis in original).

*Negussie*, 915 A.2d at 397, quoting *Getson v. WM Bancorp*, 694 A.2d 961, 962 (Md. 1997).

Under the "Maryland approach" it is thus the function of the trier of fact "to determine the extent of loss of use, and hence the percentage of disability, and not merely to adopt medical evaluations of anatomical impairment." *Gly Construction Co. v. Davis*, 60 Md.App. 602, 606, 483 A.2d 1330, 1332 (1984). To hold that the trier of fact is compelled to make a disability determination based only on the medical evaluations that are presented into evidence "would impermissibly shift the legal determination of 'disability' to physicians" – which would not only be "in clear contravention of the legislative intent" but also the traditional role of the trier of fact. *Gly Construction*, 60 Md.App. at 607; 483 A.2d at 1333.

While *Negussie* thus affirms the discretionary authority under the Act of administrative law judges in determining disability percentage ratings for schedule awards, the question raised by the instant appeal that remains unresolved is what, in addition to the medical assessments, may an ALJ consider in determining the degree of a claimant's disability where presented with a claim for a schedule award.

As previously mentioned, in determining the degree of Petitioner's schedule disability in the instant case the ALJ invoked a two-step process beginning with an assessment of the degree of physical impairment to Petitioner's right hand, based upon competing medical opinions, that resulted in a finding of a 33% medical impairment. This was then followed by an assessment of

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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."

the economic impact of Petitioner's physical impairment, resulting in an 18% disability rating. CO, at 7-8. It is as to the nature and scope of this latter assessment that Petitioner takes issue, arguing that the ALJ committed reversible error by taking wage-loss into consideration as part of the determination of the degree of Petitioner's schedule disability.

As the ALJ explained, the evidence of record indicated that the primary basis for Petitioner's medical impairment rating (*i.e.* lack of right hand grip strength) had little if any impact on her ability to perform her job duties and responsibilities. Notwithstanding her injury, Petitioner was and had for some time been engaged full time in a light duty capacity, and was "able to perform all of the responsibilities of her positions." CO, at 8. Having determined that Petitioner's physical impairment thus had "little in the way of an economic impact," *id.*, the ALJ nevertheless was not prepared to completely disregard the potential effect upon Petitioner's wages that her residual right-hand pain might have:

Claimant's wage-earning capacity may be affected by the need for her to grip or grasp objects and to take breaks to rest her hand and wrist. The pain Claimant experiences after increased activity may affect her work capacity, thereby affecting Claimant's potential wages.

CO, at 8. Accordingly, the ALJ assigned an 18 percent right hand disability rating "to reflect the vocational impact of Claimant's impairment on her *ability to earn wages.*" *Id.* (emphasis added).

As previously noted, Petitioner argues that taking wage loss into consideration is impermissible under District of Columbia jurisdictional authority that holds that wage loss is immaterial to an employee's entitlement to a permanent partial disability schedule award under the D.C. Workers' Compensation Act. In support, Petitioner cites to a half dozen D.C. Court of Appeals decisions spanning a fifteen year period, including the seminal decision of *Smith v. D.C. Dept. of Employment Services*, 548 A.2d 95 (D.C. 1988).

It is asserted, however, that none of the authorities cited by Petitioner, including *Smith*, prohibit consideration of the actual impact that a schedule injury has upon a claimant's *current earnings* in assessing the degree of disability to be awarded. The cited authorities, it is argued, stand for nothing more than that a loss of wages is *not necessary* for a schedule award, and that an actual wage loss that arises *after* a schedule award cannot form the basis of an additional award based upon wage loss.

The problem with this argument is that there is nothing within the plain language of the Act or the case law interpreting the provisions governing schedule awards that supports such a narrow and limited construction. It is correct that the issue confronted in *Smith* involved the question of an employee's right to additional future wage-loss benefits subsequent to a schedule award, and that the Court of Appeals held that once an employee receives a schedule award pursuant to D.C. Official Code § 32-1508(3), the employee is not entitled to additional compensation based upon future wage loss arising out of the same injury for which he was compensated pursuant to the

prior schedule award.<sup>5</sup> However, in so holding the Court explained that “the fixed and arbitrary amount of compensation for a schedule loss represents a legislative determination that attempts to balance the seriousness of the injury with its likely effect on future earning potential,” and that not only is a schedule award payable “irrespective of future wages”, the legislated schedule award amount is to be paid “*despite [the claimant’s] return to work on a full time basis and even if she were not to miss any work thereafter.*” *Smith*, 584 A.2d at 101-102 (emphasis added).

The Court acknowledged in *Smith* that consistent with the fact that “compensation under the Act is predicated upon the loss of wage earning capacity,”<sup>6</sup> a schedule award “is intended to compensate only for economic, not physical impairment.” 548 A.2d at 100-101. Nevertheless, the Court stated, “schedule benefits for permanent partial disability are payable regardless of actual wage loss.” *Id.* As the Court further explained, while not intended as a departure from or an exception to the wage-loss principle, such that the “underlying principle of compensation law -- that benefits relate to loss of earning capacity and not to physical injury as such -- remains the same,” the distinction is that “the effect on earning capacity is a *conclusively presumed* one” for schedule awards, “instead of a specifically proved one based on the individual’s actual wage-loss experience.” 548 A.2d at 101, quoting 2 LARSON, LAW OF WORKERS’ COMPENSATION § 57.14(c) at 10-54, and § 58.11 at 10-323 -324 (1985) (emphasis added). “[T]he fixed and arbitrary amount of compensation for a schedule loss represents a legislative determination that attempts to balance the seriousness of the injury with its likely effect on future earnings potential.” *Id.*

Since *Smith*, the Court of Appeals has revisited the nature of schedule awards under the Act on several occasions without departure from the foregoing principles. The first opportunity by the Court to do so was in *DeShazo v. D.C. Dept. of Employment Services*, 638 A.2d 1152 (D.C. 1994), a case dealing with the circumstances under which an injured worker’s average weekly wage is to be calculated. Distinguishing wage-loss benefits from schedule awards under the Act, the Court of Appeals pointed out that:

The statutory approach to permanent partial disability, however, is different. D.C. Code § 36-308(3) [now D.C. Official Code § 32-1508(3)] entitles a claimant to such benefits by reference to the type of injury suffered, *e.g.* arm, foot, eye, for specified numbers of weeks, *without regard to actual wage loss.* See *Bundy v. Washington Metro Area Transit Authority*, H&AS No. 84-94 (July 11, 1985) (“compensation under the schedule . . . *in no way depends upon the employee’s wage loss during the*

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<sup>5</sup> As the Court subsequently made clear, its holding in *Smith* was limited to affirmation of “the agency’s ruling that once a permanent partial award has been received there can be no further temporary total disability awards for the same injury.” *Murrell v. D.C. Dept. of Employment Services*, 697 A.2d 40, 42 (D.C. 1997).

<sup>6</sup> The Court’s use in this context of the term “wage earning capacity” might at first blush appear to be in conflict with its prior admonition that “[u]nder the plain language of the Act the benefits for permanent partial disability are based on an actual loss of wages, and not a loss of earning capacity.” *Harris v. D.C. Dept. of Employment Services*, 746 A.2d 297, 302 (D.C. 2000) (citing *Mauti v. Pro Football, Dir. Dkt. No. 87-57*, H&AS No. 86-433 (March 4, 1994)). However, we discern no conflict as the Court in *Harris* addressed a claim for disability benefits based upon wage loss, whereas in *Smith* the Court was concerned with a claim presented under the schedule award provisions of the Act. See also *WMATA v. D.C. Dept. of Employment Services*, 683 A.2d 470, 473 (D.C. 1996) (distinguishing the schedule award provisions of D.C. Official Code § 32-1508(3)(A) through (U) from the wage loss provision at D.C. Official Code § 32-1508(3)(V)).

*specified number of weeks of compensation*”). The assumption underlying this approach is that, although the claimant may be able to continue working, the impact of the injury causing a permanent partial disability sooner or later will take its toll, and that the scheduled benefit will be an appropriate, if arbitrary, compensation to offset wage losses that eventually can be anticipated. See 1C A. Larson, *Law of Workmen’s Compensation* §§ 57.31 and 58.00 (1983). . . . *the theory underlying the compensation schedule for permanent partial disability benefits is to provide a benefit attributable to a particular kind of injury, without regard to the ups and downs of actual wages.*

*DeShazo*, 638 A.2d at 1156 (emphasis added).

In *Washington Metropolitan Area Transit Authority (WMATA) v. D.C. Dept. of Employment Services*, 683 A.2d 470 (D.C. 1996), the Court addressed a claimant’s right to receive a schedule award arising from a non-schedule injury. Consistent with *Smith* and *Deshazo*, the Court distinguished the provisions of D.C. Code § 32-1508(3)(V), which provide for a permanent partial disability award where the employee “actually suffers a reduction in average weekly wages as a result of the disability,” from the provisions of D.C. Code § 32-1508(3)(A) through (U) under which “a claimant qualifies for a schedule award *regardless of whether the claimant actually suffers a wage loss as a consequence of the disability.*” 683 A.2d at 473 (emphasis added). *Accord, Lenaerts v. D.C. Dept. of Employment Services*, 545 A.2d 1234, 1236 (D.C. 1988) (schedule award “is made without regard to whether any actual wage loss occurred”).

In *Capitol Hill Hospital v. D.C. Dept. of Employment Services*, 726 A.2d 682 (D.C. 1999), cited by Petitioner, the Court initially affirmed the right of the claimant therein to seek a schedule award following expiration of her temporary total disability wage loss benefits and return to work. The Court then addressed the employer’s argument that the Director had nevertheless committed reversible error by affirming the claimant’s schedule award without taking into consideration the claimant’s loss of wages, or lack thereof, which the employer argued the Director was compelled to do in light of the Court’s recognition in *Smith* that a schedule award is intended “to compensate for . . . disability, which is [defined as] ‘physical or mental incapacity because of injury *which results in the loss of wages.*’” 548 A.2d at 100 (quoting D.C. Code § 32-1501(8)). In rejecting the employer’s argument, the Court explained that this language from *Smith* was merely the recognition that “a lump-sum schedule award looks to ‘*presumable effects* [on] earning capacity,’ *Smith*, 548 A.2d at 100, whether or not the employee actually misses work and loses wages. *Id.* at 101-102.” *Capitol Hill*, 726 A.2d at 687 n.6 (emphasis added).

In *Morrison v. D.C. Dept. of Employment Services*, 736 A.2d 223 (D.C. 1999), also cited by Petitioner, the Court of Appeals affirmed the right of a claimant who suffers multiple disabilities from a single injury to both schedule and non-schedule benefits, “subject to proof that the non-schedule disability led to wage loss.” 736 A.2d at 226. In *Morrison*, the claimant was awarded permanent partial disability schedule benefits after having returned to work in a light duty capacity without regard to the fact that upon his return to work the claimant was earning wages (albeit at a reduced rate). It was only with respect to his second claim for disability benefits, based on a “non-schedule” disability resulting from the same work injury, that the issue of wage-loss became relevant. In upholding the claimant’s entitlement to wage-loss benefits

notwithstanding his schedule award, the Court noted that the Act distinguishes permanent partial disability schedule awards from non-schedule awards based, in part, on the fact that the Act provides for a fixed payment for schedule disabilities, whereas non-schedule permanent partial disability awards require consideration of the impact of the injury upon one's wage earning capacity:

The statute that provides for payments for permanent partial disabilities divides such disabilities into two categories: "schedule" and "non-schedule." D.C. Code § 36-308(3)(A)-(M) [now D.C. Official Code § 32-1508(3)(A)-(M)] lists certain parts of the body which, if permanently disabled, entitle the worker to disability payments equal to the number of weeks' compensation listed for that body part in the schedule. D.C. Code § 36-308(V) [§ 32-1508(V)] provides a formula for compensating disabilities that are not expressly set out in the schedule, measured in terms of actual wages lost as a result of the disability.

*Morrison*, 736 A.2d at 225. *Accord*, *Harris v. D.C. Dept. of Employment Services*, 746 A.2d 297, 300 (D.C. 2000) (explaining award mechanism). *See also* *Pepco v. D.C. Department of Employment Services*, 835 A.2d 527, 531 (D.C. 2003) (for benefits to be awarded, wage loss must be demonstrated "except in the case of a 'schedule' injury enumerated in the statute"). In further clarification, the Court has more recently explained that a schedule award pursuant to D.C. Official Code § 32-1508(3) "is an award designed to compensate an employee who has suffered a permanent partial disability, that is, a disability that does not result in the loss of two hands, arms, feet, legs, or eyes and that does not prevent the employee from 'earning any wages in the same or other employment.'" *Muhammad v. D.C. Dept. of Employment Services*, 774 A.2d 1107, 1109 n.1 (D.C. 2001) (emphasis added).

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 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),<sup>7</sup> 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.

Notwithstanding the cited case authority, Respondent argues that the Board's decision in *Wormack v. Fischback & Moore Electric*, CRB No. 03-159 (July 22, 2005), countenances consideration of wage loss impact in schedule award determinations. As hereafter explained, Respondent misconstrues *Wormack*.<sup>8</sup>

In *Wormack* the CRB held, contrary to the Director's prior decisions in *Amaya v. Ft. Myers Construction Co.*, Dir. Dkt. No. 03-15, OHA no. 01-80 (April 29, 2003), and *Deguzman v. Bell Atlantic*, Dir. Dkt. No. 99-73, OHA No. 99-231 (May 31, 2002), that an ALJ may consider more than just the medical impairment ratings in determining the extent of an injured claimant's schedule disability. In addressing what the Board characterized as "the non-medical question of loss of industrial use," the Board acknowledged the ALJ's "broad discretion . . . as the fact finder to consider the medical impairment, the Maryland Factors, and the effect of the work injury on [the claimant's] industrial capacity in arriving at a percentage of disability under the Act."

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<sup>7</sup> At footnote 6 of the Compensation Order it is stated, "The use of the word 'may' [in § 32-1508(3)(U-i)] makes clear that the use of such devices is suggested, but not mandatory. The claimant must elect to employ an alternative method of calculating compensation. § 32-1508(3)(V)."

<sup>8</sup> While the ALJ in the instant case does not cite *Wormack*, nor any other D.C. jurisdictional authority, as precedent for taking impact upon wage loss into consideration, relying instead upon *American Mutual Insurance Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970), and *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5<sup>th</sup> Cir. 1981), cases involving claims for wage loss disability under the federal Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 901-950, the Administrative Hearings Division appears in a number of other cases to have misconstrued *Wormack*, citing the decision as authority for considering the impact of a claimant's impairment upon his/her ability to earn wages when determining the degree of disability for schedule awards. See e.g. *Centorcelli v. American Red Cross*, AHD No. 99-127B, OWC No. 284070 (March 22, 2006) (claimant seeking schedule award required to demonstrate that the physical impairment "has impacted claimant's ability to earn wages"); *Koppleman v. Sidly, Austin, Brown & Wood*, AHD No. 98-042A, OWC No. 97902 (Sept. 27, 2006) (claimant's schedule award based on lower rating than doctor's medical impairment rating due to ALJ's determination that the lower rating "more closely aligned with [claimant's] actual disability in terms of her wage earning capacity"); *Morales v. Clark Construction Company*, AHD No. 05-249, OWC No. 600089 (Dec. 1, 2005) (ALJ "must consider the physical effects of the injury in terms of claimant's future capacity to earn wages"); *Rubio v. Renaissance Hotels Int'l*, AHD No. 02-094A, OWC No. 533971 (March 10, 2006) (having ascertained the claimant's medical impairment rating, ALJ turned to the question of "the extent to which claimant's potential to earn wages in the present or in the future has been adversely impacted because of his scheduled loss"); *Siyma v. Metropolitan Club*, AHD No. 04-166A, OWC No. 591408 (July 12, 2006) (medical impairment rating reduced due to "failure to present specific evidence of the impact of claimant's current disability on her present and future wage earning capacity"). See also, *Reymonte Washington v. Capitol Hilton Hotel*, AHD No. 05-450A, OWC No. 611066 (May 31, 2007), and *Jennifer Etienne v. George Washington Hospital*, AHD No. 04-048A, OWC No. 579980 (June 27, 2007).

Recently the Court of Appeals, in *Negussie v. Dept. of Employment Services*, 915 A.2d 391 (D.C. 2007), affirmed the broad range of factors that *Wormack* recognized as requiring consideration in schedule award claims. “There is nothing within the “plain words” of sections 32-1508(3)(S) or -1508(3)(U-i) “stating explicitly, or even implicitly, that the determination of disability is the sole function of a medical doctor.” *Negussie*, 915 A.2d at 396. Nor did the Court find that the legislative history supported such a conclusion. *Id.* Rather, “D.C. Code § 32-1508(3)(U-i) authorizes ALJs to consider, in addition to the medical impairment rating, a claimant’s ‘pain, weakness, atrophy, loss of endurance, and loss of function’” in determining the degree of disability. 915 A.2d at 398. “[D]isability, which is assessed by nonmedical means,” the Court went on to explain, “means an alteration of an individual’s capacity to meet personal, social, or occupational demands.” More than “merely adopt[ing] medical evaluations of anatomical impairment” is required, the extent of loss of use must be assessed “by considering how the injury has affected the employee’s ability to do his or her job.” 915 A.2d at 397 (quoting *Getson v. WM Bancorp*, 346 Md. 48, 61-62, 694 A.2d 961 (1997) and the AMA Guides). “[F]rom a disability standpoint . . . the purpose and function of the legislative measure is to compensate for loss of use rather than merely for an injury to a scheduled member.” *Negussie*, 915 A.2d 398 (quoting *Tubaya v. Tam Joines*, 69 Md. App. 607, 519 A.2d 215, 218 (Md. 1987)).<sup>9</sup>

We thus do not view *Wormack* as inconsistent with *Negussie*, nor with the D.C. Court of Appeals authority that preceded *Negussie* which has been herein cited. Where confusion has no doubt arisen with respect to the decision in *Wormack*, which in turn has led in certain instances to consideration at the AHD level of wage-loss in schedule award cases (*see* footnote 8, *supra*), are the references therein to “loss of industrial use” and to “industrial capacity.”<sup>10</sup> While use of the terms “industrial loss of use” and effect upon “industrial capacity” in other jurisdictions has been equated with loss of wage earning capacity,<sup>11</sup> the terminology as used by *Wormack* in the context

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<sup>9</sup> Consistent with the foregoing, the CRB has had the opportunity on several recent occasions since *Negussie* to reaffirm the scope of consideration required of an ALJ in assessing the degree of disability in schedule award claims. *See e.g., Beatrice Faulkins v. George Washington University*, CRB No. 03-61, AHD No. 99-75B (Feb. 1, 2007) (“Respondent is correct to assert that the effect of an injury upon claimant’s ability to work is a relevant issue in considering the degree of disability to be awarded under the schedule.”); *Glenn Heath v. AM Briggs*, CRB No. 07-26, OHA No. 06-353 (Feb. 8, 2007) (ALJ properly considered effect of schedule injury upon the claimant’s ability to work.); *Hammond v. D.C. Public Schools*, CRB No. 07-18, AHD/PBL No. 06-10A (March 1, 2007) (ALJ may consider impact the claimant’s work injury has upon claimant’s current work capacity.). *See also, Majano v. Linens of the Week*, CRB No. 07-66, AHD No. 06-285 (April 24, 2007); *Briscoe v. PEPCO*, CRB No. 07-102, AHD No. 06-313 (June 19, 2007).

<sup>10</sup> In rejecting the Director’s decisions in *Amaya v. Ft. Myers Construction Co.*, *supra*, and *Deguzman v. Bell Atlantic*, *supra*, limiting consideration of schedule awards to the medical impairment ratings, the CRB in *Wormack* stated that in determining the “non-medical question of the *loss of industrial use*,” an ALJ necessarily has “broad discretion . . . as the fact finder to consider the medical impairment, the Maryland Factors, and the effect of the work injury on [the claimant’s] *industrial capacity* in arriving at a percentage of disability under the Act.” (emphasis added).

<sup>11</sup> Under Maryland’s workers’ compensation statute, for example, the term “loss of industrial use” has been viewed as synonymous with “loss of wage-earning capacity” as that term is found under the Federal Longshoremen’s and Harbor Workers’ Compensation Act, and thus applicable only in the determination of wage-loss disability awards, as opposed to schedule awards. *Cox v. American Store Equipment Corp.*, 283 F.Supp. 390, 394-395 (Dist. Md. 1968). *Accord, Giant Food, Inc. v. Coffey*, 52 Md. App. 572, 578 (Md. Ct. Spec. App. 1982); *Gillespie v. R&J*

of schedule awards is not imbued with the same meaning. Unlike the Maryland statute, the phrase "industrial use" does not appear anywhere in the specific loss provisions of the D.C. Workers' Compensation Act. Its use in *Wormack*, and that of the related concept of "industrial capacity," was intended as judicial shorthand to describe the condition of the injured member from the standpoint of its use in employment. By introducing the concept of "loss of industrial use" and the effect of a claimant's schedule work injury on a claimant's "industrial capacity" into the determination of the degree of disability for schedule awards, *Wormack* contemplates for consideration, in addition to the physical condition of the injury (as assessed by the medical experts), and the "Maryland Factors," consideration of the employee's scheduled injury or loss from the standpoint of the injured member's use in employment. We nevertheless concede that this description causes confusion because it does not adequately capture the proper standard, which is that specific loss is to be determined without reference to the claimant's earning capacity or ability to return to work. As the cited case law establishes, compensation is paid if the loss has been incurred, and it is not relevant whether the worker can work after the loss. We believe it was this concept that the *Wormack* decision was attempting to articulate, and we clarify by means of this opinion that holding.

Turning to the case at hand, ultimately the problem we are confronted with in the present appeal is that we cannot determine from the Compensation Order as written whether the presiding ALJ intended that wage loss be taken into consideration or not in claims for a schedule award. "In order to withstand review, a Compensation Order must state findings of fact on each material contested factual issue, which findings must be based upon substantial evidence, and the legal conclusions reached must flow rationally from those facts." *Hines v. Washington Metropolitan Area Transport*, CRB No. 07-004, AHD No. 98-263D (Dec. 22, 2006). *Accord, Perkins v. District of Columbia Dep't. of Employment Serv's.*, 482 A.2d 401, 402 (D.C. 1984).

Based upon the foregoing, the ALJ found that, "Claimant has a medical impairment rating for her right hand at 33 percent based on her grip strength; and, has a disability rating attributable to the industrial loss of use at 18 percent." CO, at 6. Relevant to this finding of "industrial loss of use" are the following excerpts taken from the discussion portion of the Compensation Order:

The second component of the disability rating is the economic impact of Claimant's physical impairment. . . .

The record evidence, which is recited herein, demonstrates little in the way of an economic impact on Claimant. . . .

Although she has presented evidence of pain and the need to take regular breaks, Claimant is able to perform all of the responsibilities of her positions, including the repetitive motion of working at the computer. It is reasonable to conclude, however, that Claimant's wage-earning ability may be affected by the need for her

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*Construction Co.*, 275 Md. 454, 341 A.2d 417 (1975). Similarly, the Michigan Supreme Court has held that "loss of industrial use" applies only to claims for wage loss disability, and not schedule injuries, because the term as used under the Michigan statute contemplates an assessment of the impact of the claimant's injury upon his earning capacity and ability to return to work. *Cain v. Waste Management, Inc.*, 472 Mich. 236, 697 N.W.2d 130 (2005).

to grip or grasp objects and to take breaks to rest her hand and wrist. The pain Claimant experiences after increased activity may affect her work capacity, thereby affecting Claimant's potential wages. . . .

Since Claimant's medical impairment rating is primarily based on her grip strength, which has little if any impact on her ability to perform her job duties and responsibilities, the medical impairment rating is reduced to 18 percent to reflect the vocational impact of Claimant's impairment on her ability to earn wages. Thus, Claimant's disability rating is 18 percent.

CO, at pp. 6-20.

The foregoing could be construed as a permissible consideration of the impact of Petitioner's physical impairment upon her ability to earn wages, without consideration of the actual wage loss that Petitioner has or might in fact sustain. On the other hand, the concluding statement that the 18% disability rating reflects "the vocational impact of Claimant's impairment on her ability to earn wages", coupled with the finding of "a disability rating attributable to the *industrial loss of use* at 18 percent" (emphasis added), could just as easily be construed as impermissibly countenancing consideration of wage loss in rendering a schedule award, as Petitioner argues. Indeed, the case authority cited by the ALJ in support of the economic analysis undertaken in the Compensation Order lends credence to Petitioner's interpretation of the ALJ's holding. As previously noted, footnote 8 *supra*, both *American Mutual Insurance Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970), and *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5<sup>th</sup> Cir. 1981), involve claims for wage loss disability under the federal Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 901-950, rather than for schedule awards.

Because we cannot discern the legal basis for the ALJ's determination, we find ourselves with no choice but to vacate the Compensation Order herein appealed and remand this matter to the Administrative Hearings Division for further consideration in light of the controlling legal principles herein articulated.

Finally, we turn to the matter raised by Judge Russell in his dissent, *i.e.*, whether there is legal authority for the Compensation Review Board to review and decide appeals presiding *en banc*.

Under the Workers' Compensation Act, the D.C. Council delegated to the Mayor broad authority to administer the Act, including rulemaking. *See, e.g.* D.C. Official Code §§ 32-1502(a), - 1520, -1522, -1529, -1530. In turn, the Mayor delegated his authority to the Director of the Department of Employment Services. Mayor's Order No. 82-126, 29 D.C. Reg. 2843 (July 2, 1982). *See Hughes v. D.C. Dept. of Employment Services*, 498 A.2d 567, 570 (DC 1985). This delegated authority formed the basis for DOES Administrative Policy Issuance No. 05-01, issued February 5, 2005, wherein the Director, in establishing the Compensation Review Board, expressly authorized *en banc* review when so directed by the Chairman of the CRB:

. . . the Compensation Review Board shall sit, review appeals, and render decisions, and perform all other delegated and related functions, in panels of three Members as shall be assigned by the Chairperson [Chief Administrative Appeals

Judge], unless the Chairperson specifically directs that an appeal or review will be decided by the full membership of the Board.

Administrative Policy Issuance No. 05-01, Section 5(e).

Pursuant to the foregoing, the Director issued regulations governing practice and procedure before the Compensation Review Board. *See* 7 DCMR §§ 118 and 250-271, D.C. Register Vol. 52 DCR 11092 (Dec. 23, 2005). Consistent with Administrative Policy Issuance No. 05-01, these regulations expressly provide for review by the full Board in certain instances, where so directed by the Chief Administrative Appeals Judge:

The Chief Administrative Appeals Judge may also direct that an appeal or review be decided by the full membership of the Board as specified in section 255.8.

7 DCMR § 255.3.

Where two or more Review Panels disagree concerning the resolution of an issue, the Chief Administrative Appeals Judge may direct that the issue be reviewed and resolved by the full Board sitting *en banc*. In such instance, official action of the full Board can be taken only on the concurring vote of at least three Board members.

7 DCMR § 255.8.

Notwithstanding the filing of a request for reconsideration, the Chief Administrative Appeals Judge may, *sua sponte*, order reconsideration *en banc* of a Review Panel Decision and Order within ten (10) days of any Review Panel decision.

7 DCMR § 268.6.

Administrative regulations that are validly promulgated pursuant to statutory authority, as in the instant case, have the force and effect of statutes. *Dankman v. D.C. Board of Elections and Ethics*, 443 A.2d 507, 513 (DC 1981) (*en banc*). *Accord, J&C Associates v. D.C. Board of Appeals & Review*, 778 A.2d 296, 303 (DC 2001); *Davis et al. v. Moore et al.*, 772 A.2d 204, 216 (DC 2001); *Hutchinson v. District of Columbia*, 710 A.2d 227, 234 (DC 1998). As such, they are to be accorded controlling weight in the construction and refinement of the statute pursuant to which they were adopted. “Particularly where there is broad delegation of authority to an administrative agency, we must give deference to a reasonable construction of the regulatory statute made by the agency . . . whether the agency construes and refines the statute through rule making or adjudication.” *Hughes, supra*; 498 A2d at 570 [citations omitted]. *Accord, Reichley v. D.C. Dept. of Employment Services*, 531 A.2d 244, 248 n.4 (DC 1987). *See also, United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001); *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory

scheme it is entrusted to administer." ). Consistent with the foregoing, the D.C. Court of Appeals has articulated the deference to be accorded an agency's interpretation of the statute it enforces:

We must give great weight to any reasonable construction of a regulatory statute that has been adopted by the agency charged with its enforcement. . . . The interpretation of the agency is binding unless it is plainly erroneous or inconsistent with the enabling statute. . . . Consequently, we sustain the agency decision even in cases in which other, contrary, constructions may be equally as reasonable as the one adopted by the agency.

*Lee v. D.C. Dept. of Employment Services*, 509 A.2d 100, 102 (DC 1986) (citations omitted).  
*Accord*, *WMATA v. D.C. Dept. of Employment Services*, 683 A.2d 470, 473 (DC 1996).

As the Supreme Court has noted, deference to an agency's regulatory interpretation of a statute it enforces is particularly appropriate where the regulation seeks to clarify or resolve ambiguities in the statute. *Chevron*, 467 U.S. at 842-845. Admittedly the City Council's amendment to the D.C. Workers' Compensation Act establishing the Compensation Review Board is silent on the subject of CRB *en banc* review, as Judge Russell in his dissent notes. See D.C. Official Code § 32-1521.01. At the same time, the amendment in question is fraught with sufficient ambiguity that clarification by agency regulation on this particular matter was required. Having established a five-member Compensation Review Board, the provision adopted by the Council bestows upon the Board's Chairperson (and Chief Administrative Appeals Judge) the authority to create Review Panels from among the full membership of the Board with authority to "decide matters before it by majority vote." D.C. Official Code § 32-1521.01(b). Contrary to the assertion in the dissent, this proviso neither requires the disposition of appeals by three-member Review Panels, nor precludes disposition by the full membership of the Board. Since the language of the amendment does not *direct* the Chairperson to establish Review Panels for every appeal presented to the Board, presumably all appeals could be decided by the full membership of the Board in the absence of action by the Chairperson establishing the three-member panels.

Rather than leave to the Chairperson's discretion the matter of when Review Panels, as opposed to the entire Board membership, would be required to decide appeals filed with the CRB, the Agency sought to clarify this matter through promulgation of the afore-referenced regulations. By providing for *en banc* review, the Agency also resolved a matter the legislation unintentionally created by its authorization for appellate decisions by Review Panels. The Agency resolved the question of how it would reconcile conflicting rulings on the same subject that will inevitably result where appeals are initially decided by panels of less than the full membership of the Board. See also 7 DCMR § 255.6 ("A Review Panel decision with respect to an issue constitutes persuasive authority for and with respect to any subsequent Review Panel decision rendered addressing the same issue.")

By providing through the regulations for initial panel review of appeals filed with the CRB, followed in certain prescribed instances by *en banc* consideration, the Director made reasonable policy decisions clarifying ambiguities inherent in the Council's legislation. The decision-making process established through the Agency's implementing regulations affords maximum independence of each Review Panel over the case before it, in so doing permitting the law to

develop to the fullest extent possible through the interpretations of the law afforded by multiple panels. At the same time, by providing for *en banc* consideration in prescribed situations, the Director has assured that conflicts and uncertainties in the law as it develops under the auspices of the multiple Review Panels are resolved by the full Board sitting *en banc*. The Director's authorization of *en banc* review is consistent with, and in furtherance of, the Director's ultimate responsibility within the agency to interpret the statutes the agency administers. *See, Harris v. D.C. Office of Workers' Compensation*, 660 A.2d 404, 407 (D.C. 1995) (noting that claim examiner's interpretation of statute entitled to less deference than Director's); *St. Clair v. D.C. Dept. of Employment Services*, 658 A.2d 1040, 1042-44 (D.C. 1995) (sustaining Director's rejection of hearing examiner's interpretation of statute).

#### CONCLUSION

Based upon the foregoing, the Compensation Review Board, sitting *en banc*, concludes that the ALJ's determination of an eighteen percent (18%) schedule award disability rating to Petitioner's hand is not in accordance with applicable law.

#### ORDER

The Compensation Order herein appealed, issued September 1, 2006, is vacated, and this matter is remanded to the Administrative Hearings Division for further consideration in light of the decision herein.

On Behalf of the Compensation Review Board presiding *En Banc*:

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E. COOPER BROWN  
*Chief Administrative Appeals Judge*

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September 14, 2007

DATE

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, dissenting:

I. Review by a panel greater than three Judges renders this decision erroneous as a matter of law.

As I have previously noted, *en banc* review is not a procedure envisioned by the legislature when it created the CRB, establishing a five member Board and charging it with deciding cases before

it in three judge panels, by majority vote. By persisting in engaging in this improper procedure, the CRB unfortunately risks creating confusion and delay in ultimately resolving disputes brought to it (beyond, that is, the inexplicable and truly regrettable delay of more than ten months experienced so far). I am hopeful that this improper procedure will be reviewed quickly by the District of Columbia Court of Appeals before the CRB does additional potential damage to the body of case law being developed, which, if these procedures are found to be improper (as I expect they will), will inevitably need to be reassessed using properly and legally constituted review panels.

Indeed, I am hopeful that the court will deviate in this case from its usual practice of declining to review cases from the CRB involving remands to AHD, in order to at least address this issue, before more harm is done, not only in this case but to the body of law that the CRB is establishing.

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.

I have been engaged in the process of considering and developing the law of this jurisdiction in this area for a good number of years, and will only refer interested persons to some of the decisions that I have authored while conducting hearings (*Deguzman, Amaya*) and subsequently as panel chair on the CRB (*Wormack, Centorcelli, Hammond, Majano*) from which my views are readily apparent.

The CRB majority's decision today runs counter to the entire theoretical construct underlying schedule awards, as discussed in the above cited cases, as well as in the court's decisions in *Smith*, and most recently, *Negussie*.

Without belaboring the point, a point of which I am at long last tiring of making, schedule awards represent the best approximation that a fact finder is able to make which reflects the anticipated future wage earning impact that an injury has upon a worker. That is the essence of *Smith*, and the line of cases cited above. Unlike other questions presented to ALJs for determination, there are no dichotomous choices in this area; there are no right or wrong answers, as there are in decisions regarding compensability generally (such as, for example, whether an injured worker is an employee under the Act, whether an injury arose out of and occurred in the course of employment, whether a particular time off work resulted in a compensable wage loss, etc.) Rather, schedule awards require ALJs to exercise their discretion in arriving at a percentage figure of disability that as nearly as possible represents, indeed, predicts, what will actually be experienced in the future, in terms of wage loss.

There are two obvious general areas of inquiry that can be relevant to this task and will aid the ALJ in exercising this discretion. The first is an assessment of the injury and medical impairment itself. Thus, the Act permits (but notably does not mandate) resort to the AMA Guides, and likewise permits reference to five additional factors, known as the Maryland Factors. These are both aids in assessing the degree of functional and medical impairment.

The second obvious area of relevant inquiry is economic: it is a commonplace in our jurisdiction the “disability is an economic, not a medical, concept”. While there are numerous ways in which the potential future economic impact of an injury can be assessed, none could possibly be as directly relevant as what the current economic impact is, at least as a starting point from which to extrapolate.

Yet the majority in this case, misunderstanding the meaning of the cases cited in the decisions issued by the Court of Appeals, has perversely determined that the most highly relevant evidence possible on the potential economic impact of an injury, its actual, current impact, is to be excluded. At root, the majority is returning the process to one which makes an award for the injury, and not for the impact that the injury will have on the future wage earning capacity of the worker.

This exclusionary rule finds no support in the Act (which indeed mandates that “in ...conducting a hearing the Mayor shall not be bound by common law or statutory rules of evidence or technical or formal rules of procedure, except as provided by this chapter, but may ... conduct such hearing in such manner as to best ascertain the rights of the parties”, D.C. Code § 32-1525 (a)) and runs counter to the most elementary principals of relevancy and materiality. Like the *en banc* procedures employed, the majority has manufactured an exclusionary rule that is nowhere found in the statute. Further, contrary to the assertion of the majority, none of the cases cited by it from the Court of Appeals stand for the proposition that such evidence is either irrelevant to the ultimate issue, or should be excluded from consideration. Rather, each case, when read in context, stands to one degree or another, for the proposition that an actual wage loss is not a requirement for a schedule award, that an award in the absence of a current demonstrable wage loss is within the contemplation of the Act, and that an additional actual wage loss that is experienced after such an award which turns out to exceed the award is not compensable, because the law presumes conclusively that the award represents the wage loss.

Although I may well have exercised my discretion differently than did the ALJ in this case, her decision appears to me to be well within the bounds of the proper exercise thereof. She made a determination as to the general degree of medical impairment, considered the impact of the injury upon wage earning capacity, including its current impact (which she assessed as non-existent)<sup>12</sup> and potential future impact (which she assessed as being potentially deleterious) and rendered a judgment based thereon and consistent with the evidence. The majority appears to view her decision as beyond the bounds of law, because she considered an economic factor (considered, but did not make dispositive) obviously relevant to her inquiry. In so doing, I judge the majority to be engaging in an impermissible substitution of their discretion for that of the ALJ.

I dissent.

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<sup>12</sup> To the extent that I detect any error, it is that the ALJ may have erred in the assessment of current economic impact, by finding that there is none, when the lack of such a current impact appears to be a result of modifications to the pre-injury job that the employer has made, and not the lack of a work-related functional impact. This, however, is a matter of the manner of analyzing the evidence, which has not been raised by the majority or the parties.