

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 11-066**

**CAROL MIDDLEDORF-KELLY,**

**Claimant–Petitioner,**

**v.**

**WASHINGTON HOSPITAL CENTER,**

**Employer–Respondent.**

Appeal from a Compensation Order on Remand by  
Administrative Law Judge Jeffrey P. Russell  
AHD No. 96-321E, OWC No. 261445

Richard W. Galiher, Jr., Esquire, for the Petitioner  
William S. Sands, Jr., Esquire, for the Respondent

Before: HEATHER C. LESLIE<sup>1</sup>, HENRY W. MCCOY and MELISSA LIN JONES, *Administrative Appeals Judges*.

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

**DECISION AND ORDER**

JURISDICTION

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

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<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).

## OVERVIEW

On November 2, 1993, Claimant injured her lower back while working for Employer. Employer voluntarily paid temporary total disability until 2001 when reduced benefits of temporary partial disability were paid after Claimant began working part-time.

On April 3, 2001, Claimant filed a claim for permanent total disability and a modification to the stipulated average weekly wage (AWW). On November 29, 2005, an Administrative Law Judge (ALJ) in the Hearings & Adjudication Section of the Office of Hearings and Adjudication, granted the request for permanent total disability but denied any change to the AWW as it was determined that the stipulation made the issue *res judicata*. *Middledorf v. Washington Hospital Center*, OHA No. 96-321E, OWC No. 261445 (November 29, 2005). Both Claimant and Employer appealed to the CRB.

Upon review, the CRB affirmed the November 29, 2005 Compensation Order. *Middledorf v. Washington Hospital Center*, CRB No. 06-20, OHA No. 96-321E, OWC No. 261445 (March 23, 2007). Both parties appealed this decision to the D.C. Court of Appeals (DCCA).

After review, the DCCA affirmed the CRB's decision in all respects with the exception of the issue of AWW, which it remanded to the CRB with instructions to further remand to the ALJ for a proper calculation. *Washington Hospital Center v. D.C. Dept. of Employment Services and Carol Middledorf-Kelly, Intervenor*, 983 A.2d 961 (2009).

On remand, the ALJ determined that Claimant only earned wages during eight of the thirteen weeks preceding her work injury. Accordingly, he divided the total wages earned by the number of weeks to make a finding that Claimant's AWW was \$644.57 for compensation purposes. *Middledorf-Kelly v. Washington Hospital Center*, AHD No. 96-321E, OWC No. 261445 (October 7, 2010)(COR I). Employer filed a timely appeal with Claimant filing an opposition.

The CRB, upon review, determined that the ALJ had exceeded the DCCA's reasoning by excluding five weeks rather than two weeks. Specifically,

On remand, the ALJ proceeded to go beyond the DCCA's reasoning by excluding 5 weeks and in doing so excluded weeks in which the claimant was paid, albeit while on sick leave. As the Court made clear, there were only two weeks when claimant was not paid and those are the only two weeks that should be excluded from the 13 week calculation period in determining her AWW. We take the position that being paid for leave time is still being paid wages for purpose this calculation. Furthermore, excluding 5 weeks would result in an inappropriately inflated (and thereby unreasonable) AWW because wage-earning weeks have been improperly excluded.

The CRB remanded the case back to the ALJ with instructions to adhere to the DCCA's determination that only two weeks should be excluded from the calculation. *Middledorf-Kelly v. Washington Hospital Center*, CRB No. 10-88, AHD No. 96-321E, OWC No. 261445 (June 16, 2011)

On June 22, 2011, the ALJ issued a Compensation Order on Remand (COR II). The ALJ recalculated the AWW, excluding the two weeks as mandated by the DCCA and adding wages described as PDO (“paid days off”) received to come to a finding that the Claimant’s AWW is \$483.37.<sup>2</sup> The Claimant timely appealed.

The Claimant argues that the CRB misinterpreted the DCCA’s remand by excluding only two weeks rather than five weeks the Claimant was out and not paid. The Claimant urges the CRB to reinstate and affirm the ALJ’s October 7, 2010 Compensation Order on Remand. The Claimant also asks for *en banc* review.

The Employer argues that the COR II is in accordance with the DCCA’s mandate and should be affirmed.

#### ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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 D.C. Workers’ Compensation Act of 1979, as amended, § 32-1501 *et seq.*, at § 32-1521.01 (d)(2)(A). “Substantial evidence”, as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even if the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

The Claimant’s primary argument is that the DCCA’s mandate was a remand to the ALJ for a “proper calculation of claimant’s average weekly wage” and that the ALJ was not limited to excluding only two weeks, but should have excluded all five weeks as they were the result of an illness. However, the Claimant fails to consider DCCA holding and rationale. Specifically,

We hold that the parties stipulated average weekly wage was contrary to law. Because claimant did not work (and was not paid) during two of the thirteen (or fourteen as calculated by they hospital) weeks preceding her accident at work, those two weeks ought not to have been included in calculating her average weekly wage. *Washington Hospital, supra* at 970.

In the CRB’s Remand Order of June 16, 2011 and relying on the DCCA’s reasoning, the CRB stated,

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<sup>2</sup> The two weeks where the Claimant received wages described as “paid days off” are those pay periods ending on September 25, 2003 and October 9, 1993. The record also reveals that the week ending October 2, 1993 is denoted as a “LOA” week or leave of absence week with no further explanation. The weeks ending October 16, 1993 and September 18, 1993 are denoted “S” and “medical” respectively, the two weeks the Claimant was out for illness related reasons.

As the Court made clear, there were only two weeks when claimant was not paid and those are the only two weeks that should be excluded from the 13 week calculation period in determining her AWW. We take the position that being paid for leave time is still being paid wages for purpose this calculation. Furthermore, excluding 5 weeks would result in an inappropriately inflated (and thereby unreasonable) AWW because wage-earning weeks have been improperly excluded.

The DCCA determined that based upon the record in this case only two weeks should have been excluded from the 13 week calculation period. Upon remand, the ALJ was constrained to adopt that reasoning and calculate the new AWW accordingly. Failure to do so warrants reversal and remand to make the calculation as instructed.

What the Claimant urges us to do is to reject the DCCA's holding and rationale and find that the Court meant five weeks rather than the two weeks explicitly discussed. This we cannot do as it is beyond the scope of our authority to question the DCCA. The ALJ properly determined the AWW in light of the DCCA's decision. We find no error in this.

We also respectfully deny the Claimant's request for *en banc* review. 7 DCMR § 255.8 allows for *en banc* review when two or more Review Panels disagree regarding the resolution of an issue.<sup>3</sup> As this has not occurred, *en banc* review is not warranted in this instance.

#### CONCLUSION AND ORDER

The Compensation Order on Remand of June 22, 2011 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE  
Administrative Appeals Judge

October 4, 2011  
DATE

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<sup>3</sup> 7 DCMR § 255.8 states "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.