

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA MARÍA MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 11-066 (1)**

**CAROL MIDDLEDORF-KELLY,  
Claimant-Petitioner,**

v.

**WASHINGTON HOSPITAL CENTER,  
Employer-Respondent**

DEPT. OF EMP. SVCS.  
STAFF SERVICES  
COMPENSATION REVIEW  
BOARD  
2013 MAR 18 PM 12:05

On Record Remand from the District of Columbia Court of Appeals  
No. 11-AA-1417

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

Before HEATHER C. LESLIE, HENRY W. MCCOY and MELISSA LIN JONES, *Administrative Appeals Judges*.

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

**DECISION ON RECORD REMAND**

OVERVIEW

On November 2, 1993, Claimant injured her lower back while working for Employer. Employer voluntarily paid temporary total disability in accordance with a stipulated Average Weekly Wage (AWW) 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 modification of the stipulated 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*. *Middendorf 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).

The DCCA affirmed the CRB's decision in all respects with the exception of the issue of AWW, which the Court held could be modified. It remanded to the CRB with instructions for further remand to the ALJ for a proper calculation. *Washington Hospital Center v. DOES and Carol Middledorf-Kelly, Intervenor*, 983 A.2d 961 (D.C. 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 in which wages were earned and calculated the Claimant's AWW as \$644.57. *Middledorf-Kelly v. Washington Hospital Center*, AHD No. 96-321E, OWC No. 261445 (October 7, 2010) (COR I). The Employer filed a timely appeal to the CRB, with Claimant filing an opposition.

The CRB determined that the ALJ's exclusion of five weeks rather than two from the AWW calculation was inconsistent with the reasoning in the DCCA's opinion. 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. 10-088, AHD No. 96-321E, OWC No. 261445 (June 16, 2011)

On June 22, 2011, the ALJ issued a Compensation Order on Remand. The ALJ recalculated the AWW, excluding the two weeks as mandated by the DCCA and added wages described as PDO ("paid days off") received by Claimant to determine the AWW as \$483.37.<sup>1</sup> The Claimant timely appealed.

On October 3, 2011, the CRB issued a Decision and Order affirming the ALJ's AWW determination. *Middledorf-Kelly v. Washington Hospital Center*, CRB No. 10-088, AHD No. 96-321E, OWC No. 261445 (October 3, 2011). The Claimant appealed to the DCCA.

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<sup>1</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 reflects 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.

On February 5, 2013, the DCCA remanded the case to the CRB for further consideration of specific questions raised by the DCCA. The DCCA stated,

Because we cannot determine from the CRB's ruling the basis of its conclusion that the accrued leave payments and weeks must be included in the calculation of petitioner's AWW, we have determined that a record remand is in order. On remand, the CRB shall:

- (a) Determine whether the two accrued leave payments and weeks are to be included in, or instead excluded from, the calculation of petitioner's AWW;
- (b) Consider, in calculating the AWW, what bearing, if any, petitioners attendance and earnings history prior to the 13 pre-injury weeks should have on a fair and reasonable estimate of petitioner's probably future earning capacity in the absence of her work injury;
- (c) Explain why the manner in which it calculates petitioner's AWW is consistent with the purpose to produce a fair and reasonable estimate of her probable future earning capacity, and with any other purpose(s) of the Worker's Compensation Act that may be implicated; and,
- (d) Should the CRB determine that the two accrued leave payments (and weeks) are to be excluded from the calculation of petitioner's AWW, consider and explain how, if at all, this ruling effects weeks during which petitioner worked for a portion of the week and for which she was paid compensation that included both hourly wages and an amount representing accrued leave

#### ANALYSIS

We respond to the DCCA remand instructions seriatim.

- (a) Determine whether the two accrued leave payments and weeks are to be included in, or instead excluded from, the calculation of petitioner's AWW

A Claimant's average weekly wage is to be determined in accordance with D.C. Code § 36-311(4) (now D.C. Code § 32-1511(4)) which states, in relevant part,

If at the time of the injury wages are fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by 13 the total wages the employee earned in the employ of the employer in the 13 consecutive calendar weeks immediately preceding the injury.

As the DCCA noted in *Asylum Co. v. DOES*, 10 A.2d 619 (D.C. 2010), the Act requires a look backward, to the average weekly wage a claimant earned in the period prior to his injury, as a proxy for the loss of future wage-earning capacity. In the case *sub judice*, the Claimant worked for the Employer for the full 13 weeks preceding the injury, which included the two weeks when the Claimant received paid leave.

In determining the AWW in the case at bar, the evidence indicates the Claimant regularly was absent and took leave during the course of her employment for which she received pay from her accrued leave. These weeks of paid leave represent a salary replacement benefit the Claimant utilized on a regular basis. As such, considering the Claimant's work history, the two weeks with PDO should be included in the AWW determination. This is consistent with the statutory definition of wages which includes "the reasonable value of board rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from other than the employer."<sup>2</sup> (Emphasis added).

Inclusion of the paid leave payments in the average weekly wage determination further comports with the purpose of the Act to arrive at an equitable result in the case at bar. To include these two weeks best represents Claimant's AWW prior to the work injury and is the best proxy for the Claimant's loss of wage-earning capacity.

(b) Consider, in calculating the AWW, what bearing, if any, petitioners' attendance and earnings history prior to the 13 pre-injury weeks should have on a fair and reasonable estimate of petitioner's probable future earning capacity in the absence of her work injury.

The DCCA has held that AWW is not to be determined by a "yardstick" approach, but to "focus[] on the need for an equitable outcome that provides 'a fair and rational estimate of claimant's average weekly wage.'" *UPS v. DOES*, 834 A.2d 868 (D.C. 2003).<sup>3</sup>

Nonetheless, when considering the Claimant's attendance and earnings history, it is important to consider that she consistently took off days from work and used accrued leave. At times, the Claimant's would also take unpaid leave. Thus, in order to produce a fair and rational estimate

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<sup>2</sup> Wages, as defined in the Act is

The money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from other than the employer.

<sup>3</sup> Although the Court refers to "probable future earning capacity" in regard to calculating the Petitioner's average weekly wage calculation, we are unaware of any statutory authority or case law where a claimant's average weekly wage is calculated on wages which would (or could) be earned after the date of accident. As we mentioned above, the Court aptly noted in *Asylum*, "the Act requires a look backward, to the average weekly wage a claimant earned in the period prior to his injury, as a proxy for the loss of wage-earning capacity" because "wage-loss benefits under the Act are not designed to make a worker whole for what he would have earned if he had continued working for his employer during the disability period." *Asylum*, 10 A.2d at 632. As this case clearly demonstrates, it is important to maintain the integrity of the definition of average weekly wage.

of the Claimant's AWW, inclusion of the weeks she received leave benefits should be included into the calculation of AWW.

The Claimant, a full time employee, had a history of not working full time hours although such a schedule was available to her. The Claimant's choice to consistently use either accrued leave or unpaid leave is important in reaching a fair and reasonable result of her AWW. Inclusion of the two weeks in the case at bar produces a fair estimate of the Claimant's average weekly wage.

(c) Explain why the manner in which it calculates petitioner's AWW is consistent with the purpose to produce a fair and reasonable estimate of her probable future earning capacity, and with any other purpose(s) of the Worker's Compensation Act that may be implicated

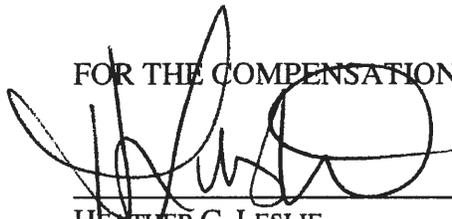
As stated above, the inclusion of the two weeks where the Claimant was paid for leave benefits results in a fair and reasonable estimate of her future earning capacity. To exclude the two weeks would artificially inflate the AWW.

While the statute references the "the humanitarian purposes of the Act," and often will refer to this purpose when concluding in favor of the injured worker, such humanitarian purposes are not furthered when an injured worker is unjustly enriched by a higher AWW based on the timing of an unforeseen injury. Such is the case presently before the Court. Including the two weeks of paid leave is not intended to punish the Claimant. Rather, including these two weeks best reflects a fair and accurate AWW and is in line with the statutory purposes of the Act.

(d) Should the CRB determine that the two accrued leave payments (and weeks) are to be excluded from the calculation of petitioner's AWW, consider and explain how, if at all, this ruling effects weeks during which petitioner worked for a portion of the week and for which she was paid compensation that included both hourly wages and an amount representing accrued leave.

As we determined that the two accrued leave payments are to be included, no further comment is necessary.

FOR THE COMPENSATION REVIEW BOARD:



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HEATHER C. LESLIE  
*Administrative Appeals Judge*

March 18, 2013

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DATE