

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-021

**CHRISTINA BARETT,
Claimant - Respondent,**

v.

**WASHINGTON HOSPITAL CENTER,
and GALLAGHER BASSETT,
Employer/Insurer-Petitioners.**

Appeal from a January 31, 2014 Compensation Order By
Administrative Law Judge Nata K. Brown
AHD No. 13-176, OWC No. 685449

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 JUN 9 PM 12 14

Lauren E. Pisano for the Respondent
William S. Hopkins for the Petitioner

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

HEATHER C. LESLIE for the Compensation Review Board,

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by Employer - Petitioner (Employer) of the January 31, 2014, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section 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 left arm. We AFFIRM.

BACKGROUND AND FACTS OF RECORD

Claimant was employed by the Employer as a Clinical Nurse III. Claimant was in charge of the total care of her patients, which included physical work such as turning over or repositioning patients every few hours. On September 3, 2011, Claimant injured her left shoulder while restraining an unruly patient.

Claimant sought medical treatment and eventually came under the care of Dr. Wiemi Douoguih. After conservative treatment failed, Dr. Douoguih recommended surgery which Claimant underwent. After surgical intervention, Claimant underwent an additional eight months of physical therapy. Claimant ultimately returned to work, full time, in a light duty position with restrictions including no lifting and pulling of more than 15 pounds and no overhead reaching. Claimant is also not eligible for overtime work, unlike her job as a Clinical Nurse. Dr. Douoguih opined Claimant suffered from a 6% impairment of the left upper extremity.

Claimant underwent an independent medical evaluation (IME) at her own request with Dr. Harvey N. Mininberg. Dr. Mininberg took a history of the injury and treatment, performed a physical examination, and reviewed radiographs. Dr. Mininberg opined Claimant suffered from a 42% impairment to her left upper extremity as a result of her work injury.

A full evidentiary hearing was held on October 18, 2012. Claimant sought an award of 42% permanent partial disability of the left upper extremity.¹ The sole issue to be adjudicated was the nature and extent of Claimant's disability. A CO was issued on January 31, 2014 which awarded Claimant 30% permanent partial disability to her left upper extremity.

Employer timely appealed. Employer appeals solely the CO's 10% award based upon the future vocational impact of the injury, arguing such a conclusion is not supported by the substantial evidence and is not in accordance with the law. Claimant opposes the appeal, arguing the CO is supported by the substantial evidence and is in accordance with the law.

THE STANDARD OF REVIEW

The scope of review by the Compensation Review Board ("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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is 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 International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

¹ In the "Claim for Relief" section of the CO, the amount Claimant sought to be awarded is listed as 46% permanent partial disability. We will treat this as a typographical error as the claim for relief as requested by Claimant's counsel at the Formal Hearing, as reflected by the IME, was 42%. Hearing transcript at 9-10.

DISCUSSION AND ANALYSIS

Employer's sole argument is that the CO is not in accordance with the law as "the Act does not require evidence of actual or potential wage loss in determining permanent partial disability for a schedule loss injury." Employer's argument at 5. We disagree.

As explained by the CRB in *Dent v. Providence Hospital*.²

As the CRB has held, the absolute prohibition upon consideration of the existence and amount of a specific, identifiable loss of wages in a particular case is no longer the law in this jurisdiction, and hasn't been since the District of Columbia Court of Appeals (DCCA) held that such a prohibition is not consistent with the law with regard to schedule awards, in *Jones v. DOES*, 43 [sic] A.3d 1219, 1224 to 1226 and footnote 7 (D.C. 2012); See also, *Hill v. Howard University*, CRB No. 12-016, AHD No. 117A, OWC No. 657973 (September 5, 2012), AAJ Jones dissenting in part; see also, *Al Robaie v. Fort Myer Construction Co.*, CRB No. 10-014, AHD No. 09-383, OWC No. 642015 (June 6, 2012), AAJ Jones, Chair, in which the following language appears:

Furthermore, the ALJ's ruling that Mr. Al-Robaie is not entitled to permanent partial disability benefits because he "has not returned to any type of gainful employment" also constitutes error. Upon remand, the ALJ is directed to reconsider the Claimant's request for permanent partial disability benefits without any consideration of wage loss *except to the extent that such wage loss correlates with or is indicative of loss of wage earning capacity or economic impairment*.

Al Robaie, supra, page 5 (emphasis added) .

The *Jones* court's footnote 7 reads as follows:

Although neither the ALJ nor the parties have referred to the relative amounts petitioner received from her full-time and part-time employment, we note there are documents in the record (one from employer's counsel) that petitioner's part-time work comprised approximately 20% of her overall earnings.

Jones, supra, at 122. [sic] Thus, consistent with the court's writing in *Jones* and the CRB holding in *Al Robaie*, "to the extent that such wage loss correlates with or is indicative of loss of wage earning capacity or economic impairment", actual wage loss history (its presence or absence) may be considered as a factor by an ALJ in making a prediction about the future impact a schedule injury will cause.

² CRB No. 13-101, AHD No. 12-381 (May 7, 2014). See also *Padilla v. M&N Contractors and Broadspire*, CRB No. 13-154, AHD No. 1312-831 (May 13, 2014).

In argument, Employer relies upon several cases all which predate the DCCA decision in *Jones*, cited above which now allows for actual wage loss history as a factor to consider when determining what future economic loss the scheduled injury will cause. We reject Employer's argument.

Turning to the CO, the ALJ found that due to her injury, Claimant would suffer an additional 10% permanent partial disability due to the effect of the work injury. The CO determined:

Claimant's impairment has resulted in a negative impact on her industrial capacity. She cannot turn or move patients anymore. She sometimes experiences left biceps pain and weakness with lifting and feels nerve pain from the inside of the top of her arm shooting down. Claimant also has aching in her shoulder around the incisions from time to time. Because of these limitations, she cannot play her flute as well as she could before, she can no longer teach salsa or dance with her husband, and she has difficulty in taking care of her son.

Further, Claimant cannot return to the ICU nurse position with the opportunity to earn overtime. She is at MMI, and her injuries to her left upper extremity will not get better. Claimant can expect to be in the workforce for about forty more years, during which she will be negatively impacted. There is no guarantee that a suitable job within her restrictions will be available for Claimant in the future, even if she earns a nurse practitioner degree.

Accordingly, the 6% impairment rating submitted by Dr. Douoguih is increased to reflect the impact of each of the Maryland Five Factors -- 6% for pain, 6% for loss of endurance, 4% for loss of function, 4% for weakness, and 2% for atrophy, for a total of 20%. In addition, the impairment rating is increased by another 10% due to effect of the impairment on Claimant's future vocational impact. Considering all the evidence, Claimant has shown that she has a 30% permanent partial medical impairment to her left upper extremity.

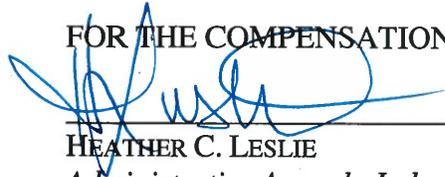
CO at 6.

We find no error in the above analysis and conclude it comports with the requirements of *Jones*. The CO lists specific limitations Claimant experiences because of her injury which could affect her ability to work and earn wages in the future based upon the evidence submitted and Claimant's credible testimony. We affirm.

CONCLUSION AND ORDER

The January 31, 2014, Compensation Order is supported by the substantial evidence in the record and in accordance with the law and is **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE

Administrative Appeals Judge

June 9, 2014

DATE