

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

CRB 14-032

**CHRISTINA SHIFFLETTE,
Claimant-Petitioner,**

v.

**RAP INC.,
and LIBERTY MUTUAL INSURANCE Co.,
Employer and Carrier-Respondent.**

Appeal from a February 26, 2014 Compensation Order
By Administrative Law Judge Gerald D. Roberson
AHD No.12-385, OWC No. 666438

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 SEP 26 AM 11 00

Lauren E. Pisano for the Petitioner
Robin Cole for the Respondent

Before: LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, HEATHER C. LESLIE and
MELISSA LIN JONES, *Administrative Appeals Judges*.

LAWRENCE D. TARR for the Compensation Review Board. MELISSA LIN JONES, *Administrative
Appeals Judge, dissenting*.

DECISION AND REMAND ORDER

This case is before the Compensation Review Board (CRB) on the appeal filed by Claimant, Christina Shifflette, challenging the February 26, 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 the CO, the ALJ determined that Claimant was not eligible to received temporary total disability benefits after she received a schedule award for permanent partial disability benefits. The ALJ held that Claimant had not proven her condition meets the narrow exception to the general rule that once an injured worker reached maximum medical improvement and received permanent partial disability benefits pursuant to D.C Code §32-1508 (3) (A)-(S), the worker is not entitled to temporary total disability benefits for future wage losses arising out of the same injury.

For the reasons stated, the CRB AFFIRMS the ALJ's finding but REMANDS this matter for the ALJ to consider whether Claimant is entitled to temporary total benefits for any wage loss caused by disability to the injured, non-schedule body part, her back.

BACKGROUND AND FACTS OF RECORD

Claimant worked for Employer, RAP, Inc. (Regional Addiction Prevention) as a driver and transportation coordinator. On December 20, 2009, she was injured when the passenger van she was driving was struck by another vehicle. Claimant sustained injuries to her neck and back with radiating pain into her left arm and left leg. Employer voluntarily accepted her claim and paid Claimant wage loss and medical benefits.

On October 18, 2012, the parties submitted a Stipulation to the Office of Workers' Compensation (OWC) that Claimant sustained a 33% permanent partial disability to her left leg and a 20% disability to her left arm as a result of the 2009 accident. OWC approved the stipulation on October 22, 2012, and Claimant received a lump sum payment for those permanent partial disabilities.

Claimant returned to work for Employer at some unspecified date and worked there until she was let go in August 2013. Claimant received wages until the end of September 2013. The present claim is for continuing temporary total benefits beginning October 1, 2013.

Claimant has received medical treatment from, or has been seen for independent medical examinations by, several doctors such as Dr. Lawrence Manning, Dr. Warren Yu, Dr. Harvey Mininberg, Dr. Matthew Ammerman, Dr. Donald Saltzman and Dr. George Drakes.

The current dispute centers on the recommendations by Claimant's treating physician, Dr. Warren D. Yu, an orthopedic surgeon, that Claimant only can work light duty and needs surgery.

Dr. Wu reported that when he first treated Claimant she presented with neck and low back pain that radiated into both legs. Dr. Wu diagnosed a cervical spine injury that exacerbated a L4-5 grade II spondylolisthesis. Dr. Wu reported on October 28, 2011 (one year before the Stipulation), and on September 6, 2012, (one month before the Stipulation) that Claimant was considering surgery. On October 2, 2012, two weeks before the Stipulation, Dr. Wu reported that Claimant wanted to proceed with surgery.

The most recent reports from Dr. Wu, dated July 30 and October 7, 2013, stated Claimant could only work light duty and that Claimant still requires surgery. Employer has authorized the surgery but has not voluntarily agreed to pay temporary total disability benefits. Claimant filed for these benefits and an ALJ held a formal hearing to consider Claimant's claim.

In his February 28, 2014, Compensation Order, the ALJ denied the claim:

The evidence from Dr. Wu establishes Claimant had agreed to proceed with the surgery prior to signing the stipulation agreement on October 15, 2012, Any worsening of Claimant's condition following the permanent partial disability award does not appear to be the impetus for her willingness to undergo surgery, and did not amount to a significant material change in her condition that would equate to an amputation. Claimant had already decided to proceed with the surgery prior to her allegations of worsening symptoms due to groin and right leg pain. Therefore, the record does not establish Claimant experienced a severe worsening equivalent to an amputation to satisfy the requirements of *Cherrydale* [*Cherrydale Heating & Air Conditioning v. DOES and Poole, intervenor*, 772 A. 2d 31 (D.C. 1998)] to support entitlement to temporary total disability benefits following an award of permanent partial disability benefits.

CO at 6.

Claimant timely filed for review with Employer timely filing an Opposition.

DISCUSSION

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. The CRB must 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.

Claimant has requested temporary total disability benefits during her recuperation period following back surgery. In general, once an injured worker reached maximum medical improvement and received permanent partial disability benefits pursuant to D.C Code §32-1508 (3) (A)-(S), the worker is not entitled to temporary total disability benefits for future wage losses arising out of the same injury. *Smith v. DOES*, 548 A. 2d 95 (D.C. 1988).

The law recognizes an exception to this general rule. This exception, stated by the District of Columbia Court of Appeals (DCCA) in the consolidated cases of *Cherrydale Heating & Air Conditioning v. DOES and Poole, intervenor*, and *Evans v. DOES and Debevoise & Plimpton, intervenors*, 722 A. 2d 31 (D.C. 1998), permits an injured worker to receive additional temporary total disability benefits "for an extreme change of condition resulting in amputation or its functional equivalent." *Id.* at 34. This exception is a "narrow exception." *WMATA v. DOES and Boyd, Intervenor*, 965 A. 2d 1 at 4-5, 11 (D.C. 2009)

The ALJ reviewed the medical evidence and determined that the Claimant's change of condition did not qualify for the exception to the general rule. The ALJ held the change of condition was not "a significant material change in her condition that would equate to an amputation."

We find the ALJ's determination with respect to Claimant's left arm and left leg is supported by substantial facts in the record and is accordance with the law. The record supports the ALJ's finding that the change of condition experienced by Claimant, the proposed surgery and related disability, did not justify a departure from the general prohibition against receiving temporary total benefits after receiving schedule permanent partial disability benefits for these body parts.

The ALJ's decision is analogous to the DCCA's decision in the companion case to *Cherrydale, Evans v. DOES and Debevoise & Plimpton, intervenor*, supra. In *Evans*, the Claimant, tripped and fell at work, injuring her left wrist and both knees. After receiving temporary total benefits, she and her employer stipulated that Evans was at maximum medical improvement and was entitled to schedule permanent partial disability benefits for the 15% disability to her left hand, the 16% disability to her right leg and the 18 % disability to her left leg.

After the stipulation, Evans had two surgeries and, after the second surgery, was not able to work. She applied for temporary total benefits but her claim was denied by the DOES Director, who at that time had agency appellate jurisdiction for workers' compensation cases.

The DCCA affirmed the denial of the claim and contrasted *Evans'* claim to the claim in the *Poole* case in which temporary total benefits were awarded:

At the same time, the Director was not convinced that the deterioration in petitioner Evans' condition justified benefits outside the framework of the previous schedule award -- which would include a possible increase in the percentage if warranted. Unlike Poole, who after amputation had little hope of returning to the level of his original maximum medical improvement, Evans underwent surgery in the expectation that this would return her to her former stabilized condition reflected in the schedule rating. In the words of *Smith*, Evans' need for surgery and attendant lost wages was foreseeable and within the "conclusively presumed . . . effect on future earnings potential" that a schedule award embodies, 548 A.2d at 101 (quoting in part 2 A. Larson, Workmen's Compensation Law § 58.11, at 10-323-24 (1987)), while Poole's amputation could not similarly be anticipated. Cf. *Franke v. Fabcon, Inc.*, 509 N.W.2d 373, 377 (Minn. 1993) (amended statute permits reopening of award only if "the change in condition was clearly not anticipated and could not reasonably have been anticipated at the time of the award"); *Stainless Specialty Mfg. Co. v. Industrial Comm'n*, 144 Ariz. 12, 695 P.2d 261, 267-68 (Ariz. 1985) (reopening for changed condition and need for treatment permissible where "the legitimacy of that need was not and could not have been adjudicated at the time of the last award"). The Director thus drew a reasonable distinction in coverage between the two situations.

722 A. 2d at 35.

In affirming his decision, we have not overlooked that the ALJ based his decision, in part, on the fact that Claimant knew she might need surgery before she entered into the stipulation that resulted in her permanency award.

Claimant's pre-permanency award subjective expectation that she would need surgery would not, in itself, be a reason to deny additional temporary total benefits. As the DCCA stated with respect to Ms. Evans' claim:

Evans further argues that the Director's decision denying her benefits relied erroneously on her testimony that before stipulating to a permanency rating, she was aware through her physician that she might need eventual surgery (and so incur wage loss). Her mere subjective expectation, she says (and we agree), would not be a rational basis for denying her further temporary benefits. The Director did point out that Evans "entered into the stipulation, not blindly, but fully aware of her medical prognosis, i.e., that her physical condition may deteriorate." But Evans reads too much into this language; we think it merely notes Evans' awareness of the *objective* nature of her injury as one that might later worsen and require surgery -- and with respect to which the "fixed and arbitrary amount" of her schedule award was "an advance payment for future temporary total disability." *Smith*, 548 A.2d at 101. The Director denied Evans further temporary disability payments because in her judgment Evans' change of condition, unlike Poole's, warranted no departure from the statutory conclusiveness of the schedule award recognized in *Smith*. That determination was reasonable and must be sustained. *Id.* at 16-17.

Id. at 36.

Here, the ALJ found that the post-permanency award change of condition was not the impetus for the surgery since Claimant knew she might need surgery. Similar to *Evans*, we find this shows Claimant's knowledge that she needed surgery when she entered into the stipulation for her permanency award, and that the schedule award was an advance payment for that eventuality.

We therefore AFFIRM as supported by substantial evidence and in accordance with the law, the ALJ's decision that Ms. Shifflette's change of condition was not the functional equivalent of an amputation that justified awarding temporary total disability benefits after a schedule award for the left arm and left leg.

However, we further find that we need to remand this matter so that the ALJ can consider the effect, if any, of *Morrison v. DOES and Washington Hospital Center, intervenor*, 736 A. 2d 223 (D.C. 1999) on this claim.

Morrison was injured while working for Washington Hospital Center and received a schedule award for permanent partial disability benefits for injury to his right arm. Claimant asserted he was entitled to additional benefits for disability to his shoulder, a body part that was not included in the schedule.

The DCCA determined that an injured work was entitled to receive both schedule and non-schedule injury benefits for two disabilities sustained in single injury if both injuries caused wage loss.

The Court held:

Therefore, we hold that when a petitioner suffers multiple disabilities from a single injury, that petitioner is entitled to both schedule and non-schedule benefits, subject to proof that the non-schedule disability led to wage loss.

Id. at 226.

Here, there is no dispute that Ms. Shifflette injured body parts that are included in the schedule (left arm and left leg) and body parts that are not included in the schedule (back and neck). Claimant has requested temporary total disability benefits during her recuperation from back surgery.¹

At the conclusion of her closing argument, Claimant's counsel argued that the benefits were sought for disability caused by surgery to her back:

We're talking about a medical necessity that even the carrier agrees must take place and will take place, thus allowing us to re-open this claim timely, within one year from the October 2012 stipulation, which we've done, and allow Ms. Shifflette to receive temporary total disability benefits while she heals and recovers from the extreme circumstance, mainly the rod being fused into her back. So while we know that that extreme surgery is being authorized, we also feel that it's logical to have temporary total disability benefits authorized, if not to begin October 1, 2013, but at least as of the date of that extreme circumstance, the date of the surgery.

HT at 37.

Our colleague in dissent correctly notes that *Morrison* involved claims for permanent partial disability benefits. However, the dissent's restrictive reading of *Morrison* as inapplicable to a claim for temporary total disability benefits is not supported by authority and inconsistent with established precedent.

¹ Apparently the surgery took place in February 2014. (Employer's Memorandum, footnote 1).

In *Suber v. WMATA*, Dir. Dkt. No. 02-27, OHA No. 96-104C, OWC No. 292090 (July 24, 2002), the Director, citing *Morrison*, affirmed an ALJ's award of temporary total and temporary partial benefits to a claimant who previously received a scheduled permanent partial disability award.

In *Sullivan v. Boatman & Magnani*, CRB No. (Dir. Dkt.) No. 03-74, OHA No. 90-597E, OWC No. 088187 (August 31, 2005), the CRB held:

For these reasons, we will read *Morrison* as permitting a schedule disability award and a concurrent wage loss partial or total disability award, but only where the partial or total wage loss disability is based upon the wage loss being due to the anatomically non-schedule body part, and there is also a distinct, separable and identifiable functional impact upon the schedule body part sufficient to sustain an award under *Kovac*.

In *Ward v. D.C. Water and Sewer*, CRB No. 24-03, AHD No. 03-355, OWC No. 563614 (April 14, 2006), the CRB, relying on *Morrison*, reversed an ALJ's decision denying temporary total disability benefits to a claimant awarded permanent partial disability benefits but remanded for a determination whether claimant sustained two separate and distinct disabilities.

Additionally, in *Howard University Hospital v. DOES and Petway, Intervenor*, 994 A. 2d 375 (D.C. 2010), the DCCA, citing *Morrison* and other cases, affirmed concurrent awards for temporary total and permanent partial disability benefits.

While we agree with the ALJ that Claimant is not entitled to temporary total disability benefits for any wage loss caused by the body parts that were included in the stipulated schedule awards (left arm and left leg), we must remand this matter to the ALJ to determine whether Claimant is entitled to temporary total benefits for any wage loss caused by disability to the injured, non-schedule body part, her back.

CONCLUSION AND ORDER

The February 26, 2014, Compensation Order is AFFIRMED with respect to the determination that Claimant is not entitled to not entitled to temporary total disability benefits for any wage loss caused by her left leg or left arm. This case is REMANDED to the ALJ to determine whether Claimant is entitled to receive benefits for any wage loss caused by disability to her back.

FOR THE COMPENSATION REVIEW BOARD:

/s/ LAWRENCE D. TARR
LAWRENCE D. TARR
Chief Administrative Appeals Judge

September 25, 2014
DATE

MELISSA LIN JONES dissenting in part:

The majority remands this matter for the ALJ to consider the effect *Morrison* has on this claim. I dissent from the remand of this matter because *Morrison* is inapplicable to this claim.

I cannot dispute that “when a petitioner suffers multiple disabilities from a single injury[] that petitioner is entitled to both schedule and non-schedule benefits, subject to proof that the non-schedule disability led to wage loss;”² however, the schedule and non-schedule disability benefits referred to in *Morrison* are both permanent partial disability benefits:

The Director of the Department of Employment Services (DOES) determined that the petitioner was entitled to payments for a “schedule injury” under D.C. Code §36-308(3) (A) (1997), based on a permanent partial disability to his right arm. On appeal, petitioner contends that he is entitled to additional, permanent partial disability “non-schedule” benefits under D.C. Code §36-308(3)(V) for his shoulder disability.³

Ms. Shifflette has not requested non-schedule disability benefits (also known as permanent partial disability wage loss benefits); she has requested temporary total disability benefits following a stipulation for permanent partial disability benefits for multiple schedule members. The concurrent benefit analysis in *Morrison* simply does not apply to the facts of this case.

This matter is governed by *Smith* and *Cherrydale* and should be affirmed outright.


MELISSA LIN JONES
Administrative Appeals Judge

² *Morrison* at 226.

³ *Id.* at 224.