

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-142

DONNA MARSHALL,
Claimant-Respondent,

v.

WASHINGTON HOSPITAL CENTER,
Self-Insured Employer-Petitioner.

Appeal from a October 13, 2014 Compensation Order by
Administrative Law Judge Amelia G. Govan
AHD No. 10-607C, OWC No. 651266

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 APR 27 PM 1 52

Krista N. DeSmyter for the Claimant
William S. Sands, Jr., for the Employer

Before: JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Employer as a “business manager” and patient care coordinator. She was injured on May 29, 2008 when she fell over some boxes at work at Employer’s hospital. Her injuries were to her lower back, both legs and feet. The injury has left her unable to return to that job.

Claimant returned to work briefly for Dr. Kim Kelly, but then found new employment in a dental office owned by Dr. Evelyn Campbell-Leach in July 2012, working as an “Office Manager” and patient care coordinator. She worked 32 hours weekly at \$30.00 per hour.

Claimant remained in that position until October 2012, when she left for reasons unrelated to her injury or the continued availability of the position, returning to work once again for Dr. Kelly between 24 or 25 hours per week, at \$23.00 per hour.

At a formal hearing before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES) Claimant sought an award of permanent partial disability based upon an ongoing wage loss, Claiming entitlement to weekly

permanent partial disability benefits in the amount of \$865.39. Employer agreed that Claimant is entitled to ongoing permanent partial disability benefits based upon a diminution in her earnings, but sought an award in the amount \$754.76.

On October 31, 2014, the ALJ issued a Compensation Order (CO), granting Claimant's claim. Employer filed a timely Application for Review and Memorandum of Points and Authorities in support thereof (Employer's Brief) of the CO with the Compensation Review Board (CRB), to which Claimant filed a timely opposition and Memorandum in support thereof (Claimant's Brief).

Employer argues the ALJ erred in applying the formula contained in D.C. Code § 32-1508 (3) (V) (ii) (I) rather than § 32-1508 (3) (V) (ii) (II) and further that the CO is legally deficient because it fails set forth specific findings of fact as to each relevant rate of pay required to calculate the amount of the award.

Because the ALJ was correct in allowing Claimant to elect to proceed under sub-subsection (I) rather than sub-subsection (II), her decision to utilize that provision is affirmed. Because the CO contains facts concerning the appropriate inputs for making the calculation, and those facts are supported by substantial evidence, the award is affirmed.

STANDARD OF REVIEW

The scope of review by the CRB, 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 on Remand are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. *See Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB is 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 where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

ANALYSIS

D.C. Code §32-1508 governs, among other things, the calculation of the proper compensation rate for permanent partial disability premised upon wage loss, and reads in pertinent part as follows:

- (V) (i) In other cases the employee shall elect:
 - (I) To have his or her compensation calculated in accordance with the formula set forth in either sub-subparagraph (ii)(I) or (II) of this subparagraph; and
 - (II) To receive the compensation at the time the employee returns to work or achieves maximum medical improvement.
- (ii) The compensation shall be 66 2/3% of the greater of:

- (I) The difference between the employee's actual wage at the time of injury and the average weekly wage, at the time of the injury, of the job that the employee holds after the employee becomes disabled; or
- (II) The difference between the average weekly wage, at the time the employee returns to work, of the job that the employee held before the employee became disabled and the actual wage of the job that the employee holds when the employee returns to work.

Employer's complaint about the application of sub-subparagraph (ii)(I) is that it contends that the job that Claimant returned to (i.e., the "job the employee holds after the employee becomes disabled") did not exist "at the time of the injury". Thus, Employer asserts, it is impossible for Claimant to elect to calculate her compensation rate pursuant to that provision.

This argument is premised upon Employer's allegation that the job to which Claimant returned is significantly different from the office manager job that existed at the time of the injury, due to the change in size and scope of the enterprise, being larger and employing more people.

The ALJ exercised her discretion and decided differently, i.e., that the jobs were in fact comparable and that application of sub-subparagraph (ii)(I) was an acceptable election.

On this question of fact, we are being asked to substitute our judgment for that of the ALJ, an exercise that we are not inclined or empowered to undertake. Employer does not question the ALJ's findings regarding the nature of the jobs in question, only her assessment that they are sufficiently comparable make application of sub-subparagraph (ii)(I) legally permissible. While it may be that the record evidence doesn't *compel* the ALJ's decision, nor does it compel a contrary conclusion.

Employer also argues that the CO is deficient because it fails to contain specific findings of fact on all the required "inputs", and does not contain a calculation showing how the ALJ determined that Claimant's asserted compensation rate is correct.

The statute requires consideration of two different "inputs" in order to determine what wage differential is to be used as the basis for the ongoing compensation rate under sub-subparagraph (v)(ii)(I).

Those inputs are (1) Claimant's average weekly wage on the date of injury, and (2) the average weekly wage of the job Claimant returned to that was in effect at the time Claimant was injured. Under this sub-subparagraph, the compensation rate is two thirds of the difference between (1) and (2).¹

¹ For sub-subparagraph (v)(ii)(II), those inputs are (3) what the average weekly wage of the pre-injury job is at the time Claimant returns to work and (4) the "actual wage" that Claimant earns when she returned to work. Under this sub-subparagraph, the compensation rate is two thirds of the difference between (3) and (4). Because we have determined that the application of sub-subparagraph (I) was legally correct, we need not address any lack of necessary findings had the application of that provision been erroneous.

Input (1) has been stipulated to be \$1,875.01. Under the facts as found in the CO, which are not challenged in this appeal, Claimant returned to work first with Dr. Kim Kelly. We can find no finding in the CO concerning the exact nature of the job Claimant had with Dr. Kelly, nor does the CO contain a finding as to what that job paid at the time Claimant was injured. Thus, assuming that the job to which Claimant returned to work was the job with Dr. Kelly, there is no finding concerning input (2).

However, the ALJ found that Claimant soon changed jobs and began working for Dr. Evelyn Campbell-Leach working 32 hours per week at \$30.00 per hour. Then there is a finding that Claimant left that job for reasons unrelated to her work injury, and returned to work for Dr. Kelly, earning “24-25 hours per week for \$23.00 per hour”.

There is no explanation as to why the CO’s analysis of what the job with Dr. Campbell-Leach, rather than the job with Dr. Kelly, would have paid on the date of injury was undertaken. While we have agreed with Claimant that the ALJ did not abuse her discretion in determining that the Campbell-Leach job was acceptable as being comparable to the job that existed on the date Claimant was injured, we do not know and cannot tell why that job was the one that the ALJ (and the parties apparently) focused on, rather than the first job with Dr. Kelly, for which there is no finding concerning what that job “would have paid” at the time Claimant was injured. However, Employer has not based its appeal upon this part of the CO, and we shall not require any reconsideration of that choice.²

Thus, the ALJ calculated input (2) to be \$576.92, since Dr. Campbell-Leach testified that at that time the job paid \$30,000.00 per year which, divided by 52 weeks, yields \$576.92. The ALJ then subtracted that figure from input (1), \$1,875.01, arriving at a wage differential of \$1,298.09, two thirds of which she determined to be \$856.39. These figures and calculations are correct, and are supported by substantial evidence. Accordingly, the award was not erroneous.

CONCLUSION AND ORDER

The application of D.C. Code § 32-1508 (3) (V) (ii) (I) was proper under the Act, and the award made is supported by substantial evidence and is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Jeffrey P. Russell
JEFFREY P. RUSSELL
Administrative Appeals Judge

April 27, 2015
DATE

² It could be that the parties assumed that the job with Dr. Campbell-Leach is more representative of Claimant’s residual earning capacity than the job with Dr. Kelly for reasons outside the record, including the fact that Claimant’s departure from that job was not related to her injury. Since this has not been raised as an issue on appeal, and since Employer theoretically could have been entitled to seek modification of the ongoing PTD rate had the technically most appropriate job been the one with Dr. Kelly, we see no purpose in further exploring this issue.