

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-134**

**FRANCES LEE,  
Claimant–Petitioner,**

**v.**

**MARRIOTT CORPORATION and  
MARRIOTT CLAIMS SERVICES,  
Self-Insured Employer-Respondent.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 MAR 9 PM 1 03

Appeal from a July 24, 2015 Compensation Order by  
Administrative Law Judge Joan E. Knight  
AHD No. 13-356, OWC No. 695619

(Decided March 9, 2016)

David J. Kapson for Claimant  
Todd S. Sapiro and Zachary I. Shapiro for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*

LINDA F. JORY, for the Compensation Review Board:

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Frances Lee (Claimant) worked as a barista at a Starbucks in Employer’s hotel lobby. On May 26, 2011, Claimant injured her left middle finger when lifting a dairy crate containing several gallons of milk in a refrigerated storeroom and her left thumb got stuck in the handle of a gallon of milk she was placing onto a roll cart. She treated primarily with Kaiser Permanente and x-rays of her left hand and fingers were normal. Following her work injury, Claimant continued performing her pre-injury duties and initially had some difficulty lifting and handling milk gallons using her left hand. She experienced some pain, weakness and problems using her left hand to lift coffee pots and trays. Her Kaiser physician, Dr. Ingrid Soderlund, suspected carpal tunnel syndrome and Claimant was referred to rheumatologist Dr. Monica Stewart who on

November 9, 2011, ruled out carpal tunnel syndrome. After November 9, 2011, Claimant did not seek further medical treatment to address her work injury.

On January 22, 2013, Claimant was examined by Dr. Joel Fechter, orthopedic surgeon for the purpose of obtaining a permanent impairment assessment of her left hand. Dr. Fechter issued a permanent impairment rating of eighteen percent (18%) to the left hand. As arranged by Employer, Claimant was examined by Dr. Richard Barth, orthopedic surgeon. Dr. Barth reviewed Claimant's medical records and notes from Kaiser Permanente from June 2011 through November 2011. Dr. Barth found Claimant to have no impairment to her left hand.

An Administrative Law Judge (ALJ) with the Administrative Hearings Division (AHD) issued a Compensation Order (CO) on July 24, 2015 which denied Claimant's claim for permanent partial disability benefits. *Lee v. Marriott Corporation*, AHD No. 13-365, OWC No. 695619.

Claimant filed an Application for Review, asserting that the ALJ's finding that Claimant has not demonstrated entitlement to an award of permanent partial disability (PPD) to the left hand is not supported by substantial evidence. Employer opposed the appeal by filing Employer's Opposition to Claimant's Application for Review and memorandum of points and authorities in support thereof (Employer's Brief). In its opposition, Employer argues that the CO ought to be affirmed because it is supported by substantial evidence.

Because the findings that Claimant has sustained no PPD as a result of the stipulated work-related injuries are supported by substantial evidence, we affirm the CO.

#### ISSUE ON APPEAL

Is the July 24, 2015 CO supported by substantial evidence and in accordance with the law?

#### ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act (the Act) and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB is bound 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Claimant first argues that “substantial evidence in the record supports a finding that Claimant has demonstrated, by a preponderance of the evidence” that she is entitled to the claimed award. Claimant’s Brief at 6.

With regard to this argument we remind Claimant that it is well-settled that the question is whether there is substantial evidence in the record to support an ALJ’s conclusion as opposed to the opposite view. *See Marriott, supra*. Claimant further asserts that the ALJ erred as a matter of law in determining the absence of wage loss is a relevant consideration as to the extent of Claimant’s disability. Initially citing *Deshazo v. DOES*, 638 A.2d 1152 (D.C. 1994) and *Smith v. DOES*, 548 A.2d 95 (D.C. 1988), Claimant argues that:

The *en banc* decision in *Corrigan v. Georgetown Univ*, CRB No. 06-094 (September 14, 2007) most closely comports with the current state of the law on permanent partial disability benefits for scheduled members. There the CRB held that ‘to incorporate consideration of wage loss into scheduled awards disability determinations would also undermine the mutually exclusive nature of the Act’s scheduled award provisions and the wage loss provision at §32-1508(v). The Board further held that actual wage loss ‘may [not] be taken into consideration assessing the degree of disability for a scheduled award’. *Id* A scheduled award amount is to be paid despite ‘her’ return to work on a full time basis and even if she were not to miss any work thereafter.’ *Corrigan*, CRB No. 06-094, citing *Smith v. D.C. Dept. of Emp’t Serv.*, 548 A.2d 95, 101-101 (D.C. 1988) (emphasis in original)

As the CRB has advised on many occasions:

*Corrigan* no longer represents the applicable law, and hasn't since the CRB issued *Al-Robaie v. Fort Myer Construction Company*, CRB No. 10-014, AHD No. 09-383, OWC No. 642015 (June 6, 2012)(*Al-Robaie*), where it was held that the effect of a work injury upon a claimant's actual earnings are relevant and can be considered "to the extent that such wage loss correlates with or is indicative of loss of wage earning capacity or economic impairment." The move away from *Corrigan* was in response to the District of Columbia Court of Appeals’ (DCCA) decision in *Jones v. DOES*, 41 A.3d 1219 (April 26, 2012), wherein the DCCA explicitly referenced the percentage of wage loss that the claimant in that case had suffered subsequent to the injury.

*See Johnson v. WMATA*, CRB No. 15-142 (February 2016) citing *El Masaoudi v. UNO Chicago Grill*, CRB No. 15-093 (October 15, 2015).

To reach her conclusion, the ALJ explained:

There is also the fact that after being released from medical care on November 9, 2011, Claimant neither sought nor received any further treatment on her left middle finger, although it was her testimony that she continued to have problems

with her finger and left hand. Claimant's testimony and her subjective complaints of chronic pain, diminished function of her left middle finger and grip strength two years after the work injury relied upon by Dr. Fechter, is not found credible. Furthermore, there is no medical evidence as to the impact if any on Claimant's ability to do her pre-injury job during the period up to November 2014 when she stopped working other than her own testimony, which is not deemed credible. Rather, her testimony is that [she] continued performing her pre-injury job until she stopped working for Employer due to a non-related subsequent work injury, which is not at issue here.

CO at 7.

Thus, while we agree with Claimant that "The ALJ clearly relied on the fact that Ms. Lee 'continued performing her pre-injury job until she stopped working for the Employer due to a non-related subsequent work injury'" we disagree that "it is legal error that the fact-finder focused on this lack of actual wage loss in determining the extent of Ms. Lee's disability". We do not find that the ALJ relied solely on the effect the work injury had upon her actual earnings, and contrary to Claimant's position the lack of actual wage loss *is* a relevant consideration. *Al-Robaie, supra*; Claimant's Brief at 12.

The ALJ simply found the zero percent PPD opinion of Dr. Barth to be more persuasive than the 18 percent impairment opinion of Dr. Fechter which the ALJ noted was not supported by his clinical findings or objective tests. The ALJ further noted that Dr. Fechter did not provide an explanation of his finding of weak grip strength testing nor did he cite to any edition of the AMA Guide in reaching his impairment rating

We agree with Employer's response that not only was the ALJ within her authority to consider the absence of wage loss since the alleged injury on May 26, 2011, the ALJ did not determine that wage loss was a condition precedent for a PPD award but it was one of many factors used to reject Claimant's claim.

We find no error in the ALJ's analysis, and affirm the decision.

#### CONCLUSION AND ORDER

The CO which determined that Claimant did not sustain a permanent partial disability to the left hand is supported by substantial evidence and is in accordance with the law. The Compensation Order is affirmed.

*So ordered.*