

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**  
**Labor Standards Bureau**

**Office of Hearings and Adjudication**  
**COMPENSATION REVIEW BOARD**



(202) 671-1394-Voice  
(202) 673-6402 - Fax

**CRB No. 07-26**

**GLENN HEATH,**

**Claimant - Petitioner**

**v.**

**AM BRIGGS AND LIBERTY MUTUAL FIRE INSURANCE,**

**Employer/Carrier - Respondent**

Appeal from a Compensation Order of  
Administrative Law Judge Melissa Lin Klemens  
OHA No. 06-353, OWC No. 604804

Jessica Bhagan, Esquire for the Petitioner

Christopher R. Costabile Esquire, for the Respondent

Before LINDA F. JORY, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and E. COOPER BROWN *Chief Administrative Appeals Judge*.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

**DECISION AND REMAND ORDER**

**JURISDICTION**

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 32-1521.01 and § 32-1522 (2004), 7 DCMR § 230 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005)<sup>1</sup>.

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<sup>1</sup>Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C.

Pursuant to 7 D.C.M.R § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

#### BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on December 5, 2006, the Administrative Law Judge (ALJ), concluded that Claimant – Petitioner (Petitioner) sustained an accidental injury arising out of and in the course of his employment; the notice of injury and filing of claim were both timely and that he sustained a 4% permanent partial disability to his left arm.

As grounds for this appeal, Petitioner alleges that the decision is arbitrary, capricious, unsupported by substantial evidence, not in accordance with the law and should therefore be reversed. Respondent asserts the Compensation Order is supported by substantial evidence and should be affirmed.

#### ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) 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 are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. D.C. Official Code § 32-1521.01(d)(2)(A). “Substantial evidence”, as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this panel are 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 reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Specifically, Petitioner asserts that the ALJ's statement that the permanent partial disability rating provided by examining physician, Dr. Fechter is devoid of any definitive explanation of how he arrived at his opinion is contrary to CE 5, Dr. Fechter's October 23, 2006 addendum to his July 18, 2005 report. Petitioner also challenges the ALJ's rejection of Dr. Fechter's report as the ALJ found it noteworthy that Dr. Fechter did not mention an event that occurred in October 2004 while Petitioner was working for another employer, especially in light of the fact that the ALJ deemed the result to be a “mild flare up” of his previous symptoms. Petitioner fails to explain how the ALJ erred, therefore, the panel shall assume Petitioner is asserting the ALJ's

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Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

rejection was not in accordance with the law as the arbitrary and capricious language utilized by Petitioner in his brief, is the criteria used in matters appealed from OWC.

Nevertheless, the ALJ's failure to accept any of Dr. Fechter's rating on this basis is not as significant to the ALJ's ultimate finding of 4% PPD without any finding of impairment, as the ALJ's failure to address or, as a legal matter, acknowledge Dr. Fechter's addendum dated October 23, 2006 which contains Dr. Fechter's breakdown of the 16% PPD rating based on the 5 factors and the AMA guidelines.

This Panel is mindful that recently the Court of Appeals agreed that ALJs have discretion in determining disability percentage ratings and disability awards because as used in the Act, disability is an economic and legal concept which should not be confounded with a medical condition. *See Soloman Negussie v. District of Columbia Department of Employment Services*, No. 05-AA-852 (January 25, 2007) The Panel further must note the ALJ was correct to consider the effect of an injury upon claimant's ability to work, while not being dispositive, is a relevant issue in considering the degree of disability to be awarded under the schedule and had she made a finding of some degree of physical impairment we would have no reason to disturb the ALJ's conclusion that Petitioner has a 4% permanent disability due to the impact his injury may have on his future wage earning capacity. Regardless of whether or not the ALJ finds the breakdown and AMA rating persuasive or probative, the Panel cannot find the 4% rating deducted by the ALJ to be based upon on substantial evidence if the ALJ has not considered the addendum and not found Petitioner has suffered from any medical impairment as a result of the work injury<sup>2</sup>.

The Panel notes that the ALJ indicated that her conclusion was based upon "the factors", however it is unlikely she was equating the 5 factors provided to Dr. Fechter in the attorney's form letter of October 23, 2006 given her statement that the record contains only a single rating from Dr. Fechter.

#### CONCLUSION

The ALJ's conclusion with respect to the degree of permanent partial impairment as contained in the December 5, 2006 Compensation Order is not supported by substantial evidence and not in accordance with the law.

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<sup>2</sup> We express no opinion concerning what weight, if any, the ALJ may give this addendum or additional record. We only hold that the ALJ's statement that the record contains but one medical rating causes us concern that the entire record may not have been considered. *But see Jacqueline Butler v. HNTLB*, CRB No. 05-38, OHA No. 04-224A, OWC No. 578968 (December 9, 2005).

**ORDER**

The portion of the December 5, 2006 Compensation Order dealing with the nature and extent of Petitioner's disability is **REMANDED** to AHD for review and consideration of CE 5, Dr. Fechter's October 23, 2006 addendum and reconsideration of Petitioner's permanent partial impairment.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY  
Administrative Appeals Judge

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February 8, 2007

DATE