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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB (Dir.Dkt.) NO. 05-36

WILBUR O. HILIGH,

Claimant-Petitioner,

v.

FEDERAL EXPRESS CORPORATION AND ALEXIS, INC. ,

Employer-Petitioner

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
OHA No. 99-138, OWC No. 513435

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, SHARMAN J. MONROE AND JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND 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, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1]

[1] 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 2004, Title J, the D.C. 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 (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. Code Ann. §§ 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. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

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 on Remand, which was filed on December 23, 2004, the Administrative Law Judge (ALJ) denied, in part, and granted, in part, the requested claim for relief. The ALJ denied the request for temporary total disability benefits from December 20, 1997 to the present and continuing, but granted the aforesaid benefits for the period December 29, 1998 to the present and continuing, along with medical expenses, vocational rehabilitation, and interest on benefits.[2] The Claimant-Petitioner (Petitioner) now seeks review of that Compensation Order on Remand. The Employer-Respondent (Respondent) is also seeking a review of the Compensation Order on Remand through its timely filed Application for Review.[3] On September 13, 2005, the Panel entertained oral arguments on the applicability of D.C. Official Code § 32-1505(c) to this case.

As grounds for this appeal, Petitioner alleges that the decision below is not supported by substantial evidence and not in accordance with the law. The Respondent asserts that the decision below is predicated upon a procedural error which is prejudicial to the Respondent.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review 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. App. 2003). Consistent with this standard of review, the CRB and this Review Panel are 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.

Turning to the case under review herein, the Petitioner alleges that the ALJ's finding that his average weekly wage and compensation rate payable is his average weekly wage earned at the time he was terminated because that amount was less than the minimum compensation rate for the year in which he was terminated is not in accordance with D.C. Official Code § 32-1505(c). The Petitioner maintains that he should be paid the minimum compensation rate at the time of his

[2] The decision on appeal was generated in response to a May 14, 2002 remand from the Director, DOES.

[3] The Claimant filed his Application for Review on January 21, 2005. The Employer filed its Application on January 26, 2005. Although the Employer is also a "petitioner" in this case, for ease of reading and clarity, the Employer will be referred to as "respondent" in this decision.

January 31, 1997 injury. In support of his assertion, the Petitioner relies upon *Hicks v. Paramount Baptist Church*, Dir. Dkt. No. 02-57, OHA No. 02-152, OWC No. 541075 (Erratum, March 18, 2003). In addition, the Petitioner argues that the ALJ's finding that the Petitioner's tardiness was not related to his work injury is not supported by substantial evidence. The Petitioner points to his testimony, the testimony of his mother and the medical reports, which he contends show that after the injury, he was depressed and experienced problems with sleeping, as well as other behavioral changes.

In its response to the Petitioner's appeal, the Respondent argues that the Petitioner should not be paid temporary total disability benefits in excess of his average weekly wage because his average weekly wage is less than the minimum compensation rate. The Respondent maintains that to do so would generate not only a huge financial windfall to the Petitioner, but also a huge disincentive for him to return to work, contrary to the intention of the Act. The Respondent cites *Hicks v. Paramount Baptist Church*, Dir. Dkt. No. 02-57, OHA No. 02-152, OWC No. 541075 (Decision and Remand Order of the Director, December 9, 2002) as support for its position. With respect to *Hicks*, *supra* (Erratum, March 18, 2003), the Respondent asserts that the Director's comment on the applicability of D.C. Official Code §32-1505(c) to temporary total disability benefits was dicta and should not be used to overrule the ALJ's finding. As to the ALJ's finding on the Petitioner's tardiness, the Respondent maintains that the medical records and the Petitioner's activities demonstrate that he was capable of working and his termination was not related to his work injury.

In its own appeal, the Respondent asserts that, on remand, the ALJ erred in considering evidence, or the lack thereof, on the issue of provision of vocational rehabilitation after the record in this case was officially closed and that the consideration thereof should not have formed the basis for the award of benefits. As a remedy, the Respondent requests that the ruling on this issue be reversed and remanded, either for findings based upon the evidence in the record, or for a reopening of the record to accept additional evidence.

The main issue in this case, whether the minimum compensation rate of D.C. Official Code § 32-1505(c), formerly D.C. Code § 36-305(c), applies to the payment of temporary total disability benefits, was previously addressed by DOES in several cases.[4] These cases, however, have not

[4] *See Joyner v. Reyna's Fashions,* H&AS No. 83-97, OWC No. 0001794 (December 7, 1983) (Held that a claimant receiving temporary total disability benefits is not entitled to be paid at the minimum compensation rate when a claimant's average weekly wage is less than the minimum compensation rate); *Walker v. Unicco*, Dir.Dkt. .No. 98-29, H&AS No. 96-383, OWC No. Unknown (July 7, 1998) (Director, specifically departing from *Joyner*, held that since the claimant's average weekly wage and compensation rate were less than the minimum compensation rate, temporary total disability benefits were to be paid at the minimum compensation rate for the year in which the injury occurred); *Larose v. Freedman Decoration Co.*, Dir.Dkt. No. 95-79, H&AS No. 95-83, OWC No. 275384 (April 2, 1999) (Citing *Walker*, Director held that the claimant's temporary total disability benefits are to be paid at the minimum compensation rate); *Hicks v. Paramount Baptist Church*, Dir.Dkt. No. 02-57, OHA No. 02-152, OWC No. 541075 (December 9, 2002) (Director held, after a review of the legislative history, that the minimum compensation rate is only applicable to the payment of permanent total disability benefits); *Cluff v. Freeman Decorating Co.*, Dir.Dkt.No. 02-70, OHA No.02-236, OWC No. 553708 (February 10, 2003) (Citing *Larose*, Director held the claimant's temporary total disability benefits were to be paid at the minimum compensation rate since the claimant's average weekly wage and compensation rate were less than the minimum compensation rate); and *Hicks v. Paramount Baptist Church*, Dir. Dkt. No. 02-57, OHA No. 02-152, OWC No. 541075 (Erratum March 18, 2003)

proved to be elucidating and have instead caused confusion. Subsequent to the issuance of these decisions, the City Council of the District of Columbia passed the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code § 32-1521.01 (2005), in which the Compensation Review Board (CRB) was established to replace the Director in providing administrative appellate review of workers' compensation claims. With this change, the existing precedent from the Director became non-binding, but persuasive authority to the CRB. *See* 7 DCMR § 255.7 (Notice of Emergency and Proposed Rulemaking, August 19, 2005).[5] Accordingly, the Panel determines, given the regulations governing the operation of the CRB, that the best solution is to begin anew the analysis on the question of applicability of D.C. Official Code § 32-1505(c) to the payment of temporary total disability benefits under the Act when a claimant's average weekly wage is less than the minimum compensation rate.

The first step in the analysis is to examine the language in the Act. We first look at the language of the statute by itself "to see if the language is plain and admits of no more than one meaning." *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979). When the language of a statute is plain and unambiguous, the plain meaning of that language is binding. *See Hudson Trail Outfitters v. D.C. Department of Employment Services*, 801 A.2d 987, 990 (D.C. 2002) (citation omitted). "However, 'even where the words of a statute have a 'superficial clarity,' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve.'" *Hively v. D.C. Department of Employment Services*, 681 A.2d 1158, 1161 (D.C. 1996) (citation omitted). In that event, the court will "look to policy and the statute's 'manifest purpose' in order to assist" in the interpretation of ambiguous statutory language. *Hively*, at 1163.

Both the Supreme Court and the D.C. Court of Appeals have recognized that "words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.'" *Harrison v. Northern Trust Co*., 317 U.S. 476, 87 L. Ed. 407, 63 S. Ct. 361 (1943) (citations omitted); Davis, supra, 397 A.2d at 956; *see Sanker v. United States*, 374 A.2d 304, 307 (1977) (quoting *Lynch v. Overholser*, 369 U.S. 705, 710, 8 L. Ed. 2d 211, 82 S. Ct. 1063 (1962) ("The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, . . . for 'literalness may strangle meaning.'") (citations omitted)).

As the D.C. Court of Appeals has explained, it is appropriate to look beyond the plain meaning of statutory language in several different situations. "First, even where the words of a statute have a 'superficial clarity,' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve. *Sanker, supra*, 374 A.2d at 307 (quoting *Barbee v. United States*, 392 F.2d 532, 535 n. 4 (5th Cir.), cert. denied, 391 U.S. 935, 20 L. Ed. 2d 855, 88 S. Ct. 1849

(Director reversed earlier Hicks decision and held that the minimum compensation rate is payable on temporary total disability benefits as such payment promotes the humanitarian purposes of the Act).

[5] 7 DCMR § 255.7 states: "[d]ecisions issued by the Director prior to establishment of the Board shall be accorded persuasive authority by the Board."

(1968) ('Whether or not the words of a statute are clear is itself not always clear')); accord *Davis, supra*, 397 A.2d at 956. Second, 'the literal meaning of a statute will not be followed when it produces absurd results.' *Varela*, supra, 424 A.2d at 65 (quoting *District of Columbia National Bank v. District of Columbia*, 121 U.S. App. D.C. 196, 198, 348 F.2d 808, 810 (1965) (citations omitted)); *Berkley v. United States*, 370 A.2d 1331, 1332 (D.C. 1977) (per curiam) ("statutes are to be construed in a manner which assumes that Congress acted logically and rationally"). Third, whenever possible, the words of a statute are to be construed to avoid "obvious injustice." *Metzler v. Edwards*, 53 A.2d 42, 44 (D.C. Mun. App. 1947); see *Center for National Policy Review on Race & Urban Issues v. Weinberger*, 163 U.S. App. D.C. 368, 372, 502 F.2d 370, 374 (1974) ('[a] court may qualify the plain meaning of a statute" to avoid consequences that would be "plainly . . . inequitable'). Finally, a court may refuse to adhere strictly to the plain wording of a statute in order "to effectuate the legislative purpose," *Mulky v. United States*, 451 A.2d 855, 857 (D.C. 1982), as determined by a reading of the legislative history or by an examination of the statute as a whole. *Floyd E. Davis Mortgage Corp. v. District of Columbia*, 455 A.2d 910, 911 (D.C. 1983) (per curiam) ("a statute is to be construed in the context of the entire legislative scheme"); *Dyer v. D.C. Department of Housing and Community Development*, 452 A.2d 968, 969-70 (D.C. 1982) ("the use of legislative history as an aid in interpretation is proper when the literal words of the statute would bring about a result completely at variance with the purpose of the Act"); *District of Columbia v. Orleans*, 132 U.S. App. D.C. 139, 141, 406 F.2d 957, 959 (1968) ("the 'plain meaning' doctrine has always been subservient to a truly discernible legislative purpose however discerned, by equitable construction or recourse to legislative history")." *Peoples Drug Stores v. District of Columbia*, 470 A.2d 751, 753-754 (D.C. 1983) (en banc).

D.C. Official Code § 32-1505(c) states: "[t]he minimum compensation for total disability or death shall be 25% of the maximum compensation." The terms "total disability" appear to be clear. However, an in-depth consideration of alternative constructions that could be ascribed to the terms reveals an ambiguity. First, under the Act, there are two (2) types of compensation payable for total disability: permanent and temporary. *See* D.C. Official Code §§ 32-1508 (1) and (2). Second, as indicated by the issue on appeal and the various decisions by the agency, there exists confusion as whether the term "total disability" refer to "permanent total disability" or "temporary total disability" or to both. Consequently, the Panel recognizes there is an ambiguity present in D.C. Official Code § 32-1505(c) and will examine the legislative history and purposes of the Act to help resolve this matter.

A review of the legislative history shows that in drafting D.C. Official Code § 32-1505 the District of Columbia City Council stated, "[t]his section also establishes minimum compensation for Total Permanent Disability or death of 25% of the maximum compensation." COMMITTEE ON HOUSING AND ECONOMIC DEVELOPMENT, REPORT ON THE DISTRICT OF COLUMBIA WORKERS' COMPENSATION ACT OF 1979, Bill 3-106, at 14 (Jan. 29, 1980). Thus, although the language in D.C. Official Code § 32-1505(c) uses the terms "total disability", which causes an ambiguity, it is clear that in drafting this section of the Act, the City Council intended the minimum compensation rate to be applicable to cases of permanent total disability only.

The Panel is aware that D.C. Official Code § 32-1505(c) has been applied to the payment of temporary total disability benefits on the grounds that such a payment promotes the humanitarian purposes of the Act and reflects a strong legislative policy of awarding benefits in questionable cases. *See Hicks, supra* (Erratum at p. 2). It is without question that the purpose of the Act is to provide medical services and income replacement benefits to workers who incur a reduction in wages due to a work-related injury. However, also among the purposes of the Act is an intent to foster and encourage an injured employee's return to work. *See* COMMITTEE ON HOUSING AND ECONOMIC DEVELOPMENT, REPORT, *supra* at 2. Indeed, the Act and its accompanying regulations state that an employer is mandated to provide vocational rehabilitation services to an injured employee when required. *See* D.C. Official Code §§ 32-1507(a) and (c); 7 DCMR § 229 *et seq*. To promote the return to work, the Act creates an incentive to accept vocational rehabilitation by suspending benefits when an injured employee unreasonably refuses to accept the vocational rehabilitation. *See* D.C. Official Code § 32-1507(e).

With respect to D.C. Official Code § 32-1505(c), the aforesaid humanitarian purposes of the Act are served with application of the minimum compensation rate where an injured employee's disability is permanent and total in nature. However, the additional purpose of providing an incentive to return to employment would not be served by applying the minimum compensation rate where the minimum rate exceeds the actual average weekly and the injured employee's disability is temporary in nature. To pay an injured employee more money while disabled than he earned while working is a clear disincentive to returning to work. Moreover, the humanitarian purposes of the Act do not require the payment of benefits at a rate not intended under the Act. *See generally Stevenson v. D.C. Department of Employment Services*, 845 A.2d 523 (D.C. 2004) (Court reasoned that although the humanitarian purposes of the Act permits doubts to be resolved in the worker's favor, it did not permit an award in the favor an injured worker when the worker concededly does not meet the Act's definition of an "employee.").

As to the strong legislative policy of awarding benefits in questionable cases, after a review of the legislative history, it is clear that the term "total disability" in D.C. Official Code § 32-1505(c) refers to permanent total disability only.

Therefore, the Panel holds that the minimum compensation rate of D.C. Official Code § 32-1505(c) does not apply to the payment of temporary total disability benefits but, to the payment of permanent total disability benefits under the Act. As the Petitioner herein was awarded temporary total disability benefits, the minimum compensation rate of D.C. Official Code § 32-1505(c) is not applicable.

Since the minimum compensation rate is not applied to the payment of temporary total disability benefits, the question remains as to the computation of the compensation rate when the average weekly wage is less than the minimum compensation rate. The ALJ determined that the Petitioner's average weekly wage and compensation rate are the Petitioner's actual average wage at the time of his termination. The Panel accepts, in part, and rejects, in part, this determination.

The Panel accepts the determination that the Petitioner's average weekly wage and compensation rate are his actual average weekly wage. Given that the injured employee's average weekly wage as calculated under the Act brings his compensation rate below the amount

the Act states is a minimum amount of compensation, it is reasonable to pay the injured worker at the full amount of his weekly wages. As the Respondent noted in its memorandum on appeal, the District of Columbia's sister jurisdiction of Maryland uses the actual average weekly wage where the average weekly wage is less than the statutory minimum compensation rate. *See* Md. LABOR AND EMPLOYMENT Code Ann. § 9-626 (2005). The Panel recognizes that there is precedence in this jurisdiction for applying the law of Maryland to the District of Columbia workers' compensation matters. The City Council of the District of Columbia, in enacting the Workers' Compensation Amendment Act of 1998, adopted the approach used by Maryland to determine permanent partial impairments. *See* COMMITTEE ON GOVERNMENT OPERATIONS, REPORT ON THE WORKERS' COMPENSATION ACT OF 1998, Bill 12-192, at 8 (October 29, 1998). Further, paying an injured worker at his actual average weekly wage when his compensation rate is less than the prescribed minimum promotes the humanitarian purposes of the Act.

In line with the above reasoning, we hold that Petitioner is entitled to payment of his average weekly wage. Where a claimant's average weekly wage is at or below the minimum compensation rate, the actual average weekly wage is deemed his compensation rate. At the same time, where a claimant's average weekly wage is higher than the minimum compensation rate, the employee is to be paid his actual weekly wage until 66⅔ of his actual wages equals the minimum compensation rate. At the point, the average weekly wage calculation of D.C. Official Code § 32-1511 becomes applicable. We determine that compensating an injured worker as stated hereinbefore is both fair and reasonable, furthers the policies under the Act as hereinbefore discussed, and is consistent with the humanitarian purposes the Act seeks to fulfill. An employee whose earnings from working are low should not be further burdened when the employee is unable to work due to an injury.

The Panel rejects the determination that the Petitioner be paid based upon his actual average wage at the time of his termination. Under the Act, the average weekly wage of an injured employee is calculated based on his income at the time of his injury. *See* D.C. Official Code § 32-1511(a). Indeed, various rights and obligations under the Act vest, and are fixed, on the date of injury. Although this case involves the payment of the actual average weekly wage, the Panel can discern no reason for deviating from fixing the average weekly wage to the income earned at the time of the employee's injury.

In his appeal, the Petitioner asserts the ALJ's finding that his tardiness, which ultimately caused his termination from employment, was not related to his work injury is not supported by substantial evidence in the record. The Petitioner argues that his termination was a "direct and natural consequence of his work injury" and points to the ALJ's finding, his testimony, the testimony of his mother and the medical reports submitted into evidence. Claimant's Application for Review at pp. 7-9.

The question before the ALJ was whether the Petitioner's tardiness, which resulted in his termination, was related to his work injury. In the Compensation Order on Remand, the ALJ clearly found that following the work injury, the Petitioner suffered from many symptoms and problems including sleep deprivation or interruption. *See* Compensation Order on Remand at pp 2-3. However, the ALJ later stated:

> The claimant did not present any testimony that his reporting to work late was caused or contributed to by his work injury. Additionally, while he testified of problems sleeping, it is unclear and he did not state these problems were occurring during the October to December 1997 period when he returned to work.
>
> Finally, the medical reports of claimant's treating physician, Dr. Regan, do not reflect the claimant's problems with sleeping or reporting to work on time were discussed with him. I therefore cannot find, based upon the evidence in this record, that claimant's tardiness in reporting to work with the employer was the result of or contributed to by his work injury, and therefore, it was due to reasons unrelated to his injury.

Compensation Order on Remand at p 6.

The Panel's task on review of an ALJ's findings of fact is not to substitute our judgment for that of the ALJ as long as such findings are supported by substantial evidence in the record. *See Marriott*, *supra* at 885. While a decision which inferred a relationship between the Petitioner's tardiness and his sleep problems may be permissible, it is not mandatory as a matter of law. The ALJ's reasons for not drawing that inference are supported by substantial evidence in the record and are affirmed.

The Respondent, in its separate appeal, argues that the ALJ committed reversible error in finding, and holding that the Respondent failed to offer the Petitioner suitable alternative employment subsequent to the July 31, 2000, the date of the original Compensation Order issued in this case.

In the May 14, 2002 Remand Order, the Director stated,

> In view of Claimant's psychological condition as a result of the injury, it is difficult to understand why no findings were made on whether Claimant's tardiness was related to the work injury, and whether Employer had provided Claimant alternative employment within his medical restriction.
>
> Because no findings were made on these relevant, material, and crucial issues, it is necessary to remand this case to the Hearing Examiner for further findings.

Remand Order of the Director at p. 3.

In the Compensation Order on Remand, the ALJ stated,

> I find that the employer provided vocational rehabilitation services to the claimant in May 1999 consisting of an interview obtaining information regarding his education, employment background, and medical restrictions. I

> find that vocational rehabilitation services then consisted of preparation of a labor market survey identifying potential jobs as suitable alternative employment available which the claimant should be capable of performing. I find that these jobs were sent to physicians who treated or evaluated claimant for their opinions regarding suitability for the claimant to pursue. I find that only the employer's evaluating physician responded opining all of the jobs identified, with the exception of one, was suitable work for the claimant. I find that none of the potential jobs identified in the labor market survey were communicated to the claimant.
>
> I find, based upon the employer's written argument on remand, that no vocational rehabilitation services have been provided on behalf of the claimant pursuant to the July 31, 2000 Compensation Order issued in this case. . . . . *I find that the claimant has not been provided with vocational rehabilitation services geared toward identifying suitable alternative employment within his restrictions as ordered in the prior compensation order.*

Compensation Order on Remand at p. 4. (emphasis added).

In discussing his findings with regard to the provision of vocational rehabilitation services, the ALJ explained,

> There is no evidence, *reflected in the parties [sic] post remand filings* that the claimant has been provided vocational rehabilitation or continuing psychiatric or psychological treatment as opined by both examining physicians *and ordered and awarded in the prior compensation order.*

Compensation Order on Remand at p. 8. (emphasis added).

In its appeal, the Respondent argues that the ALJ's responsibility with respect to the merits of the case ended after his determination that the Petitioner's tardiness was not related to the work injury and, thus, that the ALJ should have merely affirmed the remainder of the July 31, 2000 Compensation Order. The Respondent notes that on remand, the ALJ denied the Petitioner's request to re-open the record for additional testimony and evidence, but instead directed the parties to submit post-remand briefs. Accordingly, the Respondent further argues that the ALJ's award of benefits based upon *the lack of evidence* on vocational rehabilitation in the Respondent's post-remand brief constitutes reversible error because the ALJ denied the Respondent the opportunity to present evidence upon which the ALJ's decision on this particular issue (due to the lack of evidence) subsequently turned. Employer Memorandum at pp. 3-5. The Respondent requests that the December 23, 2004 decision be reversed and remanded with instructions that the ALJ limit his findings to the record evidence in existence at the time of the original Compensation Order or that the ALJ reopen the record to permit the submission of further evidence on the question of what, if any, vocational rehabilitation services the Respondent has offered the Petitioner since the Compensation Order issued.

Initially, the Panel rejects the Respondent's argument concerning the ALJ's responsibility concerning the merits of the case on remand after determining that the Petitioner's tardiness was not related to the work injury. The ALJ was directed in the Remand Order to make findings on the issue of whether the Respondent had provided the Petitioner alternative employment within his medical restriction.[6]

However, with respect to the ALJ's determination that the Respondent did not provide suitable employment to the Petitioner and additionally found, based upon the post-remand briefs, that the Respondent had not provided vocational rehabilitation and suitable alternative employment to the Petitioner *since the original decision in this case issued*, the Panel determines that the ALJ committed reversible error.

When this matter was remanded, the ALJ had the option to issue a new decision based upon the evidence submitted at the formal hearing or to re-open the record for additional evidence.[7] The ALJ chose not to accept new or additional evidence, thereby disallowing the parties the opportunity to submit any new or additional evidence and limiting the reconsideration of this matter to the evidence submitted into the record at the formal hearing. Having done so, the ALJ's deliberation necessarily focused on the state of this case on July 19, 1999, the date the record closed after the formal hearing. It was thus inappropriate for the ALJ to make a finding predicated upon the *lack of evidence* in the parties' post-remand briefs. Given these circumstances, the finding that the Respondent had not provided vocational rehabilitation and suitable alternative employment to the Petitioner since the original decision in this case issued is vacated.[8]

In the Compensation Order on Remand, the ALJ found that the Petitioner was temporarily totally disabled from December 1998 due to his psychiatric condition. The ALJ, although not specifically citing the treating physician preference, relied upon the opinion of Dr. Lawrence Sank, the Petitioner's psychologist, that the Petitioner's depression impaired his ability to function in the work place. The ALJ also found that, at the time that the original Compensation

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[6] The Panel is not clear on why this directive was made. One of the issue discussed in the July 31, 2000 Compensation Order was whether the Petitioner voluntarily limited his income. The Respondent had argued that since it had affirmatively shown, through a labor market survey there was suitable alternative employment available, the Petitioner had voluntarily limited his income. The ALJ found that the Respondent retained a vocational rehabilitation counselor who conducted a labor market survey, that twelve jobs were identified as suitable alternative employment, that the Respondent's IME psychiatrist approved eleven of the positions, and that none of the positions were communicated to the Petitioner so that he could pursue them. The ALJ then indicated that a labor market survey alone is not sufficient to satisfy an employer's obligation to provide vocational rehabilitation services. The ALJ ultimately found that that the Petitioner had not voluntarily limited his income. The ALJ, however, did not award temporary total disability benefits because he determined that the Petitioner's wage loss was due to reasons unrelated to his injury. *See Hiligh v. Federal Express*, H&AS No. 99-138, OWC No. Unknown (July 31, 2000).

[7] 7 DCMR § 230.7 states: "[o]n remand, the Hearing or Attorney Examiner may hold a hearing to permit the presentation of the additional evidence, may modify his or her findings of fact and may modify or set aside his or her original order by reason of the modified or new findings of fact."

[8] The Act provides mechanisms for resolving events occurring, or not occurring, after a Compensation Order is issued. Herein, the prior Compensation Order ordered the Respondent to institute vocational rehabilitation services. Therefore, the parties may either request a modification pursuant to D.C. Official Code § 32-1524 or a default pursuant to D.C. Official Code § 32-1519, whichever is appropriate.

Order issued, the Respondent did not provide suitable employment to the Petitioner. Both of these findings are supported by substantial evidence in the record and will not be disturbed.

CONCLUSION

The Compensation Order on Remand of December 23, 2004 is supported by substantial evidence in the record and is in accordance with the law in part. The finding that the Petitioner is to be paid based upon his wages at the time of his termination is not in accordance with the law. The finding that the Respondent had not provided vocational rehabilitation and suitable alternative employment to the Petitioner since the original decision in this case issued is not based on substantial evidence and is not in accordance with the law.

The findings that the Petitioner is to be paid compensation based upon his actual average weekly wage, that the Petitioner's tardiness was not related to his work injury and that the Respondent, at the time that the original Compensation Order issued, did not provide suitable alternative employment to the Petitioner, are based upon substantial evidence and are in accordance with the law.

ORDER

The Compensation Order on Remand of December 23, 2004 is hereby AFFIRMED IN PART, AND VACATED, IN PART.

The portion of the decision finding that the Petitioner is to be paid at his actual average weekly wage at the time of his termination is VACATED.

The portion of the decision finding that the Respondent had not provided vocational rehabilitation and suitable alternative employment to the Petitioner since the original decision in this case issued is VACATED.

All other portions of the Compensation Order on Remand are AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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SHARMAN J. MONROE
Administrative Appeals Judge

December 22, 2005
DATE