

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-093

**IBRAHIM EL MASAOUDI,
Claimant-Petitioner,**

v.

**UNO CHICAGO GRILL and
HANOVER INSURANCE COMPANY,
Employer-Respondent.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 OCT 15 PM 12 16

Appeal from a May 4, 2015 Compensation Order by
Administrative Law Judge Gerald D. Roberson
AHD No. 14-040A, OWC No. 703747

(Decided October 15, 2015)

David J. Kapson for Claimant
Julie D. Murray for 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

Except as noted otherwise, the following facts are taken from the Findings of Fact and Discussion portions of the Compensation Order under review, issued May 4, 2015 (the CO) and unless noted otherwise are not contested by either party in this appeal.

Ibrahim El Masaoudi (Claimant) worked as a part-time server for UNO Chicago Grill. His duties included taking food orders from customers, wiping down tables and delivering food orders on heavy trays to the tables. The work involved much walking, turning, and bending. Claimant was injured on March 27, 2013 when a host bumped into him while Claimant was carrying a soup tray. Claimant lost his balance and control of the tray, causing the contents to contact his left hand, neck and the right side of face, burning those body parts.

The incident also caused Claimant to fall against a wall, injuring his back and shoulder. Claimant also kicked a trash can with his left foot, injuring it as well.

Claimant sought treatment at George Washington Hospital on April 3, 2013. He was given Advil, missed a week from work before returning to his job as a server for Employer, without restrictions and performing his full duties.

On May 8, 2013, Claimant sought medical care from Dr. Jeffrey Phillips. He complained of neck and back pain, headaches, difficulty sleeping, and left foot pain over the distal 2nd and 3rd metatarsals.¹ On examination Dr. Phillips noted a good range of motion of the toes and the subtalar joint.² X-rays revealed no bony abnormalities or arthritic changes in the foot, and Dr. Phillips diagnosed the injury as a contusion. He recommended physical therapy.

On June 7, 2013, Claimant was seen by Dr. Richard Meyer, a colleague in Dr. Phillips's practice. Claimant complained of left foot pain over the 2nd and 3rd metatarsal heads and the proximal phalanges³ of the left foot. On examination Dr. Meyer noted the absence of ankle pain. He ordered an MRI to rule out occult injury.⁴

On June 21, 2013, when seen again by Dr. Phillips, Claimant reported that he was doing better and had returned to work. Claimant complained of tenderness over the metatarsal heads. Dr. Phillips noted on examination that Claimant had good range of motion of the ankle and subtalar joint and good foot strength. Dr. Phillips advised Claimant to discontinue any medication, discharged Claimant from any further active care, and noted that Claimant could continue working.

On June 24, 2013 Claimant was evaluated at his own request by Dr. K. Thomas Wagner for the purpose of an independent medical evaluation (IME), and specifically for a determination regarding what, if any, permanent partial impairment he retained from the injury. Dr. Wagner authored a report in which he opined that Claimant was at maximum medical improvement, and that Claimant had no impairment for structural abnormalities, and that taking into account pain, weakness, atrophy, loss of function and endurance, Claimant had sustained a 3% whole-body impairment related to the left foot. In an addendum authored July 23, 2014, Dr. Wagner opined that the assigned percentage represented 5% impairment to the leg.

¹ A metatarsal is one of the five long bones in the foot that are immediately adjacent to the first bone in toes. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29TH EDITION, W.B. Saunders Company, 2000, (DORLAND'S), pp. 1096 – 1097.

² Subtalar means "inferior to the talus". Inferior refers to being below. The talus is also known as the "ankle" or "ankle bone". *See* DORLAND'S, pp. 896, 1722 and 1787.

³ In this instance, phalanges are the three bones that comprise the toe. A distal phalange is the farthest out of the bones of the toe, whereas a proximal phalange is the closest to the metatarsal. *See* DORLAND'S, pp. 534 AND 1365.

⁴ An "occult injury" is one which is "obscure; concealed from observation; difficult to understand." *See* DORLAND'S, p. 1253.

On December 3, 2013, Claimant was evaluated by Dr. Louis Levitt at the request of Employer for the purpose of an IME. Dr. Levitt authored a report in which he opined that, pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition (the AMA Guides), Claimant had sustained 0% impairment to the left foot, and had recovered fully from the foot injury.

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 5% permanent partial disability under the schedule (PPD) to the left leg, which Employer opposed in its entirety.

Following the hearing, the ALJ issued the CO, in which he awarded Claimant 1% PPD to the left foot.

Claimant filed an Application for Review (AFR) and memorandum of points and authorities in support thereof (Claimant's Brief) with the Compensation Review Board (CRB), asserting that the CO was arbitrary, capricious, unsupported by substantial evidence and not in accordance with the law, seeking reversal of the 1% award and to have an award of 5% entered in his favor.

Employer filed an Opposition to the AFR and a memorandum of points and authorities in support thereof (Employer's Brief), asserting that the CO is supported by substantial evidence, is in accordance with the law, and should be affirmed.

Because the CO is supported by substantial evidence and the basis therefor is adequately apparent, we affirm the CO.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. *See* D.C. Code § 32-1521.01 (d)(1)(A). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a different conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

Claimant argues that the ALJ erred in making an award for PPD to the foot, rather than the leg. The basis for this argument is not abundantly clear from Claimant's Brief, but it is argued that Claimant "submitted substantial and credible evidence, through testimony and medical reports that demonstrate his entitlement to an award of 5% permanent partial disability to the left lower extremity" and that he "testified at the Formal Hearing that he still has pain in his left foot and occasional pain higher up in the left leg." Claimant's Brief, p. 6.⁵ Assuming the assertion is accurate, it is axiomatic that the mere fact that there is substantial evidence in the record to

⁵ Claimant's Brief contains no citation to or quotation from the hearing transcript supporting this assertion.

support a claim is insufficient grounds upon which to find a compensation order is deficient. It is not our role to substitute our judgment for that of the ALJ.

Further, we note that the ALJ wrote:

Dr. Wagner does not explain how he arrived at this rating of 5%, and he does not state whether the initial 3% whole person rating equates to a rating of 5% for the lower extremity. Given these shortcomings, Dr. Wagner's rating does not offer any medical rationale for providing a rating for the left lower extremity.

CO p. 6. This is a well-reasoned and rational basis upon which to reject the argument that this injury, whatever its extent, is not a leg disability, but is a more properly considered a foot disability.

Although Claimant asserts in the AFR that the CO is unsupported by substantial evidence and is otherwise defective, he makes only one other specific reference in Claimant's Brief to any alleged shortcomings of the CO other than that a contrary conclusion could also have been drawn from the record, and does so rather obliquely.

On page 6, Claimant asserts "Whether or not Claimant has suffered a wage loss is irrelevant to determining the Claimant's eligibility to received [sic] scheduled benefits, because of a conclusive presumption that Claimant will have his or her working life end earlier due to the injury", citing *Corrigan v. Georgetown University*, CRB No. 06-094, AHD No. 06-256, OWC No. 604612 (September 14, 2007). This is apparently a complaint about the ALJ's finding that Claimant only missed a week of work and has suffered no additional time off work since then.

There are several problems with this argument.

First, the ALJ did not find that Claimant was not "eligible" to receive a schedule award, and in fact, the CO contains an award.

Second, *Corrigan* says nothing of the kind. When *Corrigan* represented the prevailing rule followed by the CRB, it stood for the proposition the presence, absence, or amount of any actual wage loss was irrelevant when assessing the extent of PPD under the schedule.

Third, *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), 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.

Accordingly, we reject Claimant's argument.

It is apparent from the uncontested finding in the CO that Claimant's own IME physician found that Claimant suffers from no anatomically identifiable failure of his foot. This opinion is shared by Employer's IME physician. Further, the ALJ's uncontested finding that Claimant has suffered only a brief, temporary period of time off work due to the injury and is now a taxicab operator, and the uncontested finding that Claimant's own treating physician opined that he can return to work without restriction and is in need of no additional medical care, support the ALJ's view that Claimant's condition is as minimal as it could possibly be, while still being subject to some PPD.

Inasmuch as Employer has not raised any issue concerning the award being unsupported by substantial evidence, we will not address the question of whether the absence of any anatomic impairment (i.e., the lack of any detectable failure of the human frame) precludes any PPD award at all.

CONCLUSION AND ORDER

The Compensation Order of May 4, 2015 is supported by substantial evidence and is affirmed.

So ordered.