

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 No. 07-141

JENNIFER ETTIENNE,

Claimant - Petitioner

v.

GEORGE WASHINGTON HOSPITAL AND CONSTITUTION STATES SERVICES

GEORGETOWN UNIVERSITY HOSPITAL AND GEORGETOWN UNIVERSITY RISK ,

Employers/Carriers - Respondents

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
OHA No. 004-048A, OWC Nos. 551613, 579980, 581031

Heather C. Leslie, Esquire for the Petitioner

David C. Numrych Esquire, for the Respondent George Washington University Hospital¹

Before LINDA F. JORY, FLOYD LEWIS AND SHARMAN MONROE, *Administrative Appeals Judges*.

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

DECISION AND REMAND ORDER

JURISDICTION

¹The record reveals that Claimant-Petitioner (Petitioner) worked for George Washington University Hospital and Georgetown University Hospital as well as two other employers on a part-time basis. Petitioner sustained injuries to her upper right extremity on three occasions —once while employed by Georgetown University Hospital and twice while employed by George Washington University Hospital with the most recent injury occurring at George Washington. The record reveals the parties and the Administrative Law Judge (ALJ) ultimately agreed that the issue to address at the Formal Hearing was the nature and extent of Petitioner's disability and that the issue of apportionment between employers would be decided based on written briefs submitted post hearing. The ALJ did not reach the apportionment issue as he found no disability resulted from any injuries. Counsel for George Washington University Hospital filed a response to Petitioner's Application for Review of the Compensation Order. Georgetown University Hospital has not filed a response to date. Accordingly when referring to Respondent in the Decision and Order herein, reference is made to George Washington University Hospital only.

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)². 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 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 June 27, 2007, the Administrative Law Judge (ALJ), concluded that Petitioner's injuries of March 26, 2000, March 20, 2002 and June 18, 20002 have not left her disabled as defined under the Act and her claim for permanent partial disability (PPD) benefits pursuant to the schedule were therefore denied.

As grounds for this appeal, Petitioner alleges that the decision to her claim for PPD benefits on the fact that her injury has not caused any wage loss is in direct contravention of the law established by the Court of Appeals in *Deshazo v. District of Columbia Department of Employment Services*, 638 A.2d 1152 (DC 1994) and *Smith v. District of Columbia Department of Employment Services*, 548 A.2d 95 (DC 1988). Second Petitioner asserts the Compensation Order failed to apply the CRB's precedent established in *Wormack v. Fishback and Moore*, CRB No. 03-159, AHD No. 03-151, OWC No. 456205 in the determination of the extent of a permanent disability to a scheduled member. Petitioner further argues that basing the determination of the extent of disability to a schedule member on proof of wage loss creates an equal protection violation as workers who return to work in their pre-injury employment with the same injury are left without a remedy for that injury.

Respondent has filed an opposition to Petitioner's AFR asserting that "because Petitioner failed to meet her burden of proof as to a disability and wage loss, the ALJ's decision was correct in finding no disability for a shoulder injury based upon substantial evidence in the record". In response to Petitioner's equal protection argument Respondent posits that "It is not a violation of eth equal protection clause for a person with economic wage loss to be compensated differently

²Pursuant 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. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

that someone without an economic wage loss for purposes of the workers' compensation state. Further, 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.

At issue in the instant matter is the ALJ's determination that Petitioner was not entitled to a scheduled loss PPD award for injuries she received to her right shoulder based solely on the ALJ's determination that a continuing injury that does not result in any wage loss-earning capacity cannot be the foundation for a finding for disability, citing the Court of Appeals decision in *The Washington Post v. District of Columbia Department of Employment Services*, 675 A.2d 37 (D.C. App. 1996)(*Mukhtar*). Review of the record as well as the Compensation Order reveals that the only claim for relief made by Petitioner at the Formal Hearing was for permanent partial disability benefits pursuant to §32-1508(A) based upon a finding of 31% permanent partial impairment to the right arm as so rated by her treating physician, Dr. Klimkiewicz. Thus, it is unclear why the ALJ referred to the Court of Appeals decision in *Mukhtar* and *Joyner v. District of Columbia Department of Employment Services*, 502 A.2d 1027 (D.C. 1986) as both cases deal with a request for temporary total disability benefits and the burdens placed on the injured worker and employer in determining if whether the aforesaid benefits are awardable under the Act.

Since the 1998 amendments to the Act, it is well settled, now that when determining disability pursuant to §32-1508(3) subsections (A) through (S), the most recent edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment may be utilized along with the following 5 factors:(i) pain (ii) weakness (iii) atrophy (iv) loss of endurance; and (v) loss of function. D.C. Code §32-1508(3) makes no reference to a loss of wages.

Petitioner asserts that the Act does not allow the determination of the extent of the disability to a scheduled member to be based on a consideration of wage loss. Petitioner initially cites to the Court of Appeals decisions in *Deshazo v. District of Columbia Department of Employment Services*, 638 A.2d 1152 (DC 1994)(*DeShazo*) and *Smith v. District of Columbia Department of Employment Services*, 548 A.2d 95 (D.C. 1988)(*Smith*) in support of its argument. Petitioner

refers specifically to the Court's reasoning and citation to Professor Arthur Larson in *DeShazo* when it explains that an injured worker is entitled to PPD benefits based on an injury to a scheduled member irrespective of whether or not that injury produces an actual loss of wages:

The assumption underlying this approach is that, although the claimant may be able to continue working, the impact of the injury causing a permanent partial disability sooner or later will take its toll, and that the scheduled benefits will be an appropriate, if arbitrary, compensation to offset wage losses that eventually can be anticipated. See 1C A. Larson, *Law of Workmen's Compensation* §§57.31

Deshazo, supra at 1156. Petitioner also cites the pertinent explanation made by the *Smith* Court: that not requiring an impaired earning capacity to receive schedule benefit should:

...not be interpreted as an erratic deviation from the underlying principle of compensation law - that benefits related to loss of earning capacity and not to physical injury as such. The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience.

Smith, supra at 99. Petitioner further relies on the CRB's decision in *Wormack v. Fishback & Moore Electric, Inc.*, CRB No. 03-159, AHD No.03-151, OWC No. 456205 (July 22, 2005)(*Wormack*) and asserts that the CRB has established a standard for determining the extent of permanent disability to a scheduled member³. While this panel agrees with Petitioner's argument that *Wormack* does not and cannot in light of the clear holdings of *Deshazo* and *Smith* allow shifting the analysis, of the extent of an injury to a scheduled member, to a simple issue of whether the injured worker is suffering a wage loss, we need not provide additional guidance here as to how the term "industrial loss" is to be analyzed in a scheduled loss award.

Recently (and after the ALJ issued the decision in this matter), in *Corrigan v. Georgetown University*, CRB No. 06-094, AHD No. 06-256 (September 14, 2007), the CRB, sitting en banc, in an extensive analysis, held that taking wage loss into consideration in such cases is impermissible under District of Columbia precedent, as wage loss is immaterial to the entitlement of an employee to a permanent partial disability schedule award under the Act. With regard to the concept of the term "industrial use" in *Wormack*, the Board explained:

By introducing the concept of "loss of industrial use" and the effect of a claimant's schedule work injury on a claimant's "industrial capacity" into the determination of the degree of disability for schedule awards, *Wormack* contemplates for consideration, in addition to the physical condition of the injury (as assessed by the medical experts), and the "Maryland Factors," consideration of the employee's scheduled injury or loss from the standpoint of the injured member's use in employment. We nevertheless concede that this description causes confusion because it does not adequately capture the proper standard,

³ The Court of Appeals agreed with the CRB's approach in *Wormack* that the ALJs have discretion in determining disability percentage ratings in *Soloman Negussie v. District of Columbia Department of Employment Services*, No. 05-AA-852 (January 25, 2007).

which is that specific loss is to be determined without reference to the claimant's earning capacity or ability to return to work. As the cited case law establishes, compensation is paid if the loss has been incurred, and it is not relevant whether the worker can work after the loss. We believe it was this concept that the *Wormack* decision was attempting to articulate, and we clarify by means of this opinion that holding.

Corrigan, supra at 11.

This is consistent with the Larson's definition of industrial loss of use by asking "in what industry" the worker would be so impaired. *See* Larson, §86-24. Nevertheless, the ALJ's decision in the instant matter to deny Petitioner request for permanent partial disability benefits, because he found Petitioner failed to prove that the injuries have prevented her from engaging in the only type of gainful employment for which she is qualified is not in accordance with the law. Therefore, the Compensation Order must be vacated and this matter remanded to the ALJ for further proceedings to resolve Petitioner's request for benefits.⁴

CONCLUSION

The ALJ's conclusion that Petitioner is not entitled to permanent partial disability benefits because he found work-related injuries of March 26, 2000, March 20, 2002 and June 18, 2002 have not left Petitioner disabled as defined under the Act, is not supported by substantial evidence and is not in accordance with the law of this jurisdiction.

⁴ In light of the very recent CRB decision in *Corrigan*, a copy thereof is distributed to the parties with the issuance of the instant Decision and Remand Order.

ORDER

The June 27, 2007 Compensation Order dealing with the nature and extent of Petitioner's disability is hereby **REVERSED AND REMANDED** to AHD for reconsideration of the evidence presented on the issue of the nature and extent of Petitioner's permanent partial impairment pursuant to the precedent set by the CRB in *Wormack, supra*, and approved by the Court of Appeals in *Negussie, supra* and in accordance with *Corrigan, supra*.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

October 3, 2007

DATE