

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

Compensation Review Board

CRB No. 12-111

JOHN WHIPPS,
Claimant-Petitioner,

v.

DOMINION MECHANICAL CONSTRUCTION, INC. AND ERIE INSURANCE EXCHANGE,
Employer/Carrier-Respondents

Appeal from a Compensation Order by
The Honorable Leslie A. Meek
AHD No. 12-085, OWC No. 672696

Michael J. Kitzman, Esquire, for the Claimant/Petitioner
Cheryl D. Hale, Esquire, for the Employer/Carrier-Respondents

Before: HENRY W. MCCOY, HEATHER C. LESLIE,¹ AND JEFFREY P. RUSSELL,² *Administrative Appeals Judges.*

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

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

¹ Judge Leslie has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

² Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

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FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was working as a pipe fitter on June 14, 2010 when he developed abdominal pain after moving a 400 pound pipe with a co-worker. Claimant later developed a bulge in his lower right groin that was diagnosed with a right inguinal hernia with diverticulosis by Dr. Neil LaHurd on September 16, 2010 and surgically repaired on October 11, 2010.

Dr. LaHurd saw Claimant for a post-operative exam on October 19, 2010, attributed the pain and swelling in the right groin area to the surgery, and released Claimant to return to work on December 6, 2010. Found by the ALJ to be a credible witness, Claimant testified that he returned to work just before Thanksgiving.

Claimant filed a claim for temporary total disability benefits for the period October 11, 2010 to November 22, 2010 and for a schedule award of 25% permanent partial disability to each lower extremity. Following a formal hearing, the presiding administrative law judge (ALJ) denied the claim for each.³ Claimant timely appealed with Employer filing in opposition.

On appeal, Claimant argues that the ALJ erred in denying both the request for disability benefits and the request for a schedule award as neither ruling is supported by substantial evidence in the record or in accordance with the law. In opposition, Employer argues that the Compensation Order (CO) should be affirmed.

STANDARD OF REVIEW

The scope of review by the CRB, 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.⁴ *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). 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.

With regard to Claimant's claim for a closed period of temporary total disability (TTD) benefits, the ALJ found:

³ *Whipps v. Dominion Mechanical Construction, Inc.*, AHD No. 12-085, OWC No. 672696 (June 22, 2012).

⁴ "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 International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

Claimant's evidence fails to show exactly when Claimant was incapable of working due to his work injuries, and also fails to show Claimant is entitled to TTD benefits for the period of October 11, 2010 to November 22, 2010.

After going through a presumption of compensability analysis when legal and medical causation had already been stipulated to, the ALJ concluded that Claimant's "current condition is causally related to the work incident of June 14, 2010". Then somewhat out of context, she made the ultimate conclusion that for the closed period of TTD benefits requested, Claimant "failed to produce evidence to show that [he] was disabled from working for that period of time due to his work injury."⁵

On appeal Claimant argues that the evidence in the record shows that he was unable to return to his pre-injury employment from the date of his surgery (October 11, 2010) until November 22, 2010. A review of the record supports Claimant's contention.

It is uncontested that Claimant sustained a work-related injury that was diagnosed as an inguinal hernia that was surgically repaired on October 11, 2010. Claimant, who was found by the ALJ to be a credible witness, testified that because of the surgery he missed six to seven weeks from work (Hearing Transcript (HT) at p. 25), and that he went back to work "right before Thanksgiving" (HT at 32).

In his October 19, 2010 post-operative examination report, Dr. LaHurd released Claimant to return to work as of December 6, 2010 and also according to the report gave Claimant a return to work notice to that effect. Employer's independent medical examiner (IME), Dr. Stuart Gordon, noted in his December 13, 2011 report that Claimant "went on to do well with surgery and was off for about six weeks and returned to full duty".

In her discussion, the ALJ made the statement that "[T]he record evidence fails to show when or if Claimant was required to remain off from work as a result of his work injury." However, this statement has no support based on the record evidence just cited. Claimant testified as to the date of his surgery and generally as to the date he returned to work. Employer's own IME somewhat corroborates that period of time off work and Claimant's treating physician did not release him to return to work until after he claims he did.

As a credible witness whose testimony was not controverted, there is record evidence that allows findings to be made as to whether Claimant was off work due to his work-related hernia surgery for the period requested. As those findings are essential to a determination of Claimant's entitlement to TTD benefits, this matter shall be returned to the ALJ to make those findings of fact with conclusions that rationally flow from them.

In addressing Claimant's claim of 25% permanent partial impairment to both lower extremities, the ALJ reasoned:

⁵ CO at p. 5.

Claimant argues he suffers from a disability, to both of his lower extremities, that is partial in character but permanent in quality. However, the Act does not provide for permanent partial disability compensation for the “lower extremity”. Nor does the Act provide for permanent partial disability compensation for the abdomen or hip. For this reason, Claimant’s claim for 25% PPD for his lower extremities must be denied.⁶

Claimant argues on appeal that in denying his claim for a schedule award, the ALJ has committed errors of both law and fact. Claimant contends that as a matter of law, the term “lower extremity” is synonymous with and interchangeable with the term “leg” and has been so used by the District of Columbia Court of Appeals (DCCA) and the administrative courts at DOES.⁷ Claimant further asserts that while his injury occurred to a non-scheduled body part it has resulted in a schedule member disability thus entitling him to an award. We find merit in both arguments.

A schedule award refers to the formula for compensating permanent partial disability described in D.C. Code § 32-1508(3)(A) – (S), which lists certain parts of the body, specifically, (B) Leg lost, 288 weeks’ compensation. While “leg” is specifically listed as a scheduled body part, the case law in this jurisdiction is replete with the term “lower extremity” being used interchangeably with “leg” when a schedule award to that body part is at issue.

In *Golding-Alleyne*, the DCCA endorsed this interchangeability when it stated that claimant’s doctor had rated her left leg impairment at 20% and then footnoted the language in the doctor’s report where he gave a 20% impairment rating to the left lower extremity.⁸ And, similar to the instant case, the ALJs in Hearings and Adjudication have regularly adjudicated cases where the claimant has injured his back resulting in radiating pain to the lower extremities wherein a claim for a schedule award to the lower extremities is sought and an award granted.⁹ Insofar as the “lower extremity” and the “leg” are synonymous for purposes of the Act, it was error for the ALJ to deny Claimant’s claim for a schedule award to both lower extremities by stating the Act does not provide for an award to the “lower extremity”.

It was also error for the ALJ to focus on the site of injury as opposed to the site of the disability in determining whether Claimant had proven entitlement to an award for permanent partial disability. Claimant is not seeking a schedule award for a disabling impairment to his abdomen or hip, or for that matter his surgically repaired hernia. His claim is that the injuries to his non-schedule body parts have caused disabling symptoms to manifest in his lower extremities, right and left, which are schedule members, his right and left legs.

⁶ *Id.* at 7.

⁷ Claimant cites to the cases *Golding-Alleyne v. DOES*, 980 A.2d 1209 (D.C. 2009); *WMATA v. DOES*, 965 A.2d 1 (2009); *Walden v. DOES*, 759 A.2d 186 (D.C. 2000).

⁸ *Golding-Alleyne, supra.*, at 1214.

⁹ See *Smalls v. DCWASA*, AHD No. 11-210, OWC No. 663192 (July 6, 2012); *Cheeks v. WMATA*, AHD No. 10-533A, OWC No. 668706 (October 27, 2011); *Johnson v. WMATA*, AHD No. 08-088A, 640907 (October 20, 2009).

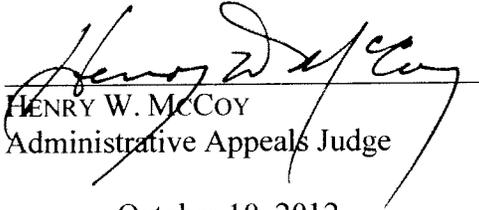
In the case of *Kovac v. Avis Leasing Corporation*, the Director, DOES, concluded that the situs of disability, not the situs of the injury, controls.¹⁰ In other words, it is not the site of the injury which determines whether a schedule award is payable, it is the site of the disability resulting from the injury which is controlling. In the matter of *WMATA v. DOES*, the DCCA held that the Director's interpretation, that the situs of the disability controls, was reasonable.¹¹

Without making specific findings, the ALJ in this case has determined that Claimant's current condition is causally related to the work incident of June 14, 2010. It needs to be determined whether the referenced "current condition" and the lower extremity disabling symptoms that Claimant asserts entitle him to a schedule award are one and the same. On remand, the ALJ shall make those findings and then proceed to determine the nature and extent of Claimant's disability, if any.

CONCLUSION AND ORDER

The Compensation Order of June 22, 2012 improperly concluded that the Act does not provide for a schedule to the lower extremities and improperly looked to the site of the injury, as oppose to the site of the disability, to determine whether a schedule award was payable. As the Compensation Order is not supported by substantial evidence in the record and is not in accordance with the law, it is REVERSED AND REMANDED for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

October 10, 2012
DATE

¹⁰ *Kovac v. Avis Leasing Corporation*, H&AS No. 84-177, OWC No. 000792, at p. 6 (July 17, 1986).

¹¹ See *WMATA v. DOES*, 683 A.2d 470, 475 (D.C. 1996).