GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-141

STEPHEN PROBEY,
Claimant–Petitioner,

v.

T.A. BEACH CORPORATION and MONTGOMERY MUTUAL INSURANCE,
Employer/Carrier-Respondent

Appeal from a July 31, 2012 Compensation Order on Remand by
Administrative Law Judge Amelia G. Govan
AHD No. 98-479A, OWC No. 269082

Benjamin T. Boscolo, Esquire, for the Claimant/Petitioner
Michael D. Dobbs, Esquire, for Employer/Respondent

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL, and MELISSA LIN JONES, *Administrative Appeals Judges*.

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

DECISION AND ORDER

PROCEDURAL HISTORY AND FACTS OF RECORD

This appeal follows the issuance on July 31, 2012 of a Compensation Order on Remand (COR) from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). In that COR, Claimant's request for permanent partial disability benefits again was denied.

The long procedural history in this case was recounted in the Compensation Review Board's (CRB) April 12, 2012 Decision and Remand Order (DRO) and will not be repeated in its

entirety.[1] It is important to note that in *Probey* I Claimant's initial request for ongoing permanent partial disability (PPD) was denied as was his subsequent modification request for PPD benefits from September 1, 1997 through November 21, 2008. In his instant appeal, Claimant argues he is entitled to PPD for the period November 4, 2004 through November 21, 2008.[2]

Most recently, following a remand to Hearings and Adjudication pursuant to a remand from the D.C. Court of Appeals, a subsequent remand decision (*Probey IV*) was issued on November 29, 2011, which again denied Claimant's claim for relief. Claimant appealed that decision and the CRB remanded, instructing the ALJ as follows:

> While the ALJ repeated Claimant's calculation showing his entitlement to PPD wage loss benefits and even though the ALJ provided an example for calculating those benefits, the ALJ made no findings as to Claimant's wages for insertion into the calculation formula; but nonetheless concluded that as of July 2006, Claimant's wages far exceeded his prior earnings. The ALJ made this conclusion of no wage loss without any findings as to Claimant's wages. Without these basic findings, we are unable to determine whether a calculation under either (ii)(I) or (II) proves or disproves Claimant had an actual wage loss. This matter must be returned to the ALJ to make those findings.[3]

On remand, the ALJ framed the issue for resolution as whether a calculation under D.C. Code § 32-1508(3)(V)(ii)(I) or § 32-1508(3)(V)(ii)(II) proves or disproves Claimant had an actual wage loss. The ALJ made findings as to Claimant's wages and based on those findings concluded that Claimant suffered no wage loss and therefore denied the claim for permanent partial wage loss benefits for the period November 4, 2004 through November 21, 2008.[4] Claimant timely appealed with Employer filing in opposition.

ANALYSIS

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 (CO) are based upon substantial evidence in the record, and whether the

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[1] For purposes of consistency in referring to the decisions in the procedural history of this case, we note that the initial December 20, 1999 CO was designated *Probey I*; the January 5, 2007 CO as *Probey II*; the October 5, 2007 COR as Probey III; the November 29, 2011 COR as Probey IV; making the instant July 31, 2012 COR on appeal *Probey V*.

[2] The parties are in basic agreement, based on their respective filings, that Claimant was paid temporary partial disability (TPD) benefits from September 1, 1997 through November 20, 2000 pursuant to *Probey* I. Claimant was also paid PPD benefits from November 20, 2000 through November 4, 2004 pursuant to a November 20, 2000 Final Order of the Office of Workers' Compensation that was ultimately declared null and void.

[3] *Probey v. T.A. Beach Corporation*, CRB No. 11-155, AHD No. 98-479A, OWC No. 269082 (April 17, 2012).

[4] *Probey v. T.A. Beach Corporation*, AHD No. 98-479A, OWC No. 269082 (July 31, 2012).

legal conclusions drawn from those facts are in accordance with applicable law.[5] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 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 CO 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.

In this latest appeal, Claimant seeks to have the July 31, 2012 Compensation Order on Remand (*Probey V*) vacated and remanded with instructions to grant the claim for relief. Claimant argues the ALJ erred in not following the CRB's instructions to make findings as to Claimant's wages for insertion into either § 32-1508(3)(V)(ii)(I) or § 32-1508(3)(V)(ii)(II) so as to prove or disprove Claimant's actual wage loss. Employer argues the ALJ should be affirmed because Claimant is not permitted to re-classify previously paid benefits and he cannot receive PPD wage loss benefits for years when no evidence of wages earned has been introduced to show a wage loss.

When this matter was previously remanded to this ALJ, it was done pursuant to the D.C. Court of Appeals having vacated and remanded the CRB's affirmation of the ALJ's finding that Claimant failed to offer sufficient evidence of a change of condition within the meaning of D.C. Code § 32-1524(a).[6] The Court observed that the CRB, and thereby also the ALJ, did not state how Claimant's wage loss was calculated to determine there was not a reason to believe a change in condition had not occurred with respect to Claimant's disability or amount of compensation. In addition, the Court determined the CRB had not explained whether it calculated Claimant's actual wage loss as of the time he sought a modification of his award, or rather, by using the formula prescribed in D.C. Code § 32-1508(3)(V)(ii)[7], and if the former, how such a calculation was consistent with the cited Code section.[8]

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[5] "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. DOES*, 834 A.2d 882 (D.C. 2003).

[6] D.C. Code § 32-1524(a) states in pertinent part:

> (a) At any time prior to 1 year after the date of the last payment of compensation or at any time prior to 1year after the rejection of a claim, …the Mayor may,…order a review of a compensation case…where there is reason to believe that a change of conditions has occurred which raises issues concerning:
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> (1) The fact or the degree of disability or the amount of compensation payable pursuant thereto; or
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> (2) The fact of eligibility or the amount of compensation payable pursuant to § 32-1509.

[7] D.C. Code § 32-1508(3)(V)(ii) provides the compensation for a non-scheduled permanent partial disability shall be, at the claimant's election, 66 and 2/3 percent of the greater of:

> (I) The difference between the employee's actual wage at the time of injury and the average weekly wage, at the time of injury, of the job that the employee holds after the employee becomes disabled; or

In *Probey IV*, the remand decision in response to the DCCA's and CRB's remands, the ALJ made no statement as to how she calculated Claimant's wage loss, but did determine that Claimant provided no additional medical information to establish entitlement to PPD benefits and determined that "the claim for relief must be denied." While ostensibly basing this determination on Claimant's failure to provide "additional medical information", the ALJ actually found more persuasive Employer's argument that Claimant's wages after he reached maximum medical improvement (MMI) in 2006 exceeded his prior earnings such that a calculation under either § 32-1508(3)(V)(ii)(I) or (II), resulted in no wage loss and therefore no benefits were owed.[9] This determination was appealed and remanded for the ALJ to make findings as to Claimant's wages for insertion in the calculation formula, which brings us to the current remand decision, *Probey V*.

In the latest remand decision, the ALJ made the following findings:

> Both parties stipulated that Claimant's average weekly wage was $904.90. Claimant elected to receive wage loss benefits by comparing his average weekly wage as in his pre-injury position as a journeyman, $904.90, to his job as a field superintendent for Chesapeake Finishing would have paid on April 15, 1994, $346.15 [$18,000 per annum/52 weeks]. I find that under this formula, Claimant suffered a weekly wage loss of $558.75 [$904.90-346.15]. As a result, Claimant was entitled to two-thirds of this amount, $368.77 and was paid by Employer/Insurer until November 4, 2004.
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> Employer/Insurer contends that Claimant's earnings rose dramatically and far exceed what Claimant's pre-injury job would have paid. The parties submitted an "Agreed Statement of Fact" stipulating, that Claimant had reached MMI and that Claimant's earnings for 2004 was (sic) $130,184.68. Although it was incomplete, it was requested that it be incorporated by reference and was thus made part of the record. As a result, when applying § 32-1508(3)(V) to Claimant's earnings, there are no benefits owed.[10]

It is uncontested that after his April 15, 1994 work injury, Claimant returned to work on September 1, 1997 for a different employer, Chesapeake Finishing, as a painting and construction superintendent. At the time Claimant returned to work, he had not reached MMI and

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> (II) The difference between the average weekly wage, at the time the employee returns to work, of the job that the employee held before the employee became disabled and the actual wage of the job that the employee holds when the employee returns to work.

[8] *Probey v. DOES*, No. 08-AA-97 (D.C. 2009).

[9] *Probey IV*, p. 4.

[10] *Probey V*, p. 5.

his starting salary was $20,000.00 per year.[11] In making his request for PPD benefits, Claimant elected to start receiving benefits at the time he returned to work as opposed to when he reached MMI.[12]

In electing to start receiving the requested PPD benefits from the time he returned to work, there remained a requirement for Claimant to establish when he reached MMI. The clear language of D.C. Code § 32-1508(3) applies to a "case of disability partial in character but permanent in quality" makes the finding of MMI a prerequisite. The parties stipulated that Claimant did not reach MMI until July 27, 2006.

In the instant case however, Claimant contends that he would be entitled to receive wage loss benefits for as long as he worked as a field superintendent, with the right to continue receiving those benefits ending only when he took a new job with Mid-Atlantic Contracting on November 21, 2008 where his AWW became $1,923.08 and therefore would exceed what his former journeyman electrician position would have paid on November 21, 2008, $1,502.40. Essentially, it is Claimant's position that once he returned to work and the calculation pursuant to (ii)(II) determined he had a wage loss, he was entitled to PPD benefits based on that wage loss for as long he remained in that return to work job, regardless of any salary increases. We disagree.

The provisions of the statute under which Claimant is requesting PPD benefits are predicated upon him experiencing, and continuing to experience, a wage loss upon his return to work.[13] In her findings, the ALJ accepted into the record an unsigned and incomplete "Agreed Statement of Fact" (ASF). Within the ASF is a chart listing Claimant's increases in earnings from 1998 to 2004. Claimant's earnings appear at Number 7 in the ASF which states:

> 7. In the years since he returned to work, Mr. Probey's earnings as a field superintendent with Chesapeake Finishing and Painting have increased as follows:
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> a. 1998 $20,492.30
> b. 1999 $21,000.00
> c. 2000 $29,138.24

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[11] The findings as to Claimant's salary upon his return to work and that he had not reached MMI were made in the initial CO in this matter, *Probey I*. As that CO was not appealed, these findings became the law of the case.

[12] D.C. Code § 32-1508(3)(V)(i) provides the compensation for a non-scheduled permanent partial disability requires the employee to make two elections:

> (V)(i) In other cases the employee shall elect:
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> (I) To have his or her compensation calculated in accordance with the formula set forth in either sub-subparagraph (ii)(I) or (II) of this subparagraph; and
> (II) To receive the compensation at the time the employee returns to work or achieves maximum medical improvement.

[13] *Harris v. DOES*, 746 A.2d 297 (D.C. 2000).

d. 2001 $88,000.12
e. 2002 $103,300.05
f. 2003 $103,299.98
g. 2004 $130,184.68

Claimant acknowledges that he was paid wage loss benefits from September 1, 1997 through November 4, 2004.[14] With that understanding, Claimant now argues entitlement to PPD wage loss benefits from November 4, 2004 through November 21, 2008 at the weekly benefit rate established when he returned to work on September 1, 1997. As the chart above shows, Claimant's earnings in 2004 were $130,184.00, for an AWW of $2,503.53 [$130,184.00/52]. In fact, Claimant ceased to have a wage loss as of 2001 based upon the chart. Substantial evidence in the record shows that as early as 2001, and definitely as of 2004, Claimant ceased to have a wage loss.

The DCCA returned this matter to the CRB for failing to "explain whether it calculated petitioner's actual wage loss as of the time he sought modification of his award, or rather, by using the formula prescribed in D.C. Code § 32-1508(3)(V)(ii)". In this statement, the DCCA appears to confound the concept of entitlement to PPD benefits with calculating the amount of PPD benefits once it has been determined that a claimant has reached MMI and experiences an actual wage loss.

To answer the DCCA, at the time Claimant sought modification in 2005, he had not reached MMI, so he was not entitled to PPD by virtue of a modification and thus no calculation based on wage loss was required under the code provision cited. In addition, once Claimant reached MMI in 2006, his annual earnings since 2001 resulted in an AWW in excess of when he returned to work. As he no longer had a wage loss, he no longer was entitled to wage loss benefits calculated pursuant to D.C. Code § 32-1508(3)(V)(ii) as clearly shown when comparing the calculation below with the earnings chart provided by the parties.

When we perform the calculation for the requested benefits pursuant to § 32-1508(3)(V)(ii)(II), the first figure in that formula is the average weekly wage (AWW), at the time Claimant returns to work of the job Claimant held before he became disabled. The ALJ found the parties stipulated to an average weekly wage of $904.90. However, this was the AWW of the journeyman position Claimant held at the time he was injured, not the AWW of that position at the time he returned to work on September 1, 1997. In their respective appellate filings, both parties are in agreement that the AWW of Claimant's job as a journeyman electrician, the job he held before he became disabled, as of September 1, 1997, the time he returned to work, was $980.00.[15]

[14] See fn. 2 above.
[15] Claimant's *Memorandum of Points and Authorities in Support to Application for Review*, unnumbered p. 8; *Employer/Insurer's Memorandum of Points and Authorities in Opposition to Claimant's Application for Review*, p. 6.

The second figure in the formula is the AWW of the actual job Claimant holds when he returns to work. The ALJ incorrectly interprets this part of the formula as the AWW of Claimant's job as a field superintendent as it would have paid on the date he was injured, April 15, 1994, to arrive at the figure $346.15 [$18,000 per annum/52 weeks]. Actually, when Claimant returned to work on September 1, 1997, his salary as a field superintendent was found to be $20,000.00, which would render an AWW of $384.62 [$20,000 per annum/52 weeks]. Inserting the figures developed pursuant to (ii)(II), would have amounted to a wage loss of $595.38 [$980.00 - $384.62] to be paid at the weekly rate of $396.92 until Claimant's earnings exceeded the AWW of $980.00.

The above calculation of Claimant's wage loss using the formula in D.C. Code § 32-1508(3)(V) (ii)(II) shows, whether using the correct AWW figures or the incorrect ones found and used by the ALJ, that as of the date Claimant returned to work, September 1, 1997, he was entitled to the weekly benefit rate of $396.92. Claimant was paid this rate until November 4, 2004.

However, as the ALJ correctly stated, PPD wage loss benefits under D.C. Code § 32-1508(3)(V) could only be paid after Claimant reached MMI. Claimant did not reach MMI until July 2006. As Claimant ceased to have a wage loss in 2001, Claimant likewise had no wage loss in November 2004. Having no wage loss, no further benefits are owed.

CONCLUSION AND ORDER

The Compensation Order on Remand of July 31, 2012 is supported by substantial evidence and is in accordance with the law. The Compensation Order on Remand of July 31, 2012 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

August 15, 2013
DATE