GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-140 (R)

SHANNON M. MOLLOY,
Claimant,

v.

POWELL, GOLDSTEIN, FRAZIER & MURPHY
and Chubb Insurance Group,
Employer/Insurer.

On Remand from the from the District of Columbia Court of Appeals
DCCA No. 14-AA-522 (October 28, 2015)

Appeal from an October 23, 2013 Supplemental Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. 02-014F, OWC No. 535245

(Decided January 21, 2016)

Benjamin T. Boscolo for Claimant
Zachary L. Erwin for Employer/Insurer

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL and HEATHER C. LESLIE, *Administrative Appeals Judges.*

LAWRENCE D. TARR, for the Compensation Review Board.

DECISION ON REMAND

INTRODUCTION

This case is before the Compensation Review Board ("CRB") on the October 28, 2015 Order issued by the District of Columbia Court of Appeals ("DCCA") vacating and remanding the May 2, 2014 CRB Decision and Order that affirmed an Administrative Law Judge's ("ALJ") October 23, 2013 Supplemental Compensation Order. The DCCA vacated and remanded the CRB's decision and directed the CRB to address the interpretation of the phrase "the maximum weekly rate applicable at the time such award was made" in D.C. Code § 32-1506(c).

As will be discussed, the CRB finds that the phrase "the maximum weekly rate applicable at the time such award was made" refers to the maximum weekly rate when a claimant was injured, not the maximum weekly rate when a claimant became permanently and totally disabled.

Claimant, Shannon M. Malloy, worked as a paralegal for Employer, Powell, Goldstein, Frazier & Murphy. Claimant injured her back at work on February 2, 1998. In an April 4, 2002, Compensation Order, Claimant was awarded temporary total disability benefits from September 1, 2000 to December 20, 2000 and continuing temporary partial disability benefits beginning March 27, 2001. In 2003, Employer voluntarily began paying Claimant temporary total disability benefits, which continue. Claimant's compensation rate was less than the maximum allowable compensation rate.[1]

Claimant filed for a formal hearing in 2012 seeking an order awarding her permanent and total disability benefits. On October 3, 2012, an ALJ issued a Compensation Order that decided Claimant was permanently and totally disabled as of January 1, 2008 and was entitled to receive the supplemental allowance starting that day in accordance with D. C. Code § 32-1506(c). On February 28, 2013, the ALJ issued a Supplemental Compensation Order Awarding Penalties ("SCOAP") in which Employer was ordered to pay penalties of 20% on the entire amount of the supplemental allowance owed to Claimant for 2009, 2010, 2011, and 2012.

A dispute arose over whether Employer paid the entire amount of the awarded supplemental allowance and Claimant filed a motion for default. After an ALJ issued a Show Cause Order, Employer filed for a formal hearing and the matter was set for hearing. The parties agreed to have the ALJ decide the matter by written briefs.

The ALJ issued the Supplemental Compensation Order ("SCO") that is the subject of this decision on October 23, 2013. The ALJ held Employer correctly calculated Claimant's supplemental allowance and therefore was not in default of the February 28, 2013 SCOAP. For the purposes of our present decision, the critical area of dispute concerned the denominator in the formula of D.C. Code § 32-1506(c)—the number to be used for "the maximum weekly rate applicable at the time such award was made."

The ALJ, relying on a CRB and Director's decision, held that the applicable maximum weekly rate for the denominator in the calculation contained in D.C. Code §32-1505(c) was the rate in the year Claimant became permanently and totally disabled. The ALJ held:

> The CRB relied on [the] Act's language as emphasized above in its decision in *Fiumara v. Marriott Corporation*, CRB No. 11-075, AHD No. 09-467A (July 10, 2013), wherein it reiterated that "The amount of the supplemental allowance is a function of the ratio of the injured workers' compensation rate to the maximum compensation rate payable in the District of Columbia as established by D.C. Code §32-1505 as of the time that the worker is deemed to have become

[1] It should be noted that while the parties agree that Claimant's compensation rate was less than the maximum rate, they do not agree on the amount of her weekly compensation benefit. Claimant, in her post-remand brief, asserts it was $585.86 (page 2) while Employer says it was $586.51 (page 4).

> permanently and totally disabled." *See also Long v. Plaza Realty Investors*, Dir. Dkt. No. 97-45B (H&AS No. 92-462B (October 2000), wherein the Director agreed with the administrative law judges' [sic] use of the year in which claimant was found to be permanently disabled in her calculation.
>
> As the CRB and previously the Director have consistently held, the amount used in the denominator of the supplemental allowance calculation fraction is the maximum compensation rate payable when claimant was deemed to permanently and totally disabled which neither party disputes is January 2008.

SCO at 4.

Claimant then appealed to the CRB. The CRB, also relying on *Fiumara, supra*, affirmed the ALJ's decision in a Decision and Order (DO) issued on May 2, 2014:

> In relying upon the CRB's decision in *Fiumara*, the ALJ has applied the correct interpretation that the maximum weekly rate used is from the time the award of permanent total disability is made, and not the date of injury. Contrary to Claimant's argument, the language of the statute that the maximum weekly rate is determined "at the time such award is made" allows of only one logical interpretation. The award referenced is the award of permanent total disability, which was January 1, 2008. The date of injury does not constitute "the time such award is made" so as to effectuate the plain meaning of the statutory language. Finding no error in the ALJ's application of the statute, there is no basis to disturb her ruling.

DO at 5.

Claimant then appealed the CRB's decision to the DCCA, which issued an Order on October 28, 2015 that vacated and remanded the CRB's decision for further explanation, noting that prior agency appellate decisions did not explicitly answer the question which maximum weekly rate should be used in the statutory calculation's denominator:

> Neither in its decision in this case nor in *Fiumara* did the CRB focus on the meaning of the term "applicable" in section 32-1506. At oral argument, the parties in this case appeared to agree that the "applicable" maximum weekly rate, for purposes of section 32-1506, is the maximum weekly rate that would properly be used in the determination of an initial award of permanent partial disability. (Citation omitted). The parties appeared to disagree, however, as to which maximum weekly rate—that of the date of injury or that of the date of permanent and total disability—should be applied in calculating an initial award to a permanent and totally disabled claimant. The parties further indicated that, as far as they were aware, the CRB has not directly answered that question.

Molloy v. DOES, DCCA No. 14-AA-522, Remand Order at 1-2 (October 28, 2015).

DISCUSSION

An injured workers' compensation rate is determined at the time the worker is injured. Typically, it is 66 2/3 per cent of the workers' average weekly wage, subject to the limitation that the compensation rate cannot exceed the maximum allowable compensation rate in effect on the day of injury. The maximum allowable compensation rate is established each year by the Department of Employment Services ("DOES") and is the average weekly wage for insured employees in the District of Columbia. D.C. Code § 32-1505.

Once the worker's compensation rate is fixed, it is neither adjusted nor increased, even when the yearly maximum compensation rate is increased. However, those workers who are adjudged totally and permanently disabled, that is permanently unable to return to work in any capacity, are eligible to receive a supplemental allowance if their worker's compensation rate is less than the new maximum allowable compensation rate.

The amount of the supplemental allowance is determined in accordance with one of two statutorily mandated formulae. D.C. Code §§ 32-1506(b) pertains to workers whose compensation rate was the maximum allowable compensation rate in effect when injured. These workers are entitled to have their compensation rates increased by a supplemental allowance so that their compensation rate equals the new maximum allowable compensation rate.

Workers whose compensation rates are less than the maximum allowable compensation rate at the time of their injury receive a supplemental allowance determined in accordance with the formula in D.C. Code § 32-1506(c):

> In any case where a person with a total disability, or a surviving spouse or domestic partner is receiving less than the maximum weekly income benefit rate applicable at the time such award was made under this chapter, the supplemental allowance shall be an amount equal to the difference between the amount the claimant is presently receiving and a percentage of the new maximum determined by multiplying it by a fraction, the numerator of which is his present award and the denominator of which is the maximum weekly rate applicable at the time such award was made.

There is no dispute that Claimant is permanently and totally disabled and is entitled to a supplemental allowance for 2009 through 2012 pursuant to D. C. Code § 32-1506(c). The issue in dispute, and for which the DCCA's remanded this case, centers on the denominator in the § 32-1506(c) formula, "the maximum weekly rate applicable at the time such award is made."

The DCCA has directed the CRB to determine which of the two possible maximum weekly rates should be used in the D. C. Code § 32-1506(c) formula; (1) the maximum rate on the date of Claimant's injury (argued by Claimant) or (2) the maximum weekly rate at the time Claimant became permanently and totally disabled (argued by Employer).

In two decisions written when he was an ALJ, E. Cooper Brown, held that the applicable weekly rate in D. C. Code § 32-1506(c) means the maximum weekly rate for the year in which a claimant was injured. *Thomas v. Metro Carpet Services*, OHA No. 99-048, OWC No. 034893 (March 5, 2003), *Palmer v. George Washington University Medical Center*, OHA No. 01-061C, OWC No. 166387 (May 21, 2004).

In the appeal of *Palmer*, the CRB referred to Judge Brown's "cogent" analysis in *Thomas* and stated it "adopts the reasoning and legal analysis contained in *Thomas*." Employer argues that the issues in *Palmer* did not involve the calculation of the supplemental allowance. Claimant argues that *Palmer* panel said it "agreed with the discussion and analysis contained in *Thomas*."

Judge Henry McCoy, when he was an ALJ, adopted Judge Brown's analysis in *Thomas* and held the denominator in the statutory formula was the maximum weekly rate for the year in which a claimant was injured. *Daniels v. Washington Metropolitan Area Transit Authority*, AHD No. 92-149E, OWC No. 219646 (November 28, 2006).

On the other hand, in *Long v. Plaza Realty*, Dir. Dkt 97-45B, H&AS No. 92-462B, OWC No. 104068 (October 20, 2000), the DOES Director, who at that time had responsibility for appellate review, approved a hearing officer's use of the maximum rate when a claimant was determined permanent and totally disabled as the denominator in the statutory formula:

> The Hearing Examiner correctly interpreted the applicable section of the Act on supplemental allowance. The Hearing Examiner could reasonably conclude that the word "award" in § 36-306 of the Act referred to the time Claimant was determined to be permanently totally disabled. In this matter, it was a Compensation Order which determined that Claimant was permanently totally disabled.

The CRB's 2013 decision, *Fiumara, supra,* contains language that also would support Employer's position. The CRB, referring to Judge Brown's *Palmer* decision stated:

> And regarding the substance of the decision, as (Employer) points out, the ALJ in *Palmer* made an error in using the date of injury as opposed to the date that permanency was attained as the comparator.

Fiumara, supra at 5.

As noted in the DCCA's remand, the CRB has not directly answered that question which of the two possible maximum weekly rates should be used in the D. C. Code § 32-1506(c) formula.

Therefore, consistent with the remand instructions from the DCCA, we must determine whether the phrase "the maximum weekly rate applicable at the time such award was made" that is used in the denominator of the formula for determining the supplementary allowance in D.C. Code §32-1506(c) refers to the maximum compensation rate at the time the worker was injured or the maximum weekly rate at the time the worker is awarded permanent and total disability benefits.

Our goal in statutory interpretation is to determine Council's intent in enacting D. C. Code § 32-1506(c) and to adopt an interpretation that is consistent with that intent. The initial step in statutory interpretation is to "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 while construing the words in their 'ordinary sense and with the meaning commonly attributed to them." *D.C. Public Schools v. DOES and Proctor, Intervenor*, 95 A. 3d 1284 (D.C. 2014), citing Dobyns v. United States, 30 A.3d 155, 159 (D.C. 2011) (quoting *Peoples Drug Stores, Inc. v. District of Columbia,* 470 A. 2d 751,753 (D.C. 1983).

This initial step does not resolve the issue. The language of the statute admits both possible interpretations as "at the time such award was made" can mean either the date of claimant's injury or the date Claimant became totally and permanently disabled. Indeed, much of D.C. Code § 32-1506 has been characterized as ambiguous. *Hively v. DOES*, 681 A.2d 1158 (D.C. 1996) at 1161-1162, *Smith v. Security Storage*, Dir. Dkt. No. 92-5, H & AS No. 91-405, OWC No. 0176751 (January 22, 1993).

There also are certain canons of statutory construction that can be helpful in resolving the issue. This was the approach used by (then) ALJ Brown in *Thomas v. Metro Carpet Services, supra* a case relied on by Claimant. Judge Brown noted that one canon of statutory interpretation, as reported in 2A Singer, *Sutherland Statutory Construction*, § 46.06 at 105 (5th. Ed. 1992), is that when the same words are used twice or more in the same legislation, those words are generally presumed to have the same meaning.

Judge Brown stated, and we agree, that when the phrase "maximum weekly benefit rate applicable at the time such award was made" is used in subsection (b) of § 32-1506, it refers to the maximum rate at the time of a claimant's injury. Since the same words are used in subsection (c), he reasoned that the phrase in subsection (c) must have the same meaning as in subsection (b) and refers to the maximum weekly rate on the date of claimant's injury.

Judge Brown also noted that another canon of statutory construction is "that each provision of a statute must be construed so as to give effect to all of the statute's provisions, not rendering any provision superfluous." He reasoned that if "the maximum rate at the time of a claimant's injury" was interpreted to refer to the date a claimant is determined to be totally and permanently disabled, then there never would be an instance in which subsection 1506(b) would apply.

> There thus can be no question but that the phrase as used within the first sentence of subsection 1506(c) references the maximum weekly rate *at the time of injury.* If it did not; if instead the phrase in 1506(c) was meant to reference either the date of the compensation order or the date that the claimant is determined to be permanently and totally disabled (both dates which always be at least a couple of years, if not more, *after* the date of injury), it will *always* be the case that the "compensation award" (which, as previously discussed, is fixed at the time of injury) will *always* be *less* than the "maximum weekly benefit rate applicable at the time such award was made" as that phrase is used in subsection 1505(b). In such an event, there would never be an instance in which the provisions of §1506 (b) would apply. Section 1506 (b) would thus be, literally, read out of the Act—in

> violation of another basic principle of statutory construction: "that each provision of the statute be construed so as to give effect to all of the statute's provision, not rendering any provision superfluous.
>
> Likewise there is nothing to suggest that in the second instance where the phrase is used in subsection 1506(c), to denote the "denominator" in the calculation prescribed for determining the additional supplemental allowance to which the claimant is entitled under subsection 1506(c), its meaning is something other than that intended with its use in the first instance.

Thomas v. Metro Carpet Services, *supra* at 6-7.

Although the CRB is not bound by an ALJ's decision, we find Judge Brown's analysis to be persuasive. Moreover, there is another, perhaps more fundamental, reason why we find the phrase "the maximum weekly rate applicable at the time such award was made" refers to the maximum rate on the day of injury.

D.C. Code § 32-1506(c) provides injured workers whose compensation awards are fixed on the date of injury with a supplemental allowance "in order to account for increases in the average weekly wage that occurred after their award" *Long v. DOES, supra,* at 330-331. Of the two possible interpretations, using the maximum rate on the day of injury as the denominator in the formula stated in D.C. Code § 32-1506(c) is the interpretation that is consistent with the purpose of that Code section.

Since the supplemental allowance is to benefit injured workers for increases in the maximum rate since the day they were injured, using the date that total and permanent disability was attained would only partially meet the statutory objective; it would only account for increases in the average weekly wage from the date that total and permanent disability was attained.

Using the maximum weekly rate on the date permanent and total disability was attained falls short of accounting for increases after the initial award and is inconsistent with the intent of the statute—to increase the total benefit paid to those workers who are permanently unable to return to any work because of their industrial accident and whose award has been reduced in value by the passage of time. Using the maximum weekly rate on the day a claimant was injured as the denominator in D.C. Code 1506(c) is consistent with the purpose of the Code section.

CONCLUSION

Although the effect of our decision would be to remand this case to the ALJ, the remand from the DCCA stated that our decision was potentially quite relevant to the Court's analysis of the CRB's decision in this case.

We therefore shall issue this decision by sending a copy to the DCCA for guidance as to whether to remand the matter to the ALJ or whether the DCCA prefers to consider this decision.

So ordered.