

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-140

SHANNON M. MOLLOY,  
Claimant-Petitioner,

v.

POWELL, GOLDSTEIN, FRAZIER & MURPHY and CHUBB INSURANCE GROUP,  
Employer/Carrier-Respondents

Appeal from an October 23, 2013 Supplemental Compensation Order by  
Administrative Law Judge Linda F. Jory  
AHD No. 02-014F, OWC No. 525245

Benjamin T. Boscolo, for the Petitioner  
Zachary L. Erwin, for the Respondent

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

HENRY W. MCCOY, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant injured herself at work on February 2, 1998, was awarded and received wage loss benefits, and she was determined to be permanently and totally disabled and awarded benefits effective January 2008.<sup>1</sup> Employer was ordered to pay penalties of 20% on the entire

<sup>1</sup> *Molloy v. Powell, Goldstein, Frazier & Murphy*, AHD No. 02-014E, OWC No. 525245 (October 3, 2012).

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COMPENSATION REVIEW  
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amount of supplemental allowance due to Claimant for 2009, 2010, 2011, and 2012 in a February 28, 2013 Supplemental Compensation Order Awarding Penalties.

On June 3, 2013, Claimant filed another motion for default claiming Employer had not paid the entire amount of the supplemental allowance. Employer was ordered to show cause why an order declaring it in default of the Supplemental Compensation Order Awarding Penalties should not issue or, in the alternative, request a formal hearing. Employer filed an Application for Formal Hearing, which the parties subsequently agreed could be decided by briefs in lieu of a formal hearing.

In the Supplemental Compensation that is the subject of the instant appeal, the Administrative Law Judge (ALJ) accepted Employer's calculations as correct and denied Claimant's request for additional penalties.<sup>2</sup> Claimant filed a timely appeal, with Employer filing in opposition.

On appeal, Claimant argues the ALJ interpreted D.C. Code § 32-1506 (c) incorrectly when she used the date that permanency was attained instead of using the date of injury for the denominator in the calculation equation. Employer counters that as the ALJ properly interpreted the statute and that interpretation is in keeping with prior case law, the Supplemental Compensation Order 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.<sup>3</sup> *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (the "Act"), 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 the payment of a "Supplemental Allowance", the Act provides as follows:

- (a) When the average weekly wage has changed as provided for in § 32-1505, any person who has a total and permanent disability ... who is receiving payments for income benefits under this chapter in amounts per week less than the new maximum for total disability or death shall receive weekly from the carrier,

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<sup>2</sup> *Molloy v. Powell, Goldstein, Frazier & Murphy*, AHD No. 02-014F, OWC No. 525245 (October 23, 2013)(SCO).

<sup>3</sup> "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).

without application, an additional supplemental allowance calculated by the Mayor in accordance with the provisions of subsections (b) and (c) of this section; provided, that such allowance shall not commence to accrue and be payable until the average weekly wage exceeds \$396.78. The Mayor shall notify the carrier of the amount of such additional supplemental allowance.

- (b) In any case where a person with a total disability, or surviving spouse or domestic partner is receiving the maximum weekly income benefit applicable *at the time such award was made under this chapter*, the supplemental allowance shall be an amount which, when added to such award, will equal the new maximum weekly benefit.
- (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*.
- (d) No supplemental allowance referred to in subsections (b) and (c) of this section shall exceed 5% of the maximum weekly benefit received the preceding benefit year.<sup>4</sup>

In the underlying matter, there is no dispute that Claimant is permanently and totally disabled effective January 2008 and entitled to the receipt of a supplemental allowance for the years 2009, 2010, 2011, and 2012; to be calculated pursuant to D.C. Code § 32-1506(c). And, as succinctly framed by the ALJ and argued in the instant appeal, the dispute lies in the formulation of the “fraction used in determining the amount of the supplemental allowance and specifically the amount used in the denominator.”<sup>5</sup>

Claimant argues on appeal that the phrase in § 32-1506(c) that “the denominator of which is the maximum weekly rate applicable at the time such award was made” allows for two possible interpretations. First, that the maximum compensation rate of the date of injury is the maximum weekly rate applicable at the time the permanent total disability award is made; and, second, that the maximum compensation rate on the date the injured worker reached permanent total disability is the maximum weekly rate applicable.<sup>6</sup> It is Claimant’s position that it is the date of injury that is controlling. We disagree.

In addressing this issue, the ALJ reasoned and concluded:

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<sup>4</sup> D.C. Code § 32-1506 (Emphasis added.)

<sup>5</sup> SCO, p. 3.

<sup>6</sup> Claimant’s *Memorandum in Support of the Application for Review*, unnumbered p. 5.

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 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.

Accordingly, as claimant was awarded permanent total disability retroactive to January 1, 2008, the maximum rate of compensation in 2008 was \$1,288.00 and this amount is the amount utilized in the denominator of the fraction, which in turn yields the percentage amount of .455 to be multiplied by the maximum weekly benefit rate in January 2009. As employer has correctly calculated pursuant to §32-1506, in January 2009, claimant would be entitled to a supplemental allowance of \$30.02 per week and this amount does not exceed 5% of the previous year's maximum which is \$64.40.<sup>7</sup>

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.

In arguing for the use of the date of injury as opposed to the time of the award of permanent total disability, Claimant cites the case of *Palmer v. George Washington University Medical Center*<sup>8</sup>, a hearing level decision that was affirmed by the CRB on appeal.<sup>9</sup> In *Palmer*,

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<sup>7</sup> SCO, p. 4.

<sup>8</sup> OHA No. 01-061C, OWC No. 166387 (May 21, 2004).

<sup>9</sup> CRB (Dir. Dkt.) No. 02-64, OHA No. 01-061C, OWC No. 166387 (January 23, 2006).

the issue was the “proper calculation of Claimant’s supplemental allowance benefits under D.C. Code §32-1506” and while the presiding ALJ used the date of injury in the denominator of the calculation equation, it was not an issue in the appeal to the CRB. Therefore, Claimant’s attempt to use the CRB’s general affirmance of the OHA decision is misplaced as the narrow issue under consideration here.

With specific regard to *Palmer* and whether it is proper to use of the date of injury in the denominator in equation established by D.C. Code §32-1506(c), the CRB stated in *Fiumara*:

“..., the Palmer [sic] holding is of little precedential value since it was not a District of Columbia Court of Appeals (DCCA), Director’s or CRB decision. And regarding the substance of the decision, as Marriott 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.<sup>10</sup>

We endorse the position taken in *Fiumara* that OHA/AHD decisions are not used as precedent for interpreting the Act. Rather, that final responsibility within the agency resides with the CRB.<sup>11</sup> As the ALJ in the case under review adopted and applied the interpretation of the statutory provision consistent with the CRB’s decision in *Fiumara*, we affirm.

#### CONCLUSION AND ORDER

The ALJ’s determination that Employer correctly calculated Claimant’s supplemental allowance and made payment of that amount is supported by substantial evidence and in accordance with the law. The October 23, 2013 Supplemental Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

  
HENRY W. MCCOY  
*Administrative Appeals Judge*

May 2, 2014  
DATE

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<sup>10</sup> *Fiumara, supra*, at 5.

<sup>11</sup> In *Vieira v. DOES*, 721 A.2d 579, 582 (D.C. 1998), the court noted that the Director of DOES is charged with the final responsibility within the agency for interpreting the D.C. Workers’ Compensation Act, a responsibility that now resides with the CRB pursuant to the Director’s delegation.