

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-152

MAYLIN STEPHENS,
Claimant–Petitioner,

v.

LANDEX MANAGEMENT and PMA Insurance Group,
Employer/Carrier-Respondent.

Appeal from a Compensation Order by
The Honorable Leslie A. Meek
AHD No. 11-242, OWC No. 641565

Michael Kitzman, Esquire, for the Petitioner
Douglas A. Datt, Esquire, for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE,¹ and HENRY W. MCCOY, *Administrative Appeals Judges*.

MELISSA LIN JONES, *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. Code §§32-1521.01 and 32-1522 (2004), 7 DCMR §250, *et seq.*, and the Department of Employment Services Director’s Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On August 12, 2007, Mr. Maylin Stephens injured his left shoulder. On that date, Mr. Stephens threw a bed rail into a dumpster during the course of his employment as a maintenance technician with Landex Management.

At a formal hearing, an administrative law judge (“ALJ”) was required to address two issues- the causal relationship between Mr. Stephens’ on-the-job accident and his current left shoulder

¹ Judge Leslie has been appointed by the Director of the Department of Employment Services as a temporary CRB member pursuant to Administrative Policy Issuance No. 11-02 (June 13, 2011).

symptoms and the nature and extent of any permanent partial disability to Mr. Stephens' left arm.² The ALJ determined that Mr. Stephens' left shoulder condition is causally related to his compensable accident³ and that Mr. Stephens is entitled to a 10% permanent partial disability award for his left arm.

On appeal, Mr. Stephens asserts the Compensation Order does not include an explanation of what evidence supports the ultimate finding. Specifically, Mr. Stephens argues the ALJ must explain how the nature of the physical injury, industrial loss, and the subjective factors lead to the percentage of disability awarded for permanent partial disability.

Landex Management contends Mr. Stephens has requested a re-weighting of the evidence to favor the opinion of the independent medical examination physician. Landex Management asserts the ALJ carefully reviewed and interpreted all of the evidence of record before arriving at her discretionary conclusion.

ISSUES ON APPEAL

1. Did the ALJ properly analyze the evidence to determine Mr. Stephens' permanent partial disability?
2. Is an ALJ required to specify what portion of a schedule-member, permanent partial disability award is attributable to the five factors?

ANALYSIS⁴

When reviewing a Compensation Order that awards permanent partial disability benefits for a schedule member, we are mindful that

unlike other questions that ALJs are called upon to decide in connection with contested compensation claims, there is no dichotomous answer in schedule award cases. That is, there is no "a" or "b" choice in schedule disability awards, as there is in cases where the ALJ must make a choice between compensable or non-compensable, causally related or not causally related, employment relationship or no employment relationship, timely notice or untimely notice, etc. Those questions present scenarios in which there is presumably a right answer and a wrong answer. However, schedule

² Disability experienced in a schedule member may be compensable even if the anatomical situs of the injury is in a non-schedule body part. *Washington Metropolitan Area Transit Authority v. DOES*, 683 A.2d 470 (D.C. 1996).

³ Neither party has appealed this ruling.

⁴ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

loss cases present the problem of prediction: the goal is to make the best approximation of the effect of a scheduled injury on future wage loss, and then to express that approximation in percentage terms of the member in question, which in the words of the Court of Appeals result in an award based upon an “arbitrary” number of weeks of benefits. See, *Smith v. District of Columbia Department of Employment Services*, 548 A.2d 95 (1988), at 101. Only time will determine whether, in any given case, the approximation arrived at through the hearing process is close to “the right answer”, or is wildly under reality, or wildly over it. That may be unfortunate, for either the employer or the worker, but as the Court of Appeals has recognized, that is the nature of the system.^[5]

When making this predictive assessment *Corrigan*⁶ prohibits consideration of the degree of any actual loss in wages, but *Corrigan* does not prohibit consideration of the effect of the injury upon the actual ability to function in the workplace. Furthermore, pursuant to §32-1508(3)(U-1) of the Act, five subjective factors also may influence the ultimate determination of a schedule-member disability rating.⁷

In this case, the ALJ ruled the “pain, weakness and loss of endurance regarding Claimant’s left shoulder warrants a schedule award of 10%.”⁸ It is clear from this portion of the Compensation Order that the ALJ considered the five, subjective factors, and this tribunal has held there is no requirement to state what portion of the permanent partial disability awarded is attributable to those five factors;⁹ however, it seems the rules have changed.

⁵ *Majano v. Linens of the Week*, CRB No. 07-066, AHD No. 06-285, OWC No. 578369 (April 24, 2007). See also *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007) (When determining permanent partial disability, the role of the ALJ is to weigh competing medical opinions of impairment together with other relevant evidence and to arrive at a determination on the issue of the nature and extent of any disability.)

⁶ *Corrigan v. Georgetown University*, CRB No. 06-094, AHD No. 06-256, OWC No. 604612 (September 14, 2007).

⁷ Section 32-1508(3)(U-1) of the Act states

In determining disability pursuant to subparagraphs (A) through (S) of this subsection, 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.

⁸ *Stephens v. Landex Management*, AHD No. 11-242, OWC No. 641565 (November 30, 2011), p. 5.

⁹ See §32-1508(3)(U-1) of the Act, *supra*. See also *Jones v. Howard University*, CRB No. 11-095, AHD No. 10-494, OWC No. 649331 (November 1, 2011) (“It is clear that, by utilizing the permissive “may” as opposed to the mandatory “shall”, the legislature was authorizing but not requiring that the analysis of schedule award claims include specific reference to the AMA Guides and/or the five factors.”)

On April 26, 2012, the D.C. Court of Appeals issued *Jones v. D.C. Department of Employment Services*,¹⁰ and despite *Negussie*'s recognition of the predictive and subjective nature of an award of permanent partial disability and despite the subjective nature of the five factors, the Court has demanded precision when an ALJ explains the "reasoning in arriving at a disability award"¹¹ in order to determine if there is substantial evidence in the record that could support the ALJ's ruling as to the actual percentage of permanent partial disability.¹² Consequently, because the Court would be "unable to review the agency's order on the record presented,"¹³ we are constrained to remand this matter for further explanation consistent with the dictates of *Jones*.

CONCLUSION AND ORDER

The November 30, 2011 Compensation Order is VACATED. This matter is remanded for further explanation of the reasoning applied to arrive at the permanent partial disability award pursuant to the precedent set by the D.C. Court of Appeals in *Jones, supra*.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

June 1, 2012
DATE

¹⁰ No. 10-AA-628 (D.C. April 26, 2012).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*