GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

CRB No. 12-134

WILLIE L. WILSON, JR.,
Claimant–Petitioner,

v.

STARBUCKS COFFEE COMPANY and GALLAGHER BASSETT SERVICES,
Employer-Respondent.

Appeal from a Compensation Order on Remand by
The Honorable Belva D. Newsome
AHD No. 11-243, OWC No. 674880

Michael J. Kitzman, Esquire for the Petitioner
Joseph C. Tarpine, Esquire for the Respondent

Before MELISSA LIN JONES, JEFFREY P. RUSSELL,[1] and HEATHER C. LESLIE,[2] *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Board,[3] MELISSA LIN JONES, *concurring in part and dissenting in part.*

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On October 20, 2010, Mr. Willie L. Wilson, Jr. injured his right shoulder when he lifted a crate of milk while working for Starbucks Coffee Company ("Starbucks"). Mr. Wilson declined to undergo surgery for his rotator cuff tear.

The parties disagreed as to the nature and extent of Mr. Wilson's permanent partial disability for his right arm, and each side solicited an opinion from an independent medical examination physician.

[1] Judge Russell has been appointed an interim Compensation Review Board ("CRB") member pursuant to the Department of Employment Services' (DOES) Director's Administrative Policy Issuance No. 12-01 (June 20, 2012).

[2] 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).

[3] Jurisdiction is conferred upon the CRB pursuant to D.C. Code §§32-1521.01 and 32-1522 (2004), 7 DCMR §250, *et seq*., and the DOES Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

Following a formal hearing, an administrative law judge ("ALJ") awarded Mr. Wilson 16% permanent partial disability of his right arm in a Compensation Order dated November 25, 2011.[4]

Mr. Wilson appealed the Compensation Order. On April 27, 2012, the CRB remanded the matter for an analysis of the medical opinions and other relevant evidence before arriving at a conclusion regarding the nature and extent of Mr. Wilson's schedule loss to his right arm.[5]

In a Compensation Order on Remand dated July 24, 2012,[6] the ALJ denied Mr. Wilson's claim for permanent partial disability benefits beyond "the 7% Starbucks has voluntarily paid."[7] Another appeal has ensued.

This time, Mr. Wilson contends the ALJ improperly considered economic loss and actual wage loss in determining his level of permanent partial disability. In addition, Mr. Wilson contends the ALJ failed to address the factors of pain, weakness, atrophy, loss of function, and loss of endurance with specificity in regards to "the amount of disability assigned to those factors."[8] Finally, Mr. Wilson contends the ALJ failed to analyze his industrial loss. For these reason, Mr. Wilson requests the CRB reverse and remand this matter.

On the other hand, Starbucks asserts the Compensation Order on Remand is supported by substantial evidence. Starbucks requests we affirm that Compensation Order on Remand.

ISSUES ON APPEAL

1. Does substantial evidence in the record support that the ALJ properly considered the directives in the April 27, 2012 Decision and Remand Order?

2. Is the July 24, 2012 Compensation Order on Remand supported by substantial evidence and in accordance with the law?

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[4] *Wilson v. Starbucks Coffee Company*, AHD No. 11-243, OWC No. 674880 (November 25, 2011).

[5] *Wilson v. Starbucks Coffee Company*, CRB No. 11-150, AHD No. 11-243, OWC No. 674880 (April 27, 2012).

[6] The July 24, 2012 Compensation Order does not include "on Remand" in its title, but it was issued in response to the directives included in *Wilson v. Starbucks Coffee Company*, CRB No. 11-150, AHD No. 11-243, OWC No. 674880 (April 27, 2012).

[7] *Wilson v. Starbucks Coffee Company*, AHD No. 11-243, OWC No. 674880 (July 24, 2012), p. 5.

[8] Memorandum of Points and Authorities in Support of Application for Review, unnumbered p. 6.

ANALYSIS[9]

The Compensation Order on Remand perpetuates some of the errors in the Compensation Order. The ALJ continues to reference a substantial evidence standard of proof:

> In interpreting the Act, it has been found, and is presently widely acknowledged, that there is no presumption of the nature and extent of claimant's disability. A claimant has the affirmative duty to present substantial credible evidence of the level of benefits sought. *Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109 (D.C. 1986). "[T]he presumption [of the compensability of a claim] has no application to the nature and extent of [a claimant's] injury. [Claimant] is entitled to a presumption that his claim is compensable, i.e. that his injury 'arises out of employment.'" *Dunston*, 509 A.2d at 111.
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> It is well settled that in determining an injured employee's entitlement to the requested level of benefits, the claimant must present credible, supporting evidence. *Id.*[10]

We cannot affirm an administrative determination that "reflects a misconception of the relevant law or a faulty application of the law."[11]

In this case, however, the ALJ continued on to state, in the "Discussion" on page 3 in the paragraph immediately following the two paragraphs concerning "substantial evidence", as follows:

> A claimant must prove the nature of his disability, i.e., whether it is temporary or permanent, and the extent thereof, i.e., whether the disability is partial or total. [citation omitted]. Claimant's burden of proving the nature and extent of her disability is a preponderance of the evidence. *WMATA v. District of Columbia Department of Employment Services,* 926 A.2d 140, 149 (D.C. 2007) [additional citations omitted].

Thus, having added to the discussion recognition of the proper standard, reference to the fact that a claimant must adduce substantial evidence to prevail is not, technically speaking erroneous, inasmuch as in order to reach a preponderance of the evidence, substantial evidence must be

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[9] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand 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 District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand 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).

[10] *Wilson v. Starbucks Coffee Company*, AHD No. 11-243, OWC No. 674880 (November 25, 2011), p. 4; *Wilson v. Starbucks Coffee Company*, AHD No. 11-243, OWC No. 674880 (July 24, 2012), p. 3.

[11] *D.C. Department of Mental Health v. DOES,* 15 A.2d 692 (D.C. 2011).

adduced as a matter of necessary logic. *Cf., Umanzor v. Tricon Construction Company,* CRB No. 11-082, AHD No. 10-383A, OWC No. 659635 (March 5, 2012), where the CRB wrote at page 3:

> Moreover, the DCCA has held that the CO must clearly identify that the ALJ utilized the correct standard of proof. In *WMATA v. DOES and Payne Intervenor*, 992 A.2d 1276 (D.C. 2010), the Court of Appeals also stated,
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> [H]ere the hearing examiner's analysis of the nature and extent of a claimant's disability reflect[ed] confusion as to the correct allocation of the burden of proof, the court could not determine whether conclusions legally sufficient to support the decision flow[ed] rationally from the findings, and thus a remand was necessary for further consideration of the evidence by the examiner under the proper standards.
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> In the case *sub judice*, we ultimately cannot tell what burden of proof was utilized, that of substantial evidence (which would be in error) or preponderance of the evidence. We will note that the ALJ correctly states the Claimant must *produce* substantial evidence to support the claimed level of disability. However, the ALJ failed to state additionally that the Claimant also had the *burden* of demonstrating the claimed level of disability by a preponderance of the evidence.[12] Such failure, pursuant to *Payne, supra*, requires us to remand the case back for "further consideration of the evidence by the examiner under the proper standards."

Furthermore, as stated in the prior Decision and Remand Order, an analysis of entitlement to permanent partial disability benefits requires the ALJ weigh competing medical opinions together with other relevant evidence and arrive at a determination on the issue of the nature and extent of any schedule loss. In the end, this determination can result in accepting one physician's rating over another or in reaching a different conclusion altogether because the ALJ is not bound by the opinions of the evaluating physicians.[13]

Although there is no requirement that an ALJ specifically state what portion of a permanency award is attributable to each of the D.C. five factors,[14] the totality of the basis for reaching the conclusion

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[12] The evidence presented in the case does not compel one conclusion over the other to the exclusion of any other inference, which could allow the board to uphold the denial. *Payne, supra* at 1282.

[13] *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007).

[14] 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:
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> (i) Pain;
> (ii) Weakness;
> (iii) Atrophy;
> (iv) Loss of endurance; and
> (v) Loss of function.

regarding Mr. Wilson's permanency this time is contained in two sentences, "The record does not reflect that Wilson suffered any economic loss from his permanent partial disability. Without economic loss, Wilson's permanent partial disability is limited to the 7% Starbucks has voluntarily paid."[15]

These two sentences are inconsistent and require we remand this matter again. The fact that Starbucks may have voluntarily paid a 7% permanent partial disability payment does not equate to a determination that Mr. Wilson has sustained a 7% permanent partial disability under the schedule. If upon consideration of the record evidence as a whole a determination is made that Mr. Wilson sustained a permanent partial disability in some amount, that is the amount to be awarded, whether it is greater than, equal to or less than that which has been voluntarily paid.

Further, we note that the statement "without economic loss, Wilson's permanent partial disability is limited to" that which has voluntarily been paid may represent a misunderstanding of the law as it pertains to schedule awards. The term "economic loss" could mean many things, and if the ALJ meant that a demonstrable loss of earnings post-injury, as shown by the injury already having resulted a claimant earning less money in the interim between returning to work and the formal hearing than the claimant would have earned absent the injury, then the statement is wrong. No such showing is required.

A summary of medical reports regarding permanent impairment is not an analysis of disability, and the little explanation that can be understood from the findings of fact is inadequate. See, of *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012). The Compensation Order on Remand, like the Compensation Order that preceded it, lacks an analysis of the medical opinions and other relevant evidence before arriving at a conclusion regarding the nature and extent of Mr. Wilson's schedule loss to his right arm.

Finally, although there was previously a prohibition on consideration of the effect that the injury has had upon a claimant's actual wages earned post-injury in connection with a schedule award claim, we now point out that since the time of the original remand in this case, the CRB has considered the effect of the case of *Jones, supra*, upon the status of the doctrines in *Corrigan*, and concluded that that case's highly restrictive constraints upon consideration of the effect of the injury upon a workers' capacity to perform the pre-injury job and earn wages in that job are inconsistent with the court's decision in *Jones.* See, *Al Robaie v. Fort Myer Constr. Co.,* CRB No. 10-014, AHD No. 09-383, OWC No. 642015 (June 6, 2012); *Hill v. Howard University*, CRB No. 12-016, AHD No. 10-117A, OWC No. 657973 (September 5, 2012), (AAJ Jones concurring in part and dissenting in part); *Puplampu v. Contract Cleaning Services*, CRB No. 12-122, AHD No. 10-255A, OWC No. 659012 (November 14, 2012). It is no longer error for an ALJ to take such matters into consideration.

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.")

[15] *Wilson v. Starbucks Coffee Company*, AHD No. 11-243, OWC No. 674880 (July 24, 2012), p. 5.

We are aware that the ALJ who authored the three compensation orders that have all been found to be legally deficient in this claim has retired. Thus, on remand, it will be necessary that the parties agree to a reassignment of the matter to a new ALJ with a new compensation order to be issued based upon the record, or that new formal hearing be convened before a new ALJ[16]. We regret the delay that this will undoubtedly cause. However, we see no alternative, given the inadequacy of the compensation order presently under review.

CONCLUSION AND ORDER

Even though an ALJ is not required to state what portion of a permanent partial disability award for a schedule member is attributable to the D.C. five factors, the July 24, 2012 Compensation Order on Remand is not supported by substantial evidence, is not in accordance with the law, and is VACATED. This matter is remanded for further proceedings consistent with the April 27, 2012 Decision and Remand Order and with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

November 30, 2012
DATE

MELISSA LIN JONES, Concurring in Part, Dissenting In Part

Based upon conflicting findings of fact, I find merit in Mr. Wilson's position that the ALJ's reference to economic loss is prohibited. While *Corrigan v. Georgetown University*, does not prohibit consideration of the effect of an injury upon the claimant's actual ability to function in the workplace, it does prohibit consideration of the degree of any actual loss in wages as a factor in assessing awards under the schedule,[17] and I find nothing in the *Jones* case[18] that alters this standard.

The ALJ considered economic loss in the following terms:

[16] It has long been established that the one who decides the case must hear the case unless the parties are given an opportunity to elect between having a new hearing or having a different agency hearing official decide the case. See, *Simmons v. District Unemployment Compensation Board*, 292 A.2d 797 (D.C. 1972); *Andrews v. District of Columbia Public Schools*, ECAB No. 94-23 (August 12, 1997), and *Swanson v. D.C. Department of Corrections,* CRB No. 12-011, AHD No. PBL 11-024, DCP No. 761032-0001-20000-005 (May 3, 2012).

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

[18] *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012).

- Mr. Wilson returned to work but changed the manner in which he performed his job by not lifting and by working the register or talking to guests because he could not perform his pre-injury duties.[19]

- Mr. Wilson left his job with Starbucks for a better opportunity.[20]

Arguably, the first finding listed here is a permissible consideration of Mr. Wilson's actual ability to function in the workplace; however, the second finding listed here impermissibly considers actual wage loss. The ALJ did not find Mr. Wilson's injury prompted his leaving his job with Starbucks (which would tend to prove ability to function in the workplace); the ALJ found Mr. Wilson was making more money at a different job (which would tend to prove no actual wage loss). As I see it, this error requires further explanation on remand.

MELISSA LIN JONES
Administrative Appeals Judge

[19] *Wilson v. Starbucks Coffee Company*, AHD No. 11-243, OWC No. 674880 (July 24, 2012), pp. 2-3.

[20] *Id*. at p. 3.