

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**

**VINCENT C. GRAY**  
**MAYOR**



**LISA M. MALLORY**  
**DIRECTOR**

**Compensation Review Board**

**CRB No. 11-155**

**STEPHEN PROBEY,**  
**Claimant–Petitioner,**

**v.**

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

Appeal from a Compensation Order on Remand by  
The Honorable 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,<sup>1</sup> and LAWRENCE D. TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *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. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

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<sup>1</sup> Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

## PROCEDURAL HISTORY AND FACTS OF RECORD

This appeal follows the issuance on November 29, 2011 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 was denied.

Claimant sustained a work-related back injury in 1994 and was out of work until returning to work in September 1997 for a different employer. In December 1998, Claimant made a claim for permanent partial wage loss benefits. After a formal hearing, Claimant, on December 20, 1999, was awarded temporary partial disability benefits based on a partial wage loss and the claim for permanent partial wage loss was denied because there was no evidence in the record that Claimant had reached maximum medical improvement (MMI).<sup>2</sup> Claimant did not appeal this decision.

On February 4, 2000, Claimant submitted a request to the Office of Workers' Compensation (OWC) again seeking permanent partial disability (PPD) from September 1, 1998 to the present and continuing due to wage loss. After an informal conference, the OWC issued a Memorandum of Informal Conference on August 2, 2000 finding that Claimant had sustained a wage loss and granted the requested benefits. A Final Order to this effect was issued on November 20, 2000. After Claimant filed a Motion for Order Declaring Default on February 15, 2005, the OWC determined, on March 14, 2005, that as Hearings and Adjudication had denied PPD benefits on December 20, 1998, OWC lacked jurisdiction to consider the issue and accordingly denied the motion for default and vacated the November 20, 2000 Final Order.

On or about May 26, 2005, Claimant filed for a formal hearing seeking to modify the December 20, 1999 CO so as to award him PPD benefits for wage loss. In a January 5, 2007 CO, the ALJ found Claimant reached MMI as of July 27, 2006 and that he had provided no evidence to suggest a change in condition to warrant the requested award as he had not suffered a wage loss since 2001.<sup>3</sup> Claimant appealed to the CRB. The CRB vacated and remanded insofar as the ALJ had not conducted the preliminary hearing required under *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988).<sup>4</sup> On remand, Claimant's request for PPD benefits was again denied.<sup>5</sup>

Claimant appealed the *Probey III* to the CRB. On January 15, 2008, the CRB affirmed; concluding the ALJ complied with its order to establish first whether there had been a threshold showing of a change in condition and that Claimant did not meet this showing.<sup>6</sup>

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<sup>2</sup> *Stephen Probey v. T.A. Beach*, H&AS No. 98-479, OWC No. 269082 (December 20, 1999) (*Probey I*).

<sup>3</sup> *Stephen Probey v. T.A. Beach*, AHD No. 98-479A, OWC No. 269082 (January 5, 2007) (*Probey II*).

<sup>4</sup> *Stephen Probey v. T.A. Beach*, CRB No. 07-36, AHD No. 98-479, OWC No. 269082 (May 16, 2007).

<sup>5</sup> *Stephen Probey v. T.A. Beach*, AHD No. 98-479A, OWC No. 269082 (October 5, 2007) (*Probey III*).

<sup>6</sup> *Stephen Probey v. T.A. Beach*, CRB No. 08-033, AHD No. 98-479, OWC No. 269082 (January 15, 2008).

Claimant again appealed to the D.C. Court of Appeals. The Court determined that the CRB relied on *Harris v. DOES*, 746 A.2d 297 (D.C. 2000) for the proposition that a claimant's entitlement to PPD benefits requires a showing of actual wage loss. The Court concluded the CRB did not state how it calculated Claimant's wage loss to determine whether under D.C. Code § 32-1524 there was a reason to believe a change of condition had occurred; and, the CRB did not explain whether it had calculated Claimant's actual wage loss at the time he sought modification of his prior award, or alternatively, pursuant to the formula prescribed in D.C. Code § 32-1508(3)(V)(ii). Given the lack of clarity in the CRB's decision, the Court vacated the final order and remanded the case for further proceedings.<sup>7</sup>

Upon receipt of the remand from the DCCA, the CRB remanded to AHD stating:

Because the Court of Appeals' remand requires a determination of mixed fact and law, we necessarily must remand this matter to AHD for the factual determinations required, and defer in the first instance to the ALJ upon remand to address the legal issues the Court's ruling presents, including those raised upon remand by Respondent.<sup>8</sup>

On remand, the ALJ again found that Claimant had not "provided any additional medical information to establish they (sic) are entitled to permanent partial disability benefits and therefore, the claim for relief must be denied." In addition, the ALJ reasoned that "when applying § 32-1508(3)(V) to Claimant's earnings, there are no benefits owed." Accordingly, Claimant's claim for relief was denied.<sup>9</sup> Claimant filed a timely appeal, with Employer filing in opposition.

#### ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, 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. 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). "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. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003). 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.

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<sup>7</sup> *Stephen Probey v. DOES*, No. 08-AA-97, (D.C. 2009).

<sup>8</sup> *Stephen Probey v. T.A. Beach*, CRB No. 08-033(R), AHD No. 98-479, OWC No. 269082 (September 14, 2009).

<sup>9</sup> *Stephen Probey v. T.A. Beach*, AHD No. 98-479A, OWC No. 269082 (November 29, 2011) (*Probey IV*).

In the instant appeal, Claimant seeks reversal of the November 29, 2011 Compensation Order on Remand, *Probey IV*. Claimant argues that the ALJ has committed reversible error in not following the instructions of the D.C. Court of Appeals in that it is still not clear how the calculation of PPD benefits based on wage loss is consistent with D.C. Code § 32-1508(3)(V)(ii).<sup>10</sup> In addition, Claimant argues that, contrary to the plain meaning of the statutory language of § 32-1508(3)(V), the ALJ used the date MMI was reached as part of the calculation to determine his entitlement to PPD benefits.

In taking up Claimant's claim after remand from the CRB, which was occasioned by the DCCA's remand, the ALJ again determined "[A]s in *Probey I*, Claimant has not provided any additional medical information to establish they (sic) are entitled to permanent partial disability benefits and therefore, the claim for relief must be denied."<sup>11</sup> The ALJ further reasoned that Claimant was owed no PPD benefits because (1) none of his wages earned before he reached MMI in July 2006 could be considered in the formula found in § 32-1508(3)(V) because the formula was used only after reaching permanency; and, (2) when Claimant reached MMI, "his wages far exceeded his prior earnings that when adjusted under calculation [§ 32-1508(3)(V)] (I) or (II) there is no wage loss and therefore no benefits are owed."<sup>12</sup>

The CRB restated the basis to the DCCA's remand as follows:

The Court of Appeals' remand of this matter focuses upon the CRB's affirmation of AHD's finding that Petitioner failed to offer sufficient evidence of a change in condition within the meaning of D.C. Official Code § 32-1524(a) warranting an award of permanent benefits upon Petitioner's condition reaching maximum medical improvement (MMI) in July of 2006 because he had not suffered a wage loss since 2001, the year in which his wages equaled or exceeded the wages he had been earning prior to his 1994 work injury. However, in reaching the foregoing conclusion, the Court noted, no explanation was provided as to how Petitioner's wage loss was calculated for purposes of determining whether a change of condition had occurred with respect to Petitioner's disability or the amount of compensation payable pursuant thereto. Necessary, the Court pointed out, is an explanation of whether Petitioner's actual wage loss was calculated as of

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<sup>10</sup> D.C. Code § 32-1508(3)(V)(ii) provides that compensation for a non-scheduled, permanent partial disability shall be, at the employee's election, 66 and 2/3 percent of the greater of:

- (1) 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
- (2) 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.

<sup>11</sup> *Probey IV*, p. 5.

<sup>12</sup> *Id.*

the time he sought the modification of his prior award or, alternatively, pursuant to the formula prescribed in D.C. Official Code § 32-1508(3)(V)(ii). If the former, the Court further noted, there necessarily must exist an explanation of how the calculation is consistent with the cited Code section.<sup>13</sup>

The ALJ acknowledged that Claimant sought PPD benefits from September 1, 1997 through November 21, 2008 and found Claimant elected to have his wage loss benefits calculated pursuant to § 32-1508(3)(V)(ii)(II). In keeping with the DCCA's directive, the ALJ concluded, in adopting the Employer's analysis in the calculation of Claimant's PPD benefits, that she calculated Claimant's actual wage loss pursuant to the formula prescribed in § 32-1508(3)(V); and, whether calculated under (ii)(I) or (II), Claimant had no wage loss as his wages after reaching MMI far exceeded his prior earnings.<sup>14</sup>

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.

#### CONCLUSION AND ORDER

The Compensation Order on Remand of November 29, 2011 is not supported by substantial evidence and is not in accordance with the law. The Compensation Order on Remand of November 29, 2011 is hereby REVERSED and REMAND for further findings of fact and conclusions consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY  
Administrative Appeals Judge

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April 17, 2012  
DATE

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<sup>13</sup> *Probey v. T.A. Beach*, CRB No. 08-033(R), p. 2.

<sup>14</sup> *Probey IV*, p. 5.