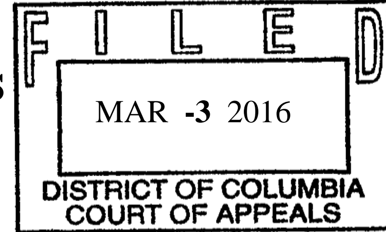

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-320

RITZ-CARLTON HOTEL AND MARRIOTT CORPORATION, PETITIONERS,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

MARTA ECHEVERRIA, INTERVENOR.

Petition for Review of a Decision of the
District of Columbia Department of Employment Services
(CRB-94-14)

(Submitted February 12, 2016 Decided March 3, 2016)

Before FISHER and EASTERLY, *Associate Judges*, and REID, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: This case returns to us following our remand by Memorandum Opinion and Judgment in *Echeverria v. District of Columbia Dep't of Emp't Servs.*, No. 12-AA-0001 (D.C. 2013) (*Echeverria I*). There we reviewed a decision of the Compensation Review Board ("CRB") "reversing the ruling of Administrative Law Judge ['ALJ'] Linda F. Jory regarding the calculation of benefits claimed for partial permanent disability sustained by [Ms. Echeverria] during the course of her employment." *Id.*, slip op. at 1. We affirmed the CRB decision "because we defer to the CRB as to its interpretation of the compensation calculation method provided in the [Workers Compensation] statute," and "we remand[ed] the case so that it [could] be further remanded to an administrative law judge to conduct a fact-finding hearing, utilizing one of the alternative methods set forth in the statute to determine and make a specific award to [Ms. Echeverria] given the ALJ's unchallenged finding that [Ms. Echeverria] is entitled to compensation for wage loss due to her permanent partial disability." *Id.* at 6.

No fact-finding hearing was held on remand because "the parties agreed that the matter could be decided by briefs in lieu of another formal hearing." *Compensation Order on Remand*, June 30, 2014, at 4. The ALJ determined that Ms. Echeverria's "permanent partial disability rate effective June 4, 2004[,] is $281.81." *Id*. at 7. In a split decision, the CRB affirmed the ALJ's compensation order on remand, in part.[1] *CRB Decision and Order*, February 24, 2015, at 11. The main issue facing the CRB was whether the ALJ properly calculated Ms. Echeverria's permanent partial disability rate. The ALJ rejected the calculation of Ms. Echeverria's expert, and instead, the ALJ made her own calculation based on documents submitted by the expert. The CRB found "the ALJ's analysis to be a reasonable way of reconciling the evidentiary limitations with the instructions to determine and make a specific award to the claimant for wage loss due to her permanent partial disability."

In this petition for review, Petitioners Ritz-Carlton and Marriott Hotels ("Ritz-Carlton and Marriott") argue that the CRB erroneously affirmed the ALJ's compensation award to Ms. Echeverria, the Intervenor. Specifically they argue that Ms. Echeverria failed to submit evidence "as to the wage trends of part-time maids . . . during the 1997 to 2004 period," and she failed to submit evidence "to suggest that the average wages of part-time maids . . . during this period behaved in the same fashion or followed the same trends as the wages of the full-time workers." Hence, Ritz-Carlton and Marriott contend that Ms. Echeverria "failed to submit evidence sufficient to carry her burden of proof on the issue," and the ALJ's "attempt to reconcile the evidentiary limitations, to reach a specific finding of the amount of wage loss, was unsupported by substantial evidence, and was contrary to the law." For the reasons stated below, we remand this case for clarification of the ALJ's alternative method of calculating Ms. Echeverria's "permanent partial disability rate effective June 4, 2004."

FACTUAL SUMMARY

We need not repeat the facts of this case that were set forth in *Echeverria I*, except to note that Ritz-Carlton and Marriott did not "[]challenge[] [the ALJ's] finding that [Ms. Echeverria] is entitled to compensation for wage loss due to her

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[1] Ms. Echeverria filed an Application for Review with the CRB on July 29, 2014, and Ritz-Carlton and Marriott filed their Application on July 30, 2014. The CRB dismissed the July 29, 2014 Application for Review.

permanent partial disability." *Id.* at 6. At the remand proceeding, as the parties agreed, Ms. Echeverria submitted a written argument to the ALJ. She essentially relied on the work of her expert, Dr. Richard B. Edelman, an economic analyst. Ms. Echeverria's counsel asked Dr. Edelman to calculate her disability benefits pursuant to the formula in D.C. Code § 32-1508 (3)(V)(ii)(II) which provides that her compensation shall be:

> 66 2/3% of . . . [t]he difference between the average weekly wage, at the time the employee returns to work, of the job that the employee held before the employee had the disability and the actual wage of the job that the employee holds when the employee returns to work.

Dr. Edelman submitted a cover letter and supporting documents. The documents included an inflation adjusted conversion table prepared by Dr. Edelman (Table 1) showing "Equivalent weekly salaries between 1997 and 2004; based on weekly salaries for maids in the DC-MD-VA-WV area reported by the U.S. Department of Labor." Dr. Edelman's exhibits consisted of "Washington-Baltimore, DC-MD-VA-WV National Compensation Survey" statistical data for the years 1997 (the year of Ms. Echeverria's injury) through 2004 (the year when Ms. Echeverria returned to work). Dr. Edelman's Table 1 revealed that a housekeeper who earned $101.84 per week in 1997 earned $123.85 per week in 2004, and that a housekeeper who earned $186.25 per week in 2004 earned $153.15 per week in 1997.

Ritz-Carlton and Marriott lodged a written response. They asserted that Ms. Echeverria failed to sustain her burden of proof. Specifically, they maintained that Ms. Echeverria submitted no evidence relating to part-time (as opposed to full-time) maids, and no evidence pertaining to part-time self-employment in 1997 and 2004.

The ALJ found that Ms. Echeverria's average weekly wage before her injury was $517.84.[2] However, the ALJ rejected Ms. Echeverria's suggestion that her

[2] We have already determined this figure is supported by substantial evidence. *Echeverria I*, *supra*, at 5. Review of the record from our previous opinion shows that $517.84 represents the $101.84 per week Ms. Echeverria earned in her self-employment housekeeping business in 1997, combined with the $416.00 per week she was paid by Ritz-Carlton and Marriott.

"pre-injury wage in 2004" amounted to $645.19, finding that figure was unsupported by Dr. Edelman's findings. Instead, the ALJ divided the average weekly wage of a housekeeper in 1997 by the average weekly wage in 2004 and found the latter to be approximately 17.6% greater. Therefore, the ALJ reasoned, it was appropriate to increase Ms. Echeverria's weekly wage in 1997 by 17.6% and arrived at $608.97 as the 2004 value. Thus, the ALJ subtracted Ms. Echeverria's actual wage from the time she returned to work ($186.25) from the average weekly wage for housekeepers ($608.97), multiplied that value by 66 2/3%, and arrived at $281.81 as Ms. Echeverria's permanent partial disability compensation benefit, and incorporated it in her order to Petitioners.[3]

A 2-1 majority affirmed the ALJ's calculation of Ms. Echeverria's compensation benefits. The dissent objected to the ALJ's determination of Ms. Echeverria's average weekly wage at the time of her return. It noted that the ALJ rejected Dr. Edelman's approach and employed an independent method to reach her conclusion. The dissent maintained that the ALJ's conclusion was not supported by the evidence presented, and therefore, the compensation award should be vacated because Ms. Echeverria failed to carry her burden as to this material issue.[4] *Compensation Order on Remand*, at 13. Ritz-Carlton and Marriott filed a timely petition for review.

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[3] On July 28, 2014, the ALJ issued an Errata order removing the limitations of D.C. Code § 32-1505 (b) from Ms. Echeverria's award. Petitioners did not appeal this matter.

[4] The dissent also objected to the ALJ's calculation of Ms. Echeverria's actual wage when she returned to work. The dissent pointed out that the ALJ arrived at $186.25 despite the fact the evidence showed she cleaned approximately five houses per week, charged approximately $87.25 per house, paid her employees approximately $50.00 per house, and kept only approximately $35.00 per house for herself—presumably leaving $2.25 per home unaccounted for in the ALJ's computation. Ritz-Carlton and Marriott did not raise this issue in their brief and we discern no reason to disturb the ALJ's determination, as this value flows rationally from substantial evidence. *Washington Metro. Area Trans. Auth. v. District of Columbia Dep't of Emp't Servs.*, 926 A.2d 140, 146-47 (D.C. 2007) (citing *Mills v. District of Columbia Dep't of Emp't Servs*., 838 A.2d 325, 327 (D.C. 2003)).

ANALYSIS

We review the CRB's affirmance of an ALJ's compensation award.[5] *Clement v. District of Columbia Dep't of Emp't Servs.*, 126 A.3d 1137, 1139 (D.C. 2015) (citing *Jones v. District of Columbia Dep't of Emp't Servs.*, 41 A.3d 1219, 1221 (D.C. 2012)). We review the CRB's legal conclusions *de novo*, recognizing that it has special expertise in administering the WCA. *Clement*, *supra*, 126 A.3d at 1139 (citing *Howard Univ. Hosp. v. District of Columbia Dep't of Emp't Servs.*, 960 A.2d 603, 606 (D.C. 2008)). But, "we cannot ignore the compensation order which is the subject of the Board's review." *Georgetown Univ. Hosp. v. District of Columbia Dep't of Emp't Servs.*, 916 A.2d 149, 151 (D.C. 2007).

The CRB's role is to determine whether the hearing examiner's findings are supported by substantial evidence in the record and to determine whether the legal conclusions drawn by the examiner are in accordance with applicable law. *Children's Defense Fund v. District of Columbia Dep't of Emp't Servs.*, 726 A.2d 1242, 1247 (D.C. 1999). We will affirm its decision unless it is "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." D.C. Code § 2-510 (a)(3)(A) (2001).

It is undisputed that the ALJ made findings as to the value to be used in the statutory equation Ms. Echeverria elected; a material issue for the purpose of this appeal, but that finding must be supported by substantial evidence. *Washington Metro. Area Trans. Auth.*, *supra*, 926 A.2d at 146-47. Based on the figures in Dr. Edelman's table, 17.6% was not the correct percentage by which to adjust Ms. Echeverria's average weekly wage in 1997 to its 2004 amount. Rather, according to the values Dr. Edelman cited in Table 1, the appropriate percentage should have

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[5] Our review is addressed to three questions: "first, whether the agency has made a finding of fact on each material contested issue of fact; second, whether the agency's findings are supported by substantial evidence on the record as a whole; and third, whether the Board's conclusions flow rationally from those findings and comport with the applicable law." *Washington Metro. Area Trans. Auth.*, *supra*, 926 A.2d at146-47 (citing *Washington Metro. Area Trans. Auth.*, *supra*, 683 A.2d at 472). "Substantial evidence" is that which "a reasonable mind might accept as adequate to support a conclusion." *Dell v. District of Columbia Dep't of Emp't Servs.*, 499 A.2d 102, 108 (D.C. 1985).

been 17.8%.[6] Second, as was established by the ALJ in the original compensation order, $517.84 represents the total of Ms. Echeverria's full-time weekly wages as Petitioners' employee *and* her weekly wages from her part-time employment. *See supra* at n.2.

Thus, even assuming the ALJ correctly determined the percentage change reflected in Table 1, she applied it to a combination of full-time and part-time wages. This was inappropriate because the evidence on which Dr. Edelman's conversion table was based—the annual National Compensation Survey from 1997 to 2004—distinguishes between the value of full-time and part-time wages,[7] and suggests that they do not change at the same rate. Therefore, we conclude that the CRB failed to recognize that the ALJ's decision on remand, as to this material issue, was not based on substantial evidence because the ALJ's decision makes no distinction between the value of full-time and part-time wages.

Accordingly, we are constrained to conclude that the CRB abused its discretion by affirming the compensation award on remand. Hence, we remand

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[6] Dr. Edelman's conversion table lists the average weekly salary of a housekeeper as $325 in 1997 and $395 in 2004. When the 1997 figure is divided by the 2004 figure, the 1997 average is approximately 82.2% the value of 2004 average. Thus the actual difference is 17.8%, not 17.6%. The same result occurs when Ms. Echeverria's 1997 weekly wage of $101.84 is divided by its 2004 value of $123.85, and when her 2004 wage of $186.25 is adjusted for inflation to reflect its 1997 value of $153.15, and the 1997 value is divided by its 2004 equivalent.

In addition, it also appears Dr. Edelman's conversion table did not accurately reflect the average weekly wages for housekeeper as determined by the Bureau of Labor Statistics for 1997 or 1998. Dr. Edelman's Table 1 lists those values as $325 and $334 respectively. But the corresponding statistical analyses list those values as $317 and $332 respectively. The other yearly averages are consistent with the corresponding statistics. There is no additional explanation as to why 1997 and 1998 would differ in Dr. Edelman's table.

[7] Dr. Edelman attached Table A-4 from the National Compensation Surveys from 1997 and 1998 which are both labeled "Weekly and annual earnings and hours for selected occupations, full-time workers only, all industries[.]" He also attached Table 3-1 for 2000 through 2004, labeled "Mean weekly earnings, full-time workers; Selected occupations, private industry and State and local government[.]"

this case so that the CRB may ask the ALJ to clarify her alternative method of calculating Ms. Echeverria's "permanent partial disability rate effective June 4, 2004."

So ordered.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

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