

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 11-086**

**CLAIRE GANTHIER,**

**Claimant- Petitioner,**

**v.**

**FAIRMONT HOTEL,**

**AND**

**ZURICH AMERICAN INSURANCE CO.,**

**Employer/Carrier – Cross-Petitioners.**

Appeal from a Compensation Order of  
Administrative Law Judge Linda F. Jory  
AHD No. 10-231A, OWC No. 647568

Eric May, Esquire, for the Claimant  
Mark W. Bertram, Esquire, for the Employer

Before HEATHER C. LESLIE<sup>1</sup>, LAWRENCE TARR, and JEFFREY RUSSELL<sup>2</sup>, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Review Panel:

**DECISION AND REMAND ORDER**

**OVERVIEW**

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the August 5, 2011, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted in part the Claimant's request for permanent partial disability to the arm. The ALJ also awarded temporary total disability benefits. We VACATE and REMAND.

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<sup>1</sup> Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

<sup>2</sup> Judge Russell has been appointed by the Director of the DOES as a interim CRB Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

## BACKGROUND AND FACTS OF RECORD

The Claimant worked for the Employer as a steward. On October 18, 2007, the Claimant slipped and fell on the floor. In order to break the fall, the Claimant put out her right arm and injured her shoulder. The Claimant immediately sought treatment that day and subsequently came under the care and treatment of Drs. Minenberg and Fechter. The Claimant, after objective testing confirmed a tear, underwent surgery on January 8, 2008. Because of continued symptoms, the Claimant was ultimately referred to a shoulder specialist, Dr. MacFarland, who opined the Claimant had a significant rotator cuff tear and required additional surgery. On June 2, 2009, the Claimant underwent a right reverse total shoulder arthroplasty. The Claimant has not returned to work since the October 18, 2007 accident at work.

The Employer paid the Claimant temporary total disability benefits from the day after the injury through and including the date of the Formal Hearing. Initially, the Claimant applied for a formal hearing seeking permanent total disability. The Claimant later amended the claim for relief sought to 100% permanent partial disability to the right arm. The Employer opposed the Claimant pursuing a schedule loss and argued that pursuant to the reports of the treating physician, the Claimant was permanently and totally disabled, as the Claimant initially claimed in the application for Formal Hearing. The Claimant argued, through counsel, that she could not be “forced to claim permanent total disability.” Hearing Transcript at 11. The ALJ agreed and the hearing proceeded with nature and extent of the Claimant’s right arm as the sole issue to be adjudicated. Hearing Transcript at 16.

On August 5, 2011 a CO was issued granting the Claimants request for permanent partial disability in part. The ALJ ordered,

Claimant’s claim for relief be, and hereby is GRANTED IN PART AND DENIED IN PART; the Claimant is awarded 40% permanent partial disability to her right upper extremity in addition to temporary total disability benefits she is receiving for the injury to the right shoulder.

The Claimant and Employer both appealed. The Claimant argues that the ALJ erred in relying solely on the medical opinions and in not considering the economic impact to the Claimant when coming to her determination that the Claimant only suffered from a 40% permanent partial disability to the right upper extremity. Specifically, the Claimant argues the ALJ failed to follow the dictates set forth in *Negussie v. DOES*, 915 A.2d 391, (D.C 2007). The Employer counters that the finding of a 40% permanent partial disability award is supported by the evidence in the record and should not be disturbed.

In the Employer’s cross appeal, the Employer argues that the ALJ erred in not finding the Claimant permanently and totally disabled.<sup>3</sup> The Employer states, “under the facts of this case and evidence, Claimant is totally and permanently disabled and not allowed a dual recovery.” Employer’s Argument at 5. The Claimant counters a finding of permanent total disability would be speculative as there was not any vocational testimony submitted to show whether, or not, the

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<sup>3</sup> The Employer also filed a day after its cross-appeal a motion to stay the payment of compensation. As we have issued the above order, the motion to stay payment of compensation is moot.

Claimant was employable. Further, the Claimant argues that to force the Claimant to accept a permanent total finding would violate her due process rights as she did not know until the day of the Formal Hearing the Employer would be seeking a finding of permanent and totally disability.

### THE STANDARD OF REVIEW

The scope of review by the CRB 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 District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

### DISCUSSION AND ANALYSIS

We first address the merits of the Employer's cross-appeal. This case, unlike many others, is unique in that the Employer is arguing that the Claimant is permanently and totally disabled. Stated another way, the Employer argues that the Claimant is incapable, because of the severity of her shoulder injury along with her age, background, etc, to return to any type of gainful employment. The Claimant at the Formal Hearing pursued only permanent partial disability to the right arm.

Procedurally, prior to the Formal Hearing, the Claimant initially filed for permanent total disability benefits, and for reasons not clear on the record, changed the claim for relief to 100% permanent partial disability to the right upper extremity. At the Formal Hearing, the Employer protested this change in the claim for relief and sought an award of permanent total disability, arguing that an award of permanent partial disability would produce a legal fiction because a Claimant who is adjudged permanently and totally disabled cannot also recover permanent partial disability, a scenario the Employer argued was occurring. The Claimant argued that the Employer cannot force the Claimant to pursue a claim for relief not sought. The ALJ agreed with the Claimant.<sup>4</sup>

What is problematic with the above procedural posture is we cannot discern when the claim for relief was changed and whether or not the Employer had sufficient time to prepare for that

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<sup>4</sup> The claimant's argument that she cannot be "forced" to accept an award she did not seek fails in that a claimant's entitlement to benefits, and an employer's obligation to provide them, are solely and completely a function of the claimant's status *vis a vis* the work injury. That is, a claimant either is or is not temporarily totally disabled, temporarily partially disabled, permanently partially disabled under the schedule, permanently partially disabled due to wage loss, permanently totally disabled, or some combination of these statuses. To the extent that a claimant's status entitles the claimant to one type of benefits and excludes entitlement to another, there is no "election" mechanism under the Act that permits the claimant to forestall a determination of what that status is. Such a scheme would impermissibly "force" an employer to pay benefits that a claimant is not entitled to obtain or continue to receive. As long as all parties are fairly on notice of the outcome sought by the opposing party at the hearing, a determination that a claimant has one or another disability status is purely a matter of what the evidence establishes, not what a claimant or employer elects to accept or pursue.

change. If the change was late, this may have prevented the Employer to file a cross application seeking an award of permanent total disability, in light of the new claim for relief. In essence, at some point prior to the Formal Hearing the Claimant changed her case theory. It may be that the Employer was ultimately prejudiced by the late change in either their preparation or in the ability to file a cross application. However, based upon the record before us we cannot discern whether or not this indeed happened.

Upon remand, the ALJ shall address and clarify this issue and proceed accordingly. For instance, if the change of the claim for relief was late and thus prejudiced the Employer in the preparation of its case in chief, then the ALJ could have continued the case to allow the Employer the ability to cross appeal, if necessary. As this may change the ultimate award, we will not address the merits of the Claimant's appeal at this time.

Moreover, in the record before us it appears the Claimant only sought permanent partial disability to the right arm. As stated in the CO, the only claim for relief before the ALJ was "an award under the Act of 100% permanent partial disability to the right upper extremity." CO at 2. This was the only contested issue listed. Ultimately, the ALJ awarded not only permanent partial disability to the right arm, but also temporary total disability as a result of the non-scheduled shoulder injury. The transcript reveals that the Employer was already voluntarily paying disability benefits on an ongoing basis and was not contesting her entitlement to wage loss benefits, only the status, i.e. that it was permanent rather than temporary, which as stated above, the ALJ declined to hear. Indeed, the ALJ noted that the Claimant was actually receiving temporary total wage loss. CO at 6. Thus, an award of temporary total disability benefits is in error as it was not a contested issue to be adjudicated.<sup>5</sup>

In sum, we are constrained to vacate and remand the case back to the ALJ to determine whether or not Employer was prejudiced by the timeliness of the Claimant's change in the claim for relief. If the ALJ determines the Employer was prejudiced, the ALJ shall allow the Employer to file a cross application and either re-open the record or re-hear the case in its entirety to address whether or not the Claimant is permanently and totally disabled. If the ALJ deems the Employer was not prejudiced, then the ALJ shall issue a Compensation Order on Remand addressing only the claim for relief sought, permanent partial disability benefits to the right arm.

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<sup>5</sup> It is also well settled in this jurisdiction that, in order to conform to the requirements of the D.C. Administrative Procedures Act (DCAPA), D.C. Official Code § 2-501 *et seq.* (2006), for each administrative decision in a contested case, (1) the agency's decision must state findings of fact on each material, *contested* factual issue, (2) those findings must be based on substantial evidence, and (3) the conclusions of law must follow rationally from the findings. (Emphasis added.) *Perkins v. D.C. Department of Employment Services*, 482 A.2d 401, 402 (D.C. 1984); D.C. Official Code § 2-509.

**CONCLUSION AND ORDER**

The November 17, 2009 Compensation Order is VACATED and this case is REMANDED for reconsideration consistent with the above opinion.

FOR THE COMPENSATION REVIEW BOARD:

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Heather C. Leslie  
*Administrative Appeals Judge*

November 29, 2011 \_\_\_\_\_  
DATE