GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD
CRB No. 10-126

MARTA ECHEVERRIA,
Claimant-Respondent
v.

RITZ-CARLTON HOTEL AND MARRIOTT CORPORATION
Employer and Insurer-Petitioners.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2011 DEC 1 PM 2 09

Appeal from a Supplemental Compensation Order issued by
The Honorable Linda F. Jory
AHD No. 02-005C, OWC No. 517977

Benjamin T. Boscolo, Esquire, for the Claimant
Jeffery W. Ochsman, Esquire, for the Employer and Insurer[1]

Before LAWRENCE D. TARR, HENRY W. MCCOY, and JEFFREY P. RUSSELL,[2] *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the employer and carrier, Ritz-Carlton Hotel and Marriott Corporation, (Employer), for review of the April 30, 2010, Supplemental Compensation Order, issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia's Department of Employment Services (DOES).

In that Supplemental Compensation Order, the ALJ held the claimant did not prove the requisite elements for calculating a permanent partial disability award under either D.C. Code §32-1508 V) (ii) (I) or (II), but nevertheless found the claimant entitled to benefits.

For the reasons stated, we reverse the ALJ's finding and vacate the award of benefits.

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[1] Curtis B. Hane, Esquire, represented the employer and insurer before the AHD.

[2] Judge Russell has been appointed by the Director of DOES as CRB members pursuant to DOES Policy Issuance No. 11-03 (June 13, 2011).

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

The claimant, Marta Echeverria, sustained injuries to her neck and both shoulders as the result of a July 27, 1997, accident at work. At the time of her injury, the claimant held two jobs. She worked as a housekeeper for this employer and also was self-employed as a housekeeper for two other employers.

After several attempts at light duty, the claimant stopped working for this employer in 2000, but continued to work at her secondary employment. However, after the 1997 injury at work, the nature of the claimant's secondary employment changed. The claimant stopped working as a housekeeper and became a supervisor of two housekeepers. .

In a June 1, 2005, Compensation Order, an ALJ held the claimant proved she sustained 16% permanent partial losses to both her arms, and also had a (non-schedule) permanent partial disability due to cervical problems from the work accident that caused an ongoing partial wage loss. The ALJ did not award a dollar amount for the claimant's losses but instead paraphrased the statutory formula for determining this benefit.

On review, the CRB affirmed the ALJ's decision not to award a dollar amount because the claimant had not asked for the calculation. The CRB remanded the case because in paraphrasing the statute, the ALJ incorrectly stated the compensation rate at which the claimant could elect to be paid. The CRB remanded the case to the ALJ so that the claimant could establish the compensation rate to which she was entitled for wage loss caused by her cervical condition.

In his Compensation Order on Remand, the ALJ acknowledged his error but did not specify the dollar amounts available under each statutory option. Neither party appealed the Compensation Order on Remand.

In 2007, the claimant filed a request for a supplementary compensation order awarding penalties and declaring the employer in default. By Order dated May 1, 2008, the ALJ denied the request, apparently accepting the employer's argument that the claimant "has not been forthcoming with the information necessary to establish the amount of wage loss or difference in wages earned upon her return to work following her work injury." The claimant appealed.

On review, in the December 17, 2009, decision, the CRB held the ALJ properly denied the requests for penalties and a default order. In its decision, the CRB noted that the claimant could make application for a judicial determination of the specific dollar amount to which she may be entitled under D.C. Official Code § 32-1508 (V) (ii) (I) or (II) but that the claimant would have the burden of presenting evidence that is sufficient to establish each element of the statutory formula.

The claimant filed the present claim seeking penalties for the alleged failure to pay the permanent partial disability benefits that have been awarded and for a determination of her earnings in the secondary housekeeping work so that she could receive benefits under §32-1508 (3)(V)(ii)(I) or (ii)(II).

On April 30, 2010, the ALJ issued the Supplemental Compensation Order that is the subject of the present review. In that Supplemental Compensation Order, the ALJ denied the request for penalties. The ALJ further held she was not able to calculate the amount of indemnity benefits the claimant was owed under § 32-1508(3)(V)(i)(ii)(I) or (II) because the claimant failed to prove the average weekly wage of the job the claimant held when she returned to work and also

failed to prove the average weekly wage at the time the claimant returned to work at the job claimant held when she became disabled.[3]

The claimant has not challenged the ALJ's finding that the claimant did not prove the necessary elements required by D.C. Code in §32-1508 (3) (V) (ii) (I). The claimant has not requested review of these determinations.

The ALJ, without recitation of any statutory or judicial authority, concluded

> Based upon a review of the evidence in the record as a whole, I conclude until such time as the necessary elements of the formulas contained at [sic] in § 32-1508(3) (V) (i) (ii) (I) and (II) are established or stipulated to, employer remains liable for 66 2/3 of the difference between the actual wage of the work claimant performed in 2004 and her pre-injury average weekly wage of $ 517.84 effective June 4, 2004.

The employer timely appealed.

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 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. "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and §32-1521.01(d) (2) (A) of 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, supra.*

ANALYSIS

D.C. Code § 32-1508 (V) (i) states that with respect to the permanent partial disability wage loss benefit:

> (T)he employee shall elect:
>
> (I) To have his or her compensation calculated in accordance with the formula set forth in either sub-subparagraph (ii)(I) or (II) of this subparagraph; and
>
> (II) To receive the compensation at the time the employee returns to work or achieves maximum medical improvement.

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[3] The ALJ held "Thus it is concluded that claimant has failed to establish these two necessary elements of the formula expressed in § 32-1508(3) (V) (i) (ii) (I) and (II). Accordingly while the undersigned is in agreement with the CRB that AHD should comply if a request for a judicial determination of a specific dollar amount to which she may be entitled, because claimant has not sufficiently established each element of the statutory formulas further computations cannot be made." Supplemental Compensation Order at 6.

The election under subparagraph (II) is not at issue. There is no dispute that the claimant chose to receive her benefit as of the date she attained maximum medical improvement, June 4, 2002.

The current dispute centers on the election under subparagraph (V)(i)(I).

Under this subparagraph, an injured worker is given a choice for determining the amount of compensation. The Code states that the claimant's compensation shall be 66 2/3% of the greater of:

> (I) 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 has a disability; or
>
> (II) 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 had the disability and the actual wage of the job that the employee holds when the employee returns to work.

The ALJ held that the claimant's benefit could not be calculated under either formula in (I) or (II) because the claimant failed to prove a necessary element of each formula. As to (I), the claimant failed to prove the average weekly wage at the time of injury of the job that claimant held when she returned to work. As to (II), the claimant failed to prove the average weekly wage at the time claimant returned to work of the job she held before she became disabled.

Despite these failures of proof, the ALJ awarded benefits under a scheme for which no authority was cited:

> This record's lack of evidence to establish these rather obscure elements of claimant's wage history however should not relieve employer from its liability to pay claimant permanent partial disability benefits based upon a straight 66 2/3 of the difference of what claimant did earn pre-injury and the actual wages claimant returned to in 2004 which the undersigned has found to be $ 186.25 per week.

Supplemental Compensation Order at 6.

The employer argues that the ALJ exceeded her authority by awarding benefits pursuant to a formula that is not in the Code. In her memorandum, the claimant does not quarrel with the fact that the ALJ awarded benefits pursuant to a scheme that is not consistent with the Code.

The claimant suggests several reasons why the ALJ's decision is good policy and that the formula the ALJ came up with is consistent with the principle that the Workers' Compensation Act should be given a liberal construction.

Establishing the levels of benefits to which claimants are entitled under the Act are matters for the City Council. No doubt the Act must be liberally construed, however, as the Court of

Appeals held in *Adjei v. DOES*, 817 A.2d 179, 184 (D.C. 2003) citing *National Geographic Society v. DOES.*, 721 A.2d 618, 622 (D.C. 1998):

> (L)iberal construction is not reconstruction. While the principle of liberal construction of workers' compensation laws "allows doubts to be resolved favorably to the employee, it does not relieve the courts of the obligation to apply the law as it is written and in accordance with its plain meaning."

We must vacate the ALJ's award because the ALJ erred by awarding benefits under a formula for which there is no authority.

CONCLUSION AND ORDER

The award of permanent partial disability benefits contained in the April 30, 2010, Supplemental Compensation Order is not supported by substantial evidence nor is it in accordance with the law. It is therefore VACATED.

FOR THE COMPENSATION REVIEW BOARD:

Lawrence D. Tarr

LAWRENCE D. TARR
Administrative Appeals Judge

December 1, 2011

DATE

APPEAL RIGHTS

Any party aggrieved by this Decision and Order may petition the District of Columbia Court of Appeals for its review. D.C. Court of Appeals Rule 15 (a) requires that the Petition for Review be filed within thirty (30) calendar days of the mailing date shown on the Certificate of Service.

The Court of Appeals is located at 430 E Street, N.W. Washington, D.C. 20001 The Court is open from 8:30 a.m. to 5:00 p.m., Monday through Friday, except legal holidays.

In addition to filing a Petition for Review with the Court of Appeals, you must send a copy of the Petition and any motions, briefs, or other documents that you submit to the court, to the opposing party in this case, and also to:

Todd S. Kim, Solicitor General
Office of the Solicitor General
441 4th Street NW, Suite 600 S
Washington, DC 20001

and

Chief Clerk
Compensation Review Board
Labor Standards Bureau
Department of Employment Services
64 New York Avenue, N.E., 3rd Floor
Washington, D.C. 20002

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CERTIFICATE OF SERVICE

I certify that the attached Decision and Order was served on December 1, 2011 by depositing the same in the U.S. mail, postage pre-paid or hand delivered as noted, addressed as follows:

Benjamin T. Boscolo, Esq. CHASENBOSCOLO, INJURY LAWYERS 7852 Walker Drive, Suite 300 Greenbelt, MD 20770	Certified Mail; Return Receipt Requested No. 7005 3110 0000 9465 6313
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Chief Administrative Law Judge Office of Hearings and Adjudications Department of Employment Services Washington DC 20002	Hand Delivery
Office of Workers' Compensation Department of Employment Services Washington DC 20002	Hand Delivery

Clerk of the Board