GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB (Dir.Dkt.) No. 05-243

MARTA ECHEVERRIA,

Claimant – Petitioner

v.

RITZ-CARLTON HOTEL AND MARRIOTT CLAIMS SERVICE,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
OHA No. 02-005B, OWC No. 517977

Matthew J. Peffer, Esq., for the Petitioner

Curtis B. Hane, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, SHARMAN J. MONROE and LINDA F. JORY, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1]

[1] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on June 1, 2005, the Administrative Law Judge (ALJ) awarded permanent partial disability benefits based upon the schedule for ratable impairments to the upper extremities, permanent partial disability benefits based upon wage loss for a cervical condition, reasonably related medical expenses and interest. The Claimant-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error the formula used by the ALJ to calculate her wage loss.

ANALYSIS

As an initial matter, the standard 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. D.C. Official Code § 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 Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 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.

Turning to the case under review herein, Petitioner asserts that the ALJ's decision mis-states the applicable law and fails to identify the rate at which the permanent partial disability benefits for a cervical condition should be paid. The Petitioner maintains that the record shows that at the time of her injury, her average weekly wage, based upon stacking was $517.84: $416.00 from the Respondent and $101.84 from secondary employment. As a result of her injury, the Petitioner asserts she cannot return to work for the Respondent, thereby bringing her actual wage after her injury to $101.84. She states that a comparison of her pre-injury average weekly wage with her post-injury actual wage yields a compensation rate of $277.33. Claimant Brief at p. 2. However, at the time she reached maximum medical improvement on June 4, 2004, the Petitioner states that her actual wage from her secondary employment was $175.00 per week and her weekly wage from the Respondent would have been $500.00, yielding an average weekly wage of $675.00 and a compensation rate of $333.33. Claimant Brief at p. 3. Based upon the plain meaning of D.C. Official Code § 32-1508(V)(ii)(II), the Petitioner argues that she should

be paid permanent partial disability benefits for her cervical condition at the greater amount of $333.33. Claimant Brief at pp. 4-5.

In its opposition, the Respondent argues that as there is no legal basis, nor was a basis cited by the Petitioner, for requiring the ALJ to state the specific weekly amount of benefits to be paid, the failure to do so was not an error. The Respondent further argues that since the Petitioner's wages from her secondary employment are not fixed but variable, then any calculation of her compensation rate must be based on her actual weekly wages and calculated weekly. Employer Brief at pp. 2-3. As to the amount of benefits to be paid, the Respondent argues that there is no evidence in the record to support the Petitioner's assertion that she earns $175.00 per week from her secondary employment and the assertion, therefore, should not be used to calculate her wage loss. Employer Brief at pp. 3-4.

In the Compensation Order, the ALJ did not award a dollar amount for the Petitioner's permanent partial disability benefits for the wage loss for her cervical condition. Rather, the ALJ set forth a formula citing D.C. Official Code § 32-1508(V)(i):

> . . . [s]he is entitled to elect the greater between the difference of the amount of her average weekly wage at the time of her injury and the job held after becoming disabled, or the difference of the average weekly wage when injured and the actual wage of the job at the time of returning to work . . .

Compensation Order at pp. 9-10.

With respect to the Petitioner's argument that the ALJ failed to identify the dollar amount of compensation rate, the Panel accepts the Respondent's position that there is no legal basis for requiring an ALJ to state the specific weekly amount of benefits to be paid. Indeed, a review of the record does not show that the Petitioner requested a specific dollar amount in her claim for relief. Rather, she requested a category of benefits which the ALJ awarded. The ALJ is affirmed on this point.

As to the calculation of the Petitioner's permanent partial disability benefits, D.C. Official Code § 32-1508(V)(i) states:

> In other cases the 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.
>
> (ii) The 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 becomes disabled; 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 became disabled and the actual wage of the job that the employee holds when the employee returns to work.

It is clear from a comparison of the formula the ALJ stated and of the language in the Act that the ALJ incorrectly stated the compensation rate at which the Petitioner can elect to be paid. The ALJ paraphrased § 32-1508(V)(ii)(I) finding that "the difference between the *average weekly wage* at the time of injury and the job held after becoming disabled", whereas the Act states "the difference between the *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." (emphasis added). The ALJ also paraphrased § 32-1508(V)(ii)(II) finding that "the difference of the *average weekly wage when injured* and the actual wage of the job at the time of returning to work, whereas the Act states "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." (emphasis added). *See* Compensation Order at pp. 9-10. The ALJ's findings on the formula are not in accordance with the law.

On appeal, the Petitioner asserts that she is entitled to be paid compensation at the rate of $333.33. The Panel, however, is not in a position to rule on the specific amount to which the Petitioner may be entitled because the Compensation Order does not contain findings of facts and conclusions on this question. Therefore, this matter is remanded for further proceedings, including, but not limited to, the issuance of findings of fact and conclusions of law, to allow the Petitioner to establish the compensation rate payable for the permanent partial disability benefits awarded for her cervical condition.

CONCLUSION

The Compensation Order of June 1, 2005 is not in accordance with the law. Specifically, the formula enunciated by the ALJ to calculate the Petitioner's wage loss is not in accordance with D.C. Official Code § 32-1508(V)(i).

ORDER

The Compensation Order of June 1, 2005 is hereby VACATED, IN PART, AND REMANDED, IN PART. The portion of the Compensation Order setting forth the formula for the election to which the Petitioner is entitled pursuant to D.C. Official Code § 32-1508(V)(i) is vacated as it is not in accordance with the law. This matter is remanded for further proceedings, consistent with the above discussion, to allow the Petitioner to establish the compensation rate payable for the permanent partial disability benefits awarded for her cervical condition. All other aspects of the Compensation Order are affirmed.[2]

FOR THE COMPENSATION REVIEW BOARD:

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SHARMAN J. MONROE
Administrative Appeals Judge

September 23, 2005
DATE

[2] It is noted that the only issue on appeal is the formula used by the ALJ to calculate the Petitioner's permanent partial disability for her cervical condition.