

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-163

JOSEPH HOFF
Claimant-Petitioner,

v.

EMCOR GOVERNMENT SERVICES AND SPECIALTY RISK SERVICES,
Employer and Carrier-Respondents.

Appeal from a November 18, 2013¹ Compensation Order on Remand
by Administrative Law Judge David L. Boddie
AHD No. 11-156A, OWC No. 676413

Michael Kitzman for the Petitioner
David O. Godwin for the Respondent

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL and MELISSA LIN JONES, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

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 November 18, 2013, Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that COR, the ALJ denied the Claimant's request for intermittent temporary total disability benefits, concluded the Claimant's average weekly wage (AWW) was \$1,089.60, and denied the Employer's request for a credit for an overpayment of workers' compensation benefits.

¹The signature page of the Compensation Order on Remand reflects a date of November 18, 2012. However, the Certificate of Service notes a date of November 18, 2013, a date reflected in the parties' arguments. We will treat the reference to November 18, 2012 as a typographical error.

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FACTS OF RECORD AND PROCEDURAL HISTORY

On November 9, 2010, the Claimant suffered an injury to his right shoulder when he was struck by a motor vehicle. The Claimant sought medical care at Calvert Memorial Hospital where he was instructed to stay off of work for two days and follow up with an orthopedic physician. After some delay, the Claimant came under the care and treatment of Dr. Bryan Herron. Dr. Herron diagnosed the Claimant with a tear to the rotator cuff, which was subsequently confirmed after undergoing an MRI. Dr. Herron recommended surgery to repair the tear.

The Employer sent the Claimant for an independent medical evaluation (IME) with Dr. Louis Levitt on May 24, 2011. Dr. Levitt took a history of the Claimant's accident, medical treatment, and performed a physical examination. Dr. Levitt opined the Claimant did injure his right shoulder in the November 9, 2010 work accident and agreed with Dr. Herron's opinion that the Claimant required surgery. The Claimant underwent the recommended surgery in August 2011. The Claimant was paid temporary total disability from August 30, 2011 to December 26, 2011.

Prior to surgery, the Claimant missed 14 days of work, allegedly for shoulder problems related to his work accident between November 9, 2010 and June 15, 2011. The Claimant kept a log of missed days attributable to his shoulder injury.

A Formal Hearing was held on March 8, 2012. The Claimant sought an award of temporary total disability for the 14 days missed between November 10, 2010 through June 15, 2011, payment of related medical expenses, and interest. The Employer sought a credit for overpayment of compensation benefits. The issues raised were the nature and extent of the Claimant's disability, if any, and the Claimant's average weekly wage. A Compensation Order was issued on September 21, 2012 which denied the Claimant's request for temporary total disability but granted the request for causally related medical expenses to be paid by the Employer. Notably, the ALJ denied the temporary total disability benefits for 11 days of temporary total disability as no medical documentation was submitted to support those days and denied the two days immediately after the injury as these days, while consecutive, did not satisfy the requirements of D.C. Code § 32-1505(a). As the requested temporary total disability benefits were denied, the ALJ concluded the issue of average weekly wage was moot.

The Claimant appealed the CO to the CRB. A Decision and Remand Order (DRO) was issued on January 14, 2013. The CRB concluded that the ALJ erred in denying three days of temporary total disability benefits as the days in question were not consecutive. Specifically, the ALJ was directed

Upon remand, the ALJ is to award the Claimant temporary total disability for the 3 days the ALJ found the Claimant to have missed as a result of his work related injury, the two days immediately after the accident and the day the Claimant attended the IME.

DRO at 4.

The ALJ was also directed to make a credibility finding and reconsider the remaining intermittent days of temporary total disability the Claimant was claiming, taking into consideration the CRB's decision in *Fuentes v. Willard Intercontinental Hotel*, CRB No. 11-149, AHD No. 11-235 (May 9, 2012). As the ALJ was directed to award a small period of temporary total disability, the ALJ was to also make a determination of the Claimant's average weekly wage.

A COR was issued on November 18, 2013. The COR denied the Claimant's request for temporary total disability benefits for intermittent dates between November 10, 2010 and June 15, 2011, and found that the Claimant's average weekly wage was \$1,089.60.

The Claimant timely appealed. The Claimant argues the ALJ erred in denying temporary total disability benefits and that the ALJ's calculation of the Claimant's average weekly wage is not in accordance with the law. The Employer argues the CO is supported by the substantial evidence in the record and is in accordance with the law and should be affirmed.

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

Prior to addressing the Claimant's arguments, we note that in the DRO, the CRB remanded the case with instructions to award the Claimant temporary total disability for the 3 days the ALJ found the Claimant to have missed as a result of his work related injury, the two days after the accident and the day the Claimant attended the IME. Furthermore, the ALJ was to reconsider the remaining intermittent days of days missed allegedly due to the work related injury, making a credibility determination and taking into consideration the CRB's holding in *Fuentes v. Willard Intercontinental Hotel*, CRB No. 11-149, AHD No. 11-235 (May 9, 2012).²

²As we stated in the DRO, quoting from *Fuentes*,

There is no requirement under the Act or in the case law that mandates that a medical condition be the subject of a written medical restriction before it can be the basis for a wage loss-based award of benefits. Such written restrictions may make adjudication of disputed claims easier, and the lack of such a restriction certainly can, in some instances, be a legitimate basis for denying a claim. However where, as here, the ALJ finds as facts that the work injury is causing a claimant to be unable to work to the same degree that was being worked prior to the injury, and that the claimant is earning less post-injury because of that inability, the claimant is entitled to a partial disability

A review of the COR reveals the ALJ in the findings of fact stated,

I find that only the November 10, and 12, 2010 dates, immediately following the work injury and May 24, 2011, a date he was scheduled for an independent medical evaluation by the Employer's physician, are dates that coincide with a medical reason for the Claimant missing for reasons related to his work injury.

COR at 3.

No credibility determination was made by the ALJ regarding the Claimant. The ALJ proceeds in the discussion section to acknowledge again November 10 and 12 as dates the Claimant was off that correspond to the medical records submitted as well as the Employer's concession that the Claimant did attend an IME on May 24, 2011. Thereafter, the ALJ, noting our discussion regarding *Fuentes*, states,

First, of the 14 dates for which compensation is claimed, only three coincide with medical records submitted into evidence and substantiate the claim, other than the Claimant's testimony, that they were dates missed from work due to the injury. These dates are November 10th and 12th of 2010 representing the first medical treatment sought and received following the injury and when the Claimant was instructed by physicians at CMH ER to take off through 11/11/2010. CE 4. The third date is May 24, 2011, and the "Dr. Appt." referenced there is for Dr. Levitt, the Employer's IME physician. CE 9, EE 1. Second, of the 14 dates claimed, it appears that there were only two days and one hour, or a total of seventeen hours on dates time was missed from work purportedly for reasons related to the work injury that the Claimant suffered a wage loss. According to the exhibit, on all of the other dates the Claimant was paid his full wages based upon past leave earned, and apparently chose to be paid sick or vacation leave at that time rather seek to be paid workers' compensation benefits.

The exhibit reflects that on February 4, 2011, when it was noted "shoulder hurting," the Claimant was paid seven hours sick leave, and went one hour with leave without pay (LWOP). Also on May 24th, where as discussed above a "Dr. Appt." was noted, and June 2, 2011, when it was again noted "shoulder hurting," the Claimant went without any pay. CE 9. The remainder of all of the dates

award based upon that ongoing wage loss, until such time as the claimant becomes eligible for an award under the schedule.

In *Fuentes*, the Claimant after undergoing surgery was unable to perform his duties at a second job due to his work related injury. The ALJ had found the Claimant to be a credible witness in describing the effect of his injury on his ability to work his second job, but denied the Claimant temporary partial disability as the Claimant's treating physician released him back to work without restrictions, thus leaving the ALJ no choice but to deny the claim as no "medical justification" had been presented. *Fuentes*, supra at 3. The CRB vacated the denial of benefits and remanded the case to the ALJ with instructions to award the Claimant the temporary partial disability sought. Thus, in limited circumstances, where the injury is significant and the Claimant credible, the ALJ may award disability benefits absent medical documentation. DRO at 5.

claimed by the Claimant are shown to indicate that while he may not have worked he did not suffer any wage loss as a result because he received his full pay. "Disability" means physical or mental incapacity because of injury which results in the loss of wages, or stated otherwise, it is an economic and not a medical concept and any injury that does not result in loss of wage-earning capacity cannot be the foundation for a finding of disability. D.C. Code § 32-1501 (8); *Negussie v. DOES*, 95 A2d 31, 396 (D.C. 2007).

COR at 7.

The ALJ denied in entirety the requested temporary total disability benefits. This is in error.

First, as our DRO indicated, the ALJ was at a minimum directed to award three days of temporary total disability benefits, the two days immediately after the accident and the day the Claimant attended the IME as the ALJ had erroneously denied those days based on the belief that the days had to be consecutive. As discussed in the DRO, they do not have to be consecutive. The ALJ acknowledges the dates, November 10 and 12 as well as May 24, 2011, but ALJ fails to award temporary total disability benefits. We are unfortunately constrained to remand the case with instructions to again award temporary total disability benefits for these dates.

We also remand the case for further analysis for the rest of the period claimed. The ALJ failed to make any credibility findings, per our DRO. As stated, in limited circumstances, where the injury is significant and the Claimant credible, the ALJ may award disability benefits absent medical documentation. *See Fuentes*. The ALJ again refused to award temporary total disability for the claimed days, at least in part, based upon some of the days not having any medical documentation to support any disability. Per *Fuentes*, this does not necessarily bar the recovery of benefits. If the ALJ finds the Claimant credible, the ALJ may award benefits. Upon remand, the ALJ is again directed to make explicit credibility findings.

Furthermore, the ALJ denies disability based upon the Claimant receiving sick leave on the days he was off.

According to the exhibit, on all of the other dates the Claimant was paid his full wages based upon past leave earned, and apparently chose to be paid sick or vacation leave at that time rather seek to be paid workers' compensation benefits.

COR at 7.

Thus, the ALJ denied the requested disability based on the sick leave the Claimant took on the days he was off, concluding that these payments represented wages. This is in error.

It is well settled that disability is an economic concept under the Act. Any wage loss caused by a compensable injury is recoverable. During the days in question, the days the Claimant alleges he was disabled because of his injury the Claimant used his sick leave, which the ALJ then denied based upon a receipt of sick leave which the ALJ classified as receiving his full pay. COR at 7.

However, the receipt of sick leave does not equate to the receipt of advance payment of compensation under the act negating entitlement to temporary total disability.

The District of Columbia Court of Appeals (DCCA) has addressed whether or not the receipt of sick leave while out for a work related injury constituted an advanced payment of compensation in *Gay v. DOES*, 644 A.2d 1326, 1327 (D.C. 1994). The DCCA noted that the decisions from the agency on this issue were unclear and often contradictory, and thus remanded the case for a “clearer exposition by the agency of its statutory analysis.” *Id.* The Court did seem troubled by the idea, however, that a worker could in fact lose wages if sick leave was considered an advance payment of compensation. The DCCA noted,

The requirement that a worker use his sick leave benefits to maintain his wages during the period he is out as a result of a job-related injury may, in practical effect, mean that he loses that protection if, later on, he loses time from work for, say, a non-job-related illness because his otherwise available sick benefits will be exhausted.

Id.

Our research does not reveal whether the Director ever issued a subsequent decision in *Gay* to answer the questions posed by the DCCA. However, subsequent agency decisions noted the troubling idea of a “vulnerability of an employee because of the potential loss of sick leave protection” when addressing an employer’s request for a credit for sick leave paid. *Simms v. WMATA*, H&AS No. 95-427, OWC No. 284726 (February 14, 1997). See also *Carey v. Safeway Stores, Inc.* H&AS No. 96-49, OWC 269941 (May 31, 1996).

In line with the above reasoning, we decline to conclude that the receipt of sick leave amounts to advance payments of compensation which would preclude an award when claiming temporary total disability. Sick leave is leave earned in anticipation of a future unforeseen event, becoming ill. The Claimant alleges he utilized this sick leave on days when he was injured due to a work related injury. As the court in *Gay* noted, by using sick leave for a work related injury, the Claimant risks using all of his sick leave and then suffering a wage loss in the future for an illness that is non-work related. Such a result would thwart the humanitarian purposes of the workers compensation statute, to compensate the Claimant for any wage loss suffered because of a work related injury. Receipt of sick leave during the time a Claimant is out for a work related injury does not preclude the later award of temporary total disability.³ Upon remand, the ALJ cannot use the receipt of sick leave as a reason to deny temporary total disability benefits.

The Claimant next argues the ALJ erred in calculating the average weekly wage (AWW). The Claimant argues the AWW should be \$1,364.87.⁴ We disagree.

³ Whether or not the award of temporary total disability would be used to buy back sick leave or not is not properly before us nor one we can determine based upon the record before us. That issue is solely between the Employer and Employee.

⁴ The Claimant arrived at this sum by dividing \$49,171.33, the year to date total as of September 5, 2010 by 36 weeks.

A review of the record reveals the Claimant worked in the same position for a number of years. In October of 2010, the Claimant's contract was transferred to Emcor after having worked for Wackenhut Services for a period of time. The Claimant's job, rate of pay, and job location did not change. In support of his argument that his average weekly wage should be \$1,364.87, the Claimant submitted two documents. One document is the Claimant's paystub for the pay period ending September 5, 2010 and the other document is a paystub for the pay period ending September 2, 2011.

The Employer, in opposition, argues that the ALJ was correct in his determination of the AWW. D.C. Official Code § 32-1511(a)(4) provides in relevant part:

If at the time of the injury wages are fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by 26 the total wages the employee earned in the employ of the employer in the 26 consecutive calendar weeks immediately preceding the injury. If the employee has been in the employ of the employer less than 26 weeks, the total wages referred to in paragraph (3) of this subsection shall be the amount the employee would have earned had the employee been employed by the employer for the full 26 calendar weeks immediately preceding the injury had had worked when work was available to other employee, in a similar occupation.

A review of the COR reveals the following discussion:

Considering the Claimant's testimony that his hourly rate of pay with the Employer, Emcor, for whom he started working for on November 2, 2010, after it took over a contract Claimant's previous Employer, Wackenhut, had operated under, was the same hourly rate of pay, but the Claimant was able to work approximately one week before his injury of November 9, 2010 took place, then it appears the applicable statutory language falls under D.C. Code § 32-1511 (4).

COR at 8.

A review of the evidence supports the ALJ's conclusion. It is uncontested that the Claimant's job duties and rate of pay did not change when his contract was transferred to Emcor. Much of the basis of the higher average weekly wage the Claimant is arguing is based on the Claimant having worked overtime. However, the Claimant failed to introduce any evidence which would show what the Claimant's average weekly wage, including overtime, was in the 26 weeks prior to the injury, or the 26 weeks prior to the paystub ending on September 5, 2010. See footnote 4, *infra*. While the Claimant wasn't able to work until a week prior to the injury for approximately a month due to a non-work related illness, the Claimant only introduced two documents into evidence, neither which was illustrative of a 26 week average weekly wage. In light of the lack of evidence introduced by the Claimant to support the higher average weekly wage claimed, we do not find it in error for the ALJ to multiply the Claimant's average weekly wage by 40 hours. As the DCCA stated in *George Hyman v. DOES*, 497 A.2d 103 (D.C 1985),

In *Savoy*,⁵ as here, DOES calculated the average weekly wage of the claimant by referring to the amount earned for the weeks actually worked by the claimant, although less than 13 weeks. In *Savoy*, DOES, in effect, placed upon the employer the burden of establishing that no work or less work would have been available to "other employees in a similar occupation" during that portion of the 13-week period preceding the injury that came before Savoy's employment. Upon the employer's failure to carry that burden, DOES assumed that Savoy would have worked during the entire 13-week period at the same rate or in the same pattern that he worked during the period of 7 weeks that spanned his actual employment. Conversely, if Savoy wished to establish an average weekly wage greater than that, he had the burden to submit evidence concerning how much work was available to similar employees during the 13-week period. We view the *Savoy* approach as reasonable and approve of its application here. See *Gomillion v. D.C. Department of Employment Services*, 447 A.2d 449, 451 (D.C. 1982) (court accords great weight to any reasonable construction of regulatory statute by agency charged with its administration); accord *Udall v. Tallman*, 380 U.S. 1, 16, 13 L. Ed. 2d 616, 85 S. Ct. 792 (1965) (great deference to agency construction). Given the paucity of the record and the absence of any evidence that would serve as the basis for use of a different method, we conclude that reference to claimant's actual earnings leads to a fair computation even though based on a period shorter than 13 weeks.

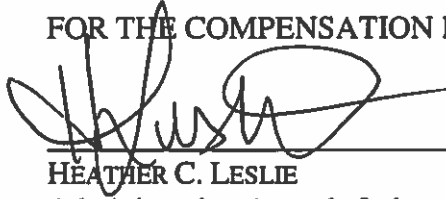
Based upon the "paucity of the record and the absence of any evidence that would serve as the basis for use of a different method," we find the ALJ's determination of the AWW to in accordance with the law. It is uncontested that the Claimant's duties and rate of pay did not change. While the Claimant testified to the availability of overtime, it was the Claimant's burden to submit evidence to support a higher average weekly wage, either through weekly checks or some other means. The Claimant failed in this burden.

⁵ *Savoy v Vienna Equipment Company*, H&AS No. 83-39, OWC No. 0002550 (July 21, 1983)

CONCLUSION AND ORDER

The November 18, 2013 Compensation Order on Remand is VACATED, in part, and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

A handwritten signature in black ink, appearing to read 'H. Leslie', is written over a horizontal line.

HEATHER C. LESLIE
Administrative Appeals Judge

March 6, 2014

DATE