

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-070

**ENCARNACION JAMBARO,
Claimant-Petitioner,**

v.

**HOSPITAL FOR SICK CHILDREN and LIBERTY MUTUAL,
Employer/Insurer-Respondent.**

Appeal from a May 10, 2013 Compensation Order By
Administrative Law Judge Linda F. Jory
AHD No. 13-154, OWC No. 632891

David M. Snyder, Esquire for the Petitioner
Robin Cole, Esquire for the Respondent

Before MELISSA LIN JONES and HEATHER C. LESLIE, *Administrative Appeals Judges* and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On August 12, 2006, Ms. Encarnation Jambaro injured her back while performing her duties as a registered nurse at the Hospital for Sick Children (“Hospital”). On May 12, 2009, Ms. Jambaro was released to light duty with a lifting restriction, and the Hospital accommodated her restriction until January 28, 2012 when Ms. Jambaro was fired.

After a period of unemployment, Ms. Jambaro secured part-time employment, and she filed a claim for temporary total disability benefits from January 29, 2012 to February 5, 2012, temporary partial disability benefits from February 6, 2012 to the date of the formal hearing and continuing, and payment of medical expenses. Following a formal hearing, an administrative law judge (“ALJ”) issued a Compensation Order awarding Ms. Jambaro her claim for relief based upon an average weekly wage of \$1,129.92.¹

¹ *Jambaro v. Hospital for Sick Children*, AHD No. 13-154, OWC No. 632891 (May 10, 2013).

Ms. Jambaro appeals the ruling that her average weekly wage is \$1,129.92. She asserts that consistent with the humanitarian nature of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545 ("Act"), the wage figure on the Employer's First Report is the appropriate finding for her average weekly wage.

In response, Hospital contends Ms. Jambaro's argument is not supported by the facts of her case. Based upon Ms. Jambaro's testimony that she worked 32 hours a week prior to her compensable accident, Hospital asserts the ALJ's ruling on average weekly wage is supported by substantial evidence and is in accordance with the law.

ISSUE ON APPEAL

Based upon the evidence in the record, did the ALJ properly assess Ms. Jambaro's average weekly wage?

ANALYSIS²

There is no presumption regarding average weekly wage; at the formal hearing, the burden of proving average weekly wage was on Ms. Jambaro.³ In order to satisfy her burden, Ms. Jambaro relied upon (1) an Employer's First Report completed in 2006 which showed average weekly earnings for an undisclosed time period as \$1,412.40 based upon a 5 day work-week and (2) her 2006 W-2 indicating taxable earnings of \$64,035 or \$1,231.44 per week.⁴

At the formal hearing, Ms. Jambaro argued that because her injury happened on August 12, 2006 it is impossible to calculate her average weekly wage in the 26 weeks prior to her injury based upon her W-2; therefore, the Employer's First Report is a more accurate indication of her average weekly wage.

The ALJ rejected Ms. Jambaro's argument that the average weekly wage should be the \$1,412.40 listed on the Employer's First Report because Ms. Jambaro did not work 5 days a week, the work-week that formed the basis for the average weekly wage listed on Employer's First Report. Instead, the ALJ accepted hourly rate included on the Employer's First Report and multiplied that figure by 32 to reflect Ms. Jambaro's actual work week.

² The scope of review by the compensation Review Board ("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. Section 32-1521.01(d)(2)(A) of the 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 International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

³ *Zakariya v. The Washington Post*, CRB No. 03-39, OHA No. 95-98, OWC No. 248715 (May 11, 2006).

⁴ The parties agree that due to computer problems no wage statement is available.

The ALJ made clear findings of fact that Ms. Jambaro “initially worked eight hours, four days a week and then she started working two twelve hour days but was paid for two 16 hour days or 32 hours in total”⁵ and “[a]t the time of the injury, August 12, 2006, claimant was working four eight hour days and was paid [\$]35.31 per hour.”⁶ Based upon these findings that are supported by substantial evidence in the record, the conclusion that Ms. Jambaro’s average weekly wage is \$1,129.92 flows reasonably from the facts:

There is no reason presented that Tammy Fendell[, the Human Resource Coordinator who prepared the Employer’s First Report,] would not have researched what claimant’s actual hourly rate was. However based on claimant’s own testimony, which I have found to be credible, claimant did not work a 5 day week for employer at any time. Accordingly the undersigned does accept as the best evidence of claimant’s earning in 2006 however, claimant’s wages should be calculated based on a 4 day work week or 32 hours or \$ 1,129.92.^[7]

Ms. Jambaro does not assert that she worked more than 32 hours per week or that the hourly rate in Employer’s First Report is not reliable. Her arguments amount to a request that the CRB reweigh the evidence; however, the CRB’s authority is limited to upholding 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.⁸

CONCLUSION AND ORDER

The ALJ’s ruling that Ms. Jambaro’s average weekly wage is \$1,129.92 is supported by substantial evidence and is in accordance with the law. The May 10, 2013 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

July 24, 2013
DATE

⁵ *Jambaro, supra*, at p. 3.

⁶ *Id.*

⁷ *Id.* at p. 4.

⁸ *Marriott, supra*.