GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

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ACTING DIRECTOR

COMPENSATION REVIEW BOARD

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 JUN 10 AM 9 45

CRB No. 13-095

KEVATTE JONES,
Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN TRANSIT AUTHORITY
and SEDGWICK CMS,
Employer/Insurer-Respondent.

Appeal from a June 26, 2013[1] Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. 08-309A, OWC No. 642640

Krista N. DeSmyter for the Petitioner
Donna J. Henderson for the Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board; HEATHER C. LESLIE, *dissenting*.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On September 25, 2007, Ms. Kevatte Jones injured her head, left ribs, left shoulder, and left knee when the bus she was driving for WMATA hit a building and a pole. After treating with Dr. Joel Fechter, Ms. Jones obtained employment in November 2007 as a school bus driver for Prince

[1] The Certificate of Service attached to the Compensation Order indicates a mailing date of June 26, 2012; however, given that the formal hearing in this matter took place on June 5, 2013, it is clear the date on the Certificate of Service is a typographical error.

George's County Schools. Ms. Jones does not have any difficulties performing her current job duties.

A dispute arose over Ms. Jones' entitlement to permanent partial disability awards for her left arm and her left leg. At a formal hearing, Ms. Jones, a former deputy sheriff with the Arlington County Sheriff, attempted to present evidence of her inability to work as a police officer; the ALJ did not permit detailed testimony regarding Ms. Jones' former employment and did not consider Ms. Jones' inability to return to that former employment when assessing Ms. Jones' entitlement to permanent partial schedule awards:

> At the outset the undersigned shall address claimant's theory of recovery that she has a permanent impairment to her left leg and left arm that affects her ability to obtain employment as a police officer because she cannot run and she cannot do pushups. As the undersigned pointed out at the formal hearing, it is irrelevant whether claimant can obtain employment as a police officer as claimant was working as a bus operator when she sustained the alleged injuries to her left arm and left knee. Whether or not claimant can work as a police officer would certainly be relevant if claimant were presenting a permanent impairment disability claim to the employer for whom she was working as a police officer when she sustained the injury to her left knee in 2006. However the facts of the instant matter are that after she sustained the 2006 injury to her left knee while employed as a police officer she ceased working as a police officer and began working as a bus operator for the instant employer. Accordingly, the undersigned is assigned the task of determining how, or if, the injury sustained while employed by the instant employer affects her potential for wage loss after determining what medical impairment claimant has sustained.[2]

After considering Ms. Jones' contradictory testimony, the medical evidence, the five factors, and the remaining evidence of record, the ALJ awarded Ms. Jones 12.5% permanent partial disability to the left arm and 16% permanent partial disability to the left leg.

On appeal, Ms. Jones contends the ALJ erred by disallowing inquiry into and consideration of Ms. Jones' industrial history, specifically, her prior employment as a deputy sheriff:

> Ms. Jones attempted to present evidence of her industrial history, her work experience, to demonstrate her diminished ability to compete in the labor market because of her work injury. The Compensation Order erred in discounting the relevance of this claim and by disallowing inquiry into Ms. Jones's industrial history and the effect of the injury on her ability to seek employment for which she is otherwise qualified. See Hearing Transcript at 28-30, 79-86 and CO at 5. The ALJ stated, "She was a bus operator when she was injured and I have to look at whether or not she can do that job now." HT at 86. Such statements and the Compensation Order's language that "it is irrelevant whether claimant can obtain employment as a police officer as claimant was working as a bus operator when she sustained the alleged injuries to her left arm and left leg" are errors of law as they are inconsistent

[2] *Jones v. WMATA*, AHD No. 08-309A, OWC No. 642640 (June 26, 2013), p. 5.

> with the concept of disability and the consideration of industrial loss when assessing permanent partial disability benefits for schedule loss.[3]

Ms. Jones requests the Compensation Review Board ("CRB") vacate the Compensation Order and award her full claim for benefits.

In response, WMATA asserts "[t]he former employment of a claimant, and specifically her ability to return to that employment, is not relevant to a claim for permanent partial disability under [the schedule] because the District of Columbia is not an 'industrial loss of use' or 'industrial capacity' jurisdiction."[4] Because Ms. Jones abandoned her position as a deputy sheriff to work as a bus driver with WMATA, WMATA argues Ms. Jones' evidence of her inability to perform the duties of a deputy sheriff are irrelevant to her claim for permanent partial disability, and WMATA requests the CRB affirm the Compensation Order.

ISSUE ON APPEAL AND ANALYSIS[5]

The only issue on appeal in this matter is whether the ALJ erred by not considering Ms. Jones' prior employment and duties as a deputy sheriff when assessing Ms. Jones' permanent partial disability to her left arm and left leg as a result of her accident while working as a bus driver for WMATA.[6] Ms. Jones' "industrial history" argument that consideration of her inability to resume her prior employment as a deputy sheriff is relevant to her current claim and that the ALJ erred in refusing to accept evidence on that issue and in refusing to consider that deficiency when assessing Ms. Jones' entitlement to a schedule member permanent partial disability award is rejected.

It seems that understanding "industrial use" and "industrial capacity" has created confusion in some contexts surrounding schedule member permanent partial disability; however, *Corrigan* explains

> [w]e thus do not view *Wormack* as inconsistent with *Negussie,* nor with the D.C. Court of Appeals authority that preceded *Negussie* which has been herein cited. Where confusion has no doubt arisen with respect to the decision in *Wormack,* which in turn has led in certain instances to consideration at the AHD level of wage-loss in schedule award cases (*see* footnote 8, *supra*), are the references therein to "loss of

[3] Memorandum of Points and Authorities in Support of Application for Review, pp. 4-5.

[4] Self-Insured Employer's Opposition to Application for Review, p. 1.

[5] 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* ("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).

[6] Ms. Jones concedes that the physical limitations Dr. Fechter imposed "would not necessarily impact her position as a bus operator," Memorandum of Points and Authorities in Support of Application for Review, p. 5, and has not appealed the ALJ's conclusion that Ms. Jones is entitled to 12.5% permanent partial disability to the left arm and 16% permanent partial disability to the left leg.

> industrial use" and to "industrial capacity." [Footnote omitted.] While use of the terms "industrial loss of use" and effect upon "industrial capacity" in other jurisdictions has been equated with loss of wage earning capacity, [footnote omitted] the terminology as used by *Wormack* in the context of schedule awards is not imbued with the same meaning. Unlike the Maryland statute, the phrase "industrial use" does not appear anywhere in the specific loss provisions of the D.C. Workers' Compensation Act. Its use in *Wormack*, and that of the related concept of "industrial capacity," was intended as judicial shorthand to describe the condition of the injured member from the standpoint of its use in employment. By introducing the concept of "loss of industrial use" and the effect of a claimant's schedule work injury on a claimant's "industrial capacity" into the determination of the degree of disability for schedule awards, *Wormack* contemplates for consideration, in addition to the physical condition of the injury (as assessed by the medical experts), and the "Maryland Factors," consideration of the employee's scheduled injury or loss from the standpoint of the injured member's use in employment. We nevertheless concede that this description causes confusion because it does not adequately capture the proper standard, which is that specific loss is to be determined without reference to the claimant's earning capacity or ability to return to work. As the cited case law establishes, compensation is paid if the loss has been incurred, and it is not relevant whether the worker can work after the loss. We believe it was this concept that the *Wormack* decision was attempting to articulate, and we clarify by means of this opinion that holding.[7]

Furthermore, none of the D.C. Court of Appeals' cases that use the phrase "industrial history" are schedule member permanent partial disability cases:

- In *Washington Post v. Department of Employment Services*,[8] when determining whether the claimant was entitled to temporary total disability benefits, the ALJ was bound to consider the claimant's industrial history (among other factors) because the employer had not offered the claimant suitable, alternative employment;

- In *Washington Metropolitan Area Transit Authority v. Department of Employment Services*,[9] because the ALJ had applied the wrong standard of proof to determine whether a modification of an existing Compensation Order was warranted, the matter was remanded for consideration of a possible change in the economic component of the claimant's disability, namely his employability, as opposed to the medical component of his disability;

- In *Pro-Football d/b/a Washington Redskins v. Department of Employment Services*,[10] the claimant requested permanent partial disability benefits based on wage loss, and in order to

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[7] *Corrigan v. Georgetown University*, CRB No. 06-094, AHD No. 06-256, OWC No. 604612 (September 14, 2007).

[8] *Washington Post v. DOES*, 675 A.2d 37 (D.C. 1996).

[9] *Washington Metropolitan Area Transit Authority v. DOES*, 703 A.2d 1225 (D.C. 1997).

[10] *Pro-Football d/b/a Washington Redskins v. DOES*, 782 A.2d 735 (D.C. 2001).

be entitled to such benefits, it was necessary to consider whether the claimant actually had suffered wage loss as a result of a work-related disability; and

- In *Logan v. Department of Employment Services*,[11] the claimant requested permanent total disability benefits, and when assessing the claimant's employability in suitable, alternative employment, it was necessary to consider the work he had performed in the past.

The closest case to Ms. Jones' case is *Pro-Football*. In that case, the claimant at least requested permanent partial disability benefits (albeit based upon wage loss). Still, it would not have been appropriate to calculate the claimant's permanent partial wage loss based upon a comparison of his current wages and his wages from an employer 10 year prior rather than a comparison of his current wages and his wages from his employer at the time of his injury. Similarly, when a claimant sustains an injury to a body part listed on the permanent partial disability schedule, the claimant may be entitled to an award in the amount of 66 2/3% of his average weekly wage multiplied by a percentage of the number of weeks set forth in the Act for the particular schedule member;[12] the average weekly wage is computed at the time of the injury with the then-current employer, and inherent in assessing the degree of the claimant's disability is consideration of the employment the claimant held at the time of injury, not employment held 10 years prior.

Just as an employer is not a guarantor of health and is only responsible for compensating a claimant for work-related injuries, an employer is not a guarantor of prior employment and is only responsible for compensating for work-related disabilities, specifically, those disabilities attributable to the employment duties at the time of injury. The dissent would permit a claimant to receive schedule member permanent partial disability benefits based upon a claimant's inability to return to employment held 10 years prior to the job during which the claimant was injured even though the claimant is capable of returning to work in the same position the claimant held at the time of injury. Evidence of that prior position is not admissible for this purpose because it is not relevant to the determination of the claimant's disability; the yardstick by which the potential for wage loss is to be measured is the claimant's employment at the time of injury, not employment with a different employer a decade before the injury. We are unwilling to increase employers' potential exposure for permanent partial disability awards by increasing the scope of acceptable factors to include a claimant's inability to return to the work capacity required by a prior employer, as opposed to the work capacity required by the employer at the time of the claimant's injury.

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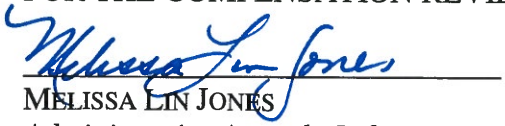
[11] *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

[12] Section 32-1508(3). See also §32-1508(3)(V)(iii).

CONCLUSION AND ORDER

The ALJ did not err by not considering Ms. Jones' prior employment as a deputy sheriff when assessing Ms. Jones' permanent partial disability to her left arm and left leg as a result of her accident while working as a bus driver for WMATA. The June 26, 2013 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

June 10, 2014
DATE

Heather C. Leslie, *dissenting*.

I respectfully dissent from the majority's holding that evidence of a Claimant's vocational history prior to the employment at which the work related-injury occurred is not admissible. I dissent because I believe such evidence may prove the potential for wage loss and therefore is relevant and admissible.

Disability, as defined by the Act means the physical or mental incapacity because of injury which results in the loss of wages. Disability is an economic and not a medical concept. As the Court stated in *Washington Post* (relying upon *American Mut, Ins. Co. v. Jones*[13]),

> The degree of disability in any case cannot be measured by physical condition alone, but there must be taken into consideration the injured man's age, his industrial history, and the availability of the type of work which he can do.[14]

This definition extends to disability which is also permanent and partial. In the oft quoted case of *Jones v. DOES,*[15] the DCCA relied upon this case in its analysis of a permanent partial disability case. As the Court stated in *Jones*,

> The ALJ comes to a conclusion based on a complex of factors, taking into account physical impairment and potential for wage loss, and the application of judgment based on logic, experience and even "prediction," and considering that any disability determination by the ALJ, once made, is impermeable to review.[16]

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[13] 138 U.S. App. D.C. 269, 271, 426 F.2d 1263, 1265 (1970).

[14] *Id.* at 40-41.

[15] *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012).

[16] *Id.*

In the case before us, Claimant's prior vocational history could be evidence that could prove the potential for wage loss. Under the majority opinion, Claimant would be precluded from introducing such evidence.

To limit the Claimant's ability to present evidence of how the accident affects her ability to perform a prior job restricts Claimant's ability to prove how the industrial accident limits her potential for future wage loss. This is not contemplated by prior case law or the statute and is inconsistent with *Jones.*

I do not agree with the majority's holding that a Claimant is limited to proving potential for wage loss only through evidence regarding the job she held when injured and any subsequent employment. As *Jones* and *Washington* conclude, to determine what permanent partial disability award a Claimant may be entitled to is largely determined by a complex of factors relevant to the case in front of an ALJ. Not all cases are the same, and not all disability determinations rely on the same set of factors. Prior vocational history can be a relevant factor in determining how the industrial accident has impaired Claimant's ability to earn income (i.e. potential for wage loss) and therefore find such evidence is admissible. To limit the Claimant's ability to present evidence of prior jobs to prove the potential for future wage loss (or the Employer's ability to introduce a Claimant's prior jobs to show the lack of potential of future wage loss) is not contemplated by prior case law or the statute.

For the reasons set forth above, I respectfully dissent.

HEATHER C. LESLIE
Administrative Appeals Judge