

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 12-AA-0001

MARTA ECHEVERRIA, PETITIONER,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

RITZ-CARLTON HOTEL, INTERVENOR,

and

MARRIOTT CORPORATION, INTERVENOR.

On Petition for Review of a Decision of the
District of Columbia Department of Employment Services
Office of Administrative Hearings
(CRB-126-10)

(Hon. Linda F. Jory, Administrative Law Judge)

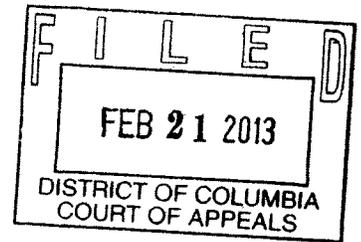
(Argued February 12, 2013)

Decided February 21, 2013)

Before WASHINGTON, *Chief Judge*, and EASTERLY, *Associate Judge*, and
PRYOR, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner Marta Echeverria challenges the decision of the Office of Hearings and Adjudications Section of the District of Columbia Department of Employee Services, arguing that the Compensation Review Board (“CRB”) erred in reversing the ruling of Administrative Law Judge Linda F. Jory regarding the calculation of benefits claimed for partial permanent disability sustained by petitioner during the course of her employment. D.C. Code § 32-1501 *et seq.* We affirm.



I.

Petitioner was employed as a housekeeper by the Ritz-Carlton Hotel and Marriot Corporation ("Employer") until she suffered an injury to her left and right shoulders when her supervisor "tugged" on her arm on July 27, 1997. On February 28, 2002, Administrative Law Judge ("ALJ") Reva M. Brown determined that petitioner's average weekly wage at the time of her injury was \$517.84 and ordered Employer to pay temporary partial disability benefits effective July 17, 2001. Later, petitioner sought a determination of permanent partial disability in both upper extremities. On June 1, 2005, ALJ David L. Boddie determined that petitioner was partially disabled and had reached "maximum medical improvement" ("MMI") as of June 4, 2004, and was entitled to compensation based upon the schedule in the statute, D.C. Code § 32-1508 (3)(V). However, ALJ Boddie did not determine the specific basis required by the statute to formulate the compensation award, finding that petitioner was "free to elect or choose the amount of her compensation rate to be paid by applying her wages to [§ 32-1508 (3)(V)] and determining which is greater." After ensuing litigation, the CRB ruled that petitioner "was not precluded from seeking [an administrative] determination of the specific dollar amount to which she may be entitled under [D.C. Code] § 32-1508 (3)(V)(ii)(I) or (ii)(II)."

Petitioner sought administrative determination of the specific dollar amount of her compensation award on March 19, 2010, before ALJ Jory. ALJ Jory issued a Supplementary Compensation Order ("SCO") on April 30, 2010, concluding that petitioner's average weekly wage at the time of her injury was \$517.84 and that her actual weekly wage at the job she returned to after her injury was \$186.25. ALJ Jory found there was insufficient evidence to determine either the "(1) average weekly wage at the time of the injury of the job that claimant held when she returned to work; and (2) the average weekly wage at the time claimant returned to work of the jobs that she held before she became disabled." Despite this finding, ALJ Jory concluded that:

This record's lack of evidence to establish these rather obscure elements of [petitioner's] wage history however should not relieve employer from its liability to pay claimant personal partial disability benefits based upon a straight $66 \frac{2}{3}$ [percent] 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.

ALJ Jory concluded that Employer “remain[ed] liable for 66 2/3 [percent] of the difference between the actual wage of the work claimant performed in 2004 [\$186.25] and her pre-injury average weekly wage of \$517.84.” Employer sought review of this April 30, 2010 order with the CRB. The CRB observed that petitioner failed to establish the necessary statutory components required under either § 32-1508 (3)(V)(ii)(I) or (ii)(II). Because the ALJ awarded benefits to petitioner under a formula not stated in the statute, the CRB vacated the award of permanent disability benefits granted in the April 30, 2010 Supplemental Compensation Order (“SCO”). This appeal followed.

II.

This court’s review of agency decisions is limited in scope. We “must affirm an agency decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” *Clark v. District of Columbia Dep’t of Emp’t Servs.* (“DOES”), 772 A.2d 198, 201 (D.C. 2001) (citing D.C. Code § 1-1510 (a)(3) (1999)). On review of agency decisions, this court makes three inquiries: “(1) whether the agency has made a finding of fact on each material contested issue of fact; (2) whether substantial evidence of record supports each finding;” and (3) whether the agency’s conclusions are “legally sufficient” so that the “decision flow[s] rationally from the findings.” *Ferreira v. District of Columbia Dep’t of Emp’t Servs.*, 667 A.2d 310, 312 (D.C. 1995).

In the context of worker’s compensation administrative decisions, this court defers to the agency’s decision so long as it “rationally flows from the facts, and those facts are supported by substantial evidence on the record”¹ – even if there is contrary evidence in the record. *Clark, supra*, 772 A.2d at 201 (citing *Washington Metro. Area Transit Auth. (WMATA) v. DOES*, 683 A.2d 470, 472 (D.C. 1996));

¹ We have defined substantial evidence as follows:

Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If substantial evidence exists to support the [agency] Director’s finding, the existence of substantial evidence contrary to that finding does not permit the Court to substitute its judgment for the [agency] Director’s.

Clark, supra, 772 A.2d at 201 (internal quotation marks and citations omitted).

Ferreira, supra, 667 A.2d at 312. We review the CRB’s legal conclusions *de novo*, but we will “defer to the agency’s interpretation of the statute and regulations it is charged by the legislature to administer, unless its interpretation is unreasonable or is inconsistent with the statutory language or purpose.” *District of Columbia Office of Human Rights v. District of Columbia Dep’t of Corr.*, 40 A.3d 917, 923 (D.C. 2012) (citing *Foggy Bottom Ass’n v. District of Columbia Zoning Comm’n*, 979 A.2d 1160, 1167 (D.C. 2009)); *Beta Constr. Co., v. District of Columbia Dep’t of Empl. Servs.*, 748 A.2d 427, 429-30 (D.C. 2000) (“The agency’s interpretation of the statute it administers is binding on this court unless it conflicts with the plain meaning of the statute or its legislative history.”). We review the order of the CRB, not the ALJ – but we do not ignore the compensation order that was the subject of the CRB review. *WMATA v. DOES*, 926 A.2d 140, 147 (D.C. 2007).

Petitioner presents two arguments for our review. First, she claims that the CRB erred by reversing the SCO because the statute is silent as to whether alternative methods for demonstrating permanent partial disability is permissible. Second, she argues that both ALJ Jory and the CRB erred in determining that petitioner was unable to demonstrate the value of her post-injury job at the time of her injury because neither took into account the possibility of using the Department of Labor Inflation Calculator to determine her hypothetical average weekly wage at the time of MMI.

A.

The statute at issue is D.C. Code § 32-1508 (3)(V)(ii)(I) and (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 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.

Id.

Petitioner had the burden to demonstrate that she was entitled to a specific compensation award. *WMATA, supra*, 926 A.2d at 149. Under § 32-1508

(3)(V)(ii), petitioner must² choose whether to calculate her compensation award under sub-paragraph (V)(ii)(I), based on the difference between the average weekly wages of her pre- and post-injury jobs at the time of her injury, or (V)(ii)(II), based on the difference between the average weekly wages of her pre- and post-injury jobs at the time she returns to work. ALJ Jory found, and the CRB agreed, that petitioner did not produce sufficient evidence to satisfy either method of calculation under the statute.

Reviewing both orders, we conclude that ALJ Jory made findings of fact on each element of the statutory compensation calculation, each supported by substantial evidence. See *Ferreira, supra*, 667 A.2d at 312. The ALJ found that: (1) petitioner's average weekly wage of the jobs she held at the time of her injury was \$517.84; (2) petitioner's average weekly wage of the new job she held at the time she returned to work (2004) was \$186.25; (3) there was insufficient evidence to establish what petitioner's pre-injury jobs would have earned in 2004; and (4) there was insufficient evidence to establish what petitioner's post-injury job would have earned at the time of her injury.

Concluding that the petitioner had not established two of the necessary statutory elements, the ALJ issued a compensation award based on a computation method not listed in the statute. Thus, her conclusions did not "flow rationally from the findings." *Ferreira, supra*, 667 A.2d at 312. The CRB reversed the ALJ's compensation award on the grounds that the ALJ acted outside of the authority granted to her in the regulating statute. Unless the CRB's interpretation of the statute is "unreasonable or inconsistent," we defer to its ruling. *Beta Const. Co., supra*, 748 A.2d at 429-30.

The petitioner urges us to consider this alternative method of calculating benefits as it is "employer-friendly," "easy to determine," and is the product of a "liberal construction" of the worker's compensation law, with any doubts resolved in the petitioner/employee's favor. *Jiminez v. DOES*, 701 A.2d 837, 840-41 (D.C. 1997). We disagree with petitioner's assertion that the ALJ's construction was a mere "liberal" interpretation of the statute, adopting instead the view held by the CRB, which noted that "[L]iberal construction is not reconstruction." *Adjei v. DOES*, 817 A.2d 179, 184 (D.C. 2003). In this context, the plain language of the statute, quoted above, indicates that two, and only two, methods of calculation may be used to arrive at the appropriate compensation award. Therefore, the CRB's

² The language of the statute is set in mandatory terms: "In other cases the employee shall elect:" D.C. Code § 32-1508(3)(V)(i).

interpretation of its own statute is both reasonable and consistent with legislative intent, history, and purpose. *See id.*

B.

Petitioner also argues, in the alternative, that the average weekly wage of her post-injury housekeeping business, had it existed at the time of her injury, could have been determined by adjusting for the rate of inflation and replacing the 2004 value of the dollar with the 1997 value of the dollar. This alternative method of calculation was not presented to the numerous ALJs who reviewed this matter, nor to the CRB. We have discretion to decide whether to entertain arguments made for the first time on appeal. *Bautista v. United States*, 10 A.3d 154, 159 (D.C. 2010). In this case, we choose not to decide petitioner's alternative argument.

In sum, because we defer to the CRB as to its interpretation of the compensation calculation method provided in the statute, we remand the case so that it can be further remanded to an administrative law judge to conduct a fact-finding hearing, utilizing one of the alternative methods set forth in the statute to determine and make a specific award to petitioner given the ALJ's unchallenged finding that the petitioner is entitled to compensation for wage loss due to her permanent partial disability.

So ordered.

ENTERED BY DIRECTION OF THE COURT:

Jeany B. Dutae

for JULIO A. CASTILLO
Clerk of the Court

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