

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. 03-74

EDWARD M. SULLIVAN,

Claimant-Respondent,

v.

BOATMAN & MAGNANI AND AETNA INSURANCE COMPANY,

Employer/Carrier-Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge E. Cooper Brown
OHA No. 90-597E, OWC No. 088187

Benjamin T. Boscolo, Esquire for the Respondent

Roger S. Mackey, Esquire for the Petitioner

Before JEFFREY P. RUSSELL, LINDA F. JORY and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, on behalf of a majority of the Review Panel,
FLOYD LEWIS, *Administrative Appeals Judges*, Dissenting.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) 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

¹Pursuant 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia 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 District of Columbia 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 April 14, 2003, the Administrative Law Judge (ALJ) granted Respondent's request for an award of permanent partial disability under the schedule, in addition to the previously awarded permanent total disability. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the Act does not permit a schedule award concurrently with an award of permanent total wage loss disability.

ANALYSIS

As an initial matter, the scope of review by the CRB and this Compensation 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. Dist. Of Columbia Dep't. Of Employment Servs.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must uphold a Compensation Order that is supported by substantial evidence, even if the record under review also contains 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.

The issue raised by Petitioner in this appeal is whether, under the Act, an award for permanent partial disability to a schedule member is proper where the injured employee is permanently and totally disabled; otherwise stated, whether an injured employee who is adjudged permanently and totally disabled may also receive a concurrent award for a schedule disability.

In the Compensation Order, this issue was examined at significant length and in substantial detail by the Administrative Law Judge (ALJ). In the Compensation Order, the ALJ accurately identified the only truly on point authority, *Pope v. A.A. Beiro Concrete Co.*, Dir. Dkt 91-27, H&AS No. 85-331 (Decision of the Director February 3, 1995).

We quote the following passages from the Compensation Order:

On point is the Director's decision ... *Pope v. AA Biero Concrete Co.*, *supra*. *Pope* did address the issue at hand, holding that a claimant is entitled to the concurrent payment of permanent total disability benefits ... and permanent partial disability benefits pursuant to a schedule award ... Given the plain language of the governing provisions of (now) § 32-1508, I find the holding in *Pope* problematic.

D.C. Code § § 32-1508 (3), governing the payment of compensation for permanent partial disabilities, provides in relevant part:

In case of disability partial in character but permanent in quality, the compensation shall be 66% of the employee's average weekly wages which shall be in addition to compensation for temporary total disability paid in accordance with paragraph (2) or (4) of this subsection respectively [Judge Brown then, in a footnote, points out that reference to subsection "(4)" has been authoritatively held to represent a drafting error, and that the correct reference is to subsection "(5)", and cites *Smith v. District of Columbia Department of Employment Services*, 548 A.2d 95 (D.C. 1988) in support].

From this plain and unambiguous language [ftnt. omitted] it is clear that permanent partial schedule benefits may be paid concurrently with payments of temporary total disability or temporary partial disability benefits. The Director and [the] O[ffice of] H[earings and] A[djudication, now the Administrative Hearings Division of OHA] have so recognized [citations omitted].

However, as to the relief that Claimant seeks, concurrent payment of a schedule award pursuant to D.C. Code § 32-1508 (3) in addition to the permanent total disability that he has been receiving pursuant to § 32-1508 (1), the Act is noticeably silent. This silence cannot be ignored.

The ALJ then made reference in a footnote to that which might just as well have been included in the body of the text. In that note he wrote:

To disregard the Act's silence would be to disregard a basic rule of statutory construction: "that when a legislature makes express mention of one thing, the exclusion of others is implied, because 'there is an inference that all omissions should be understood as exclusions.'" *McCray v. McGee*, 504 A.2d 1128, 1130 (D.C. 1986) (citing 2A Sutherland, *Statutes and Statutory Construction* § 47.23 (4th Ed. 1984)). The doctrine is generally known by the Latin phrase *expressio unius est exclusio alterius*, "the mention of one thing implies the exclusion of another." 73 AM. JUR. 2D, *Statutes* § 211 (1974). Cf. *Smith v. D.C. Dept. Of Employment Services*, 548 A.2d at 100, n. 13 ("Where a statute, with reference to one subject, contains a given provision, the omission of such provision from a similar statute concerning a related subject ... is significant to show a different intention existed.")

The ALJ then continued, in the body of the text, as follows:

Thus, in the absence of express statutory authority, Claimant can only prevail, as a matter of statutory construction, if it is determined that the Act is nevertheless subject to a permissible construction that would permit the concurrent award of

the benefit payments that Claimant seeks [citation omitted]. In this regard, the question becomes whether, as a matter of policy, the Act can nevertheless, in light of its purpose and the nature of the benefits available thereunder, be construed to authorize the concurrent payment of both a permanent partial disability schedule award and permanent total disability wage-loss benefits. A schedule award is intended to compensate for economic, not physical, impairment by providing advance payment for future wage loss anticipated to result from a work-related injury irrespective of any wage loss actually incurred. *Smith v. D.C. Dept of Employment Services*, 548 A.2d at 100-102. See also, *Bradley v. WMATA*, H&AS No. 96-135B, OWC No. 249967 (March 12, 1999). “The fixed and arbitrary amount of compensation for a schedule loss represents a legislative determination that attempts to balance the seriousness of the injury with its likely effect on future earning potential.” *Smith*, 548 A.2d at 101. However, where an injured employee is determined to be permanently and totally disabled, the question of the impact of the employee’s injury upon future earnings potential has been conclusively resolved. Payment of a permanent partial disability schedule award in addition to permanent total disability benefits based on actual wage loss not only fails to further the intended purpose of providing schedule awards, the concurrent payment of both actually undermines the overriding purpose and intent of the Act recognized by the Director in *Pope v. A.A. Beiro Concrete*— of providing compensation for actual wages lost.

The ALJ then proceeded to review numerous cases decided under the Longshoreman’s and Harbor Workers’ Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq.*, universally understood to be the predecessor statute and model for the Act, and he noted the frequent and repeated practice of the Court of Appeals looking to the identical provisions of the LHWCA for guidance. In that review, the ALJ noted several cases, including *Potomac Electric Power Company v. Director, Office of Workers’ Compensation Programs*, 49 U.S. 268 (1980), nt. 17 “((S)ince the § 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes irrelevant.”) in which the identical LHWCA provisions had been interpreted to preclude such concurrent recovery. That review is explicitly recognized in this decision as if set forth fully herein.

The ALJ then concluded, with obvious reluctance, that despite the plain language of the statute, the analytic framework underpinning the purpose and intent of the Act, and the federal jurisprudence covering the identical LHWCA provision, he was bound to follow what he clearly felt was a significant misinterpretation of the Act, contained in *Pope*.

Subsequent to the ALJ’s Compensation Order, the role of the Director in review and interpretation of the Act has been changed by statute, and the appellate role has been abolished. See, D.C. Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code § 32-1521.01.

There is precedent in this agency for the proposition that where an appellate body has been abolished, existing precedent from the abolished body wears the mantle of persuasive authority. *Henderson v. District of Columbia Department of Corrections*, CRB No. 05-03, AHD No. PBL

01-015B, DCP No. 005054 (March 23, 2005); *Settles v. District of Columbia Department of Corrections*, Dir. Dkt. No. 8-00, OHA No. PBL 99-03, OBA No. 000216 (May 17, 2001).

It should be noted that the rule in *Pope* has never been presented to the Court of Appeals for its consideration. Further, the factual circumstance presented in this case, that is, a permanently and totally disabled worker who seeks additional awards under the schedule, is not a common or frequently recurring factual scenario, and it cannot therefore be said that significant numbers of such cases have been resolved by reference to the rule in that case.

In this instance, a majority of this Panel is so persuaded by the force of the exhaustive and detailed analysis in the Compensation Order as to be disinclined to follow *Pope*. However, we also acknowledge the concerns raised by Respondent, and by our colleague in dissent, to the effect that *Morrison v. District of Columbia Department of Employment Services*, 736 A.2d 223 (D.C. 1999) presents an analytical problem which must be resolved. In that case, the Court of Appeals ruled that, in appropriate cases, claimants are entitled to concurrent awards under the schedule and for wage loss benefits.

This matter was argued by the parties at oral argument, and each party expressed its views on the question.

At that time, Petitioner asserted that *Morrison* is distinguishable from the case under review, because in *Morrison*, the claimant was awarded two disabilities, one for partial wage loss, and one for a partial schedule disability, and according to Petitioner, the fact that they were both partial awards distinguishes that case, because in this case, the wage loss is total.

We see no legitimate distinction based upon that fact. To say that one injured employee who has a partial schedule disability may also get an additional concurrent award for ongoing partial wage loss, while a second such injured employee is *limited* to only the schedule award because he has an even *greater* (e.g., total) permanent wage loss, is irreconcilably obtuse and anomalous. Such a distinction presents the even more bizarre specter of the question of what happens to the first claimant if over the course of time his partial wage loss grows, due to a worsening of his condition and an attendant further diminution of his wages. It makes no sense to have a rule that would continue to pay him an ever-increasing wage loss benefit up until the point that he has a total wage loss, and then terminate the wage loss benefits altogether, because he now has a total as opposed to a partial wage loss disability. We see no likelihood that this is what the Act contemplates.

Conversely, Respondent eschewed the argument that *Morrison* stands for the proposition that concurrent awards are appropriate where the non-schedule anatomical injury causes two distinct disabilities, one being for disability to a schedule part, and the other being a wage loss traceable directly to the non-schedule anatomical injury, when considered separate and apart from the effects of the disability to the schedule member. That is, Respondent rejected the suggestion that the Court in *Morrison* ruled that Mr. Morrison was entitled to his schedule disability to his arm based upon the disabling effects of the shoulder injury on his arm, plus a wage loss award if Mr. Morrison had shown a wage loss due to the *shoulder* problem in and of itself, without specific regard to the effect of the *shoulder* injury on the *arm*.

At argument, Respondent's position was that the analytical conundrum presented in this case is due to the existence of *Smith v. District of Columbia Department of Employment Services*, 548 A.2d 95 (D.C. 1988),² which Respondent argued is fundamentally erroneous where it states that the basic underlying award under the schedule is for a "conclusive determination as to the extent of presumed future wage loss". Rather, Respondent argues that a schedule award is an award for the *injury* to the schedule member itself, and that the presence or absence of an additional disability for wage loss is irrelevant to the fact or amount of a schedule award. In that regard, Respondent appears to agree that the most that any claimant can ever obtain on a wage loss theory is total disability; that limit is, in his view, fundamentally irrelevant, because, *Smith* notwithstanding, a schedule award is in addition to wage loss, representing an award for having injured the body part. Respondent would have us abandon *Smith* altogether, along with its limit upon wage loss benefits beyond reaching permanency and employability.

Somewhat surprisingly, Respondent went on to suggest a possible solution to this problem, which solution has the merit of being one that this Board could adopt without explicitly jettisoning either *Morrison* or *Smith*, a course that we would be highly loathe to take even if we felt that we had the power to reject decisions of the Court which are so clearly statutorily based (rather than being mere approvals of an Agency interpretation) as are these two cases. Respondent's suggestion was that *Kovac* injury awards be elections on the part of a claimant. That is, where an anatomical injury is sited in a non-schedule body part, yet results in pain, a loss of use or function, or other debilitating effects upon a schedule body part, a claimant would be in a position to continue to receive any ongoing, permanent or partial wage loss, for as long as it remained. If, at some point, the claimant decided that he would prefer a schedule award, a claim for said award based upon the effect of the non-schedule injury on the schedule body part would be made. Such might occur where, for example, an injured worker resumes his pre-injury job or

² The *Smith* wage loss paradigm also distinguishes the Act from the interpretive analysis undertaken by the Maryland Court of Appeals in *Gillespie v. R & J Construction Company, et al.*, 275 Md. 454, 341 A.2d 475 (1975), to which Respondent has directed our attention, and the precepts of *Smith*, rather than *Gillespie* underscore our analysis of the award of schedule disabilities in the recently issued *Wormack v. Fishbach & Moore Electric, Inc., et al.*, CRB No. (Dir. Dkt) 03-159, AHD No. 03-151, OWC No. 564205 (July 12, 2005). However, we do note that the *Gillespie* court's treatment of schedule losses as being a completely different legal question than "medical impairment" is perfectly in tune with *Wormack*, as is the discussion of this subject contained in § 9.4-1 of the treatise on Maryland workers' compensation law to which Respondent also directs our attention, *Maryland Workers' Compensation Law*, Gilbert & Humphries, "Benefits", page 198 ("the function of the Commission 'is to determine the extent of loss of use, and hence the percentage of disability, and not merely to adopt medical evaluations of anatomical impairment' [citing *Gly Constr. Co. v. Davis*, 60 Md. App. 602, 483 A.2d 1330 (1984)].")

obtains suitable alternative employment earning at or near his pre-injury average weekly wage. In effect, this approach would obviate any need to choose between *Smith* and *Morrison*, because *Morrison* only applies (in this context, at least) in the case of a *Kovac*-type claim.³

Respondent alternatively urges us to rule that schedule awards are not, as set forth in *Smith*, awards for wage loss, but are solely awards for injury. In essence, Respondent and our colleague in dissent urges that we should ignore or otherwise “overrule” *Smith*. This we are unprepared to do, not only because we doubt that doing so is within our authority (*Smith* being a decision by the Court of Appeals which was more than a mere affirmance of an Agency-created interpretation, but rather was a decision reached by the Court from its own analysis of the Act), but also because we are fundamentally in agreement not only with *Smith*, but also with the extensive and well reasoned arguments contained in the Compensation Order, both as to fundamental principals of statutory construction and conceptually as they relate to the purposes of awards of compensation under the Act, that militate against the award of concurrent benefits.

It is our preference (as well as our obligation) to attempt to reconcile *Morrison* and *Smith*, where we can. In so doing, we start with the understanding that *Morrison* exists because of a Director’s decision, yet *Kovac*, which, while approved by the Court of Appeals as being an interpretation of the Act within the discretion of the Director, was not mandated by the Court. That is, the Court has held that the Agency may (but not that it must) interpret the Act to permit a schedule award where the anatomical situs of injury is in a non-schedule body part, such as the neck or back.

One solution would be to overrule *Kovac* entirely, and hold that where an injury is anatomically limited to a non-schedule body part, any disability award for that injury would be limited to wage loss attributable to that injury directly.⁴ Such a rule would eliminate the *Morrison* problem, making such questions moot. We have no doubt that we could proceed in that fashion. We are reluctant to do so, however, because the *Kovac* rule is of long standing, and despite numerous instances of amendments to the Act since the *Kovac* rule arose, no amendments to the rule have been passed, nor to our knowledge has any consideration been given to this issue. Further, we agree that, in light of the humanitarian nature of the Act, where a disability is identifiably the result of an injury at work, it should be subject to an award.

For these reasons, we will read *Morrison* as permitting a schedule disability award and a concurrent wage loss partial or total disability award, but only where the partial or total wage loss disability is based upon the wage loss being due to the anatomically non-schedule body part, and there is also a distinct, separable and identifiable functional impact upon the schedule body part sufficient to sustain an award under *Kovac*. That is, where the effect upon the injured worker is twofold (the non-schedule injury causes or contributes to the awarded wage loss, independently of the dysfunction associated with the anatomically injured body part), both a schedule and non-schedule award are allowable. For example, where a non-schedule injury (such

³ In a sense, adopting this suggestion would have the effect of overruling *Morrison*, by making the question moot in all possible cases, since by making the election mandatory, the concurrent award would not be possible.

⁴ This problem is resolved under the Maryland statute, discussed at length by Petitioner in both oral argument and post-argument written submissions, by treating neck, back and other non-scheduled body parts as “body as a whole” injuries, and assigning a specified number of weeks to the whole person for permanency upon attainment of maximum medical improvement.

as an injury to the neck) results in a functional incapacity to a schedule body part (say, the left arm), a claimant (who for example, is a truck driver) may, under *Kovac*, recover for the left arm even without an ongoing age loss. However, if for reasons unrelated to and independent of the lost left arm function, the claimant also experiences a wage loss (such as, in our example, where due to the injury to the neck and its own loss of range of motion, the claimant is unable to return to work as a truck driver, since he can no longer turn his head sufficiently to permit him to drive), he can also recover for the wage loss attributable to the non-schedule anatomical work injury.

As far as we can tell from the cases to which the parties have referred us, this decision is not inconsistent with the general theoretical and practical application and interpretation of the predecessor version of the same provisions as are found in the LHWCA, *Pope's* rejection of which we find unconvincing, being mere recitation of the un-illuminating statement that “the Act is a wage loss statute, and not a wage earning capacity statute”⁵, which view in fact militates against the ultimate holding in that case, not in its favor.

FLOYD LEWIS, *Administrative Appeals Judge*, dissenting:

I respectfully disagree with the majority’s holding to permit a concurrent schedule and wage loss award only in those situations where the wage loss is due to the non-schedule body part and there is also a distinct, separable functional impact upon the schedule body part

The District of Columbia Court of Appeals in *Morrison v. Dist. of Columbia Dep’t. of Employment Servs.*, 736 A.2d 223, 226 (D.C. 1999), expressly held that when an injured employee suffers multiple disabilities from a single work-related injury, that employee is entitled to both schedule and non-schedule benefits, subject to proof that the employee’s non-schedule disability led to the wage loss. In my opinion, the *Morrison* case, along with another decision by the Court of Appeals in *Washington Metro. Area Transit Auth. (WMATA) v. Dist. of Columbia Dep’t. of Employment Servs.*, 683 A.2d 470 (D.C. 1996), indicate that the majority erred by limiting an employee’s right to receive concurrent schedule and non-schedule wage loss benefits only to cases where the wage loss is shown to be the result of a non-schedule injury and the resultant disability is separate, distinct and in addition to the disability to the schedule member. I believe the decision of my colleagues also is at odds with other well established workers’ compensation principles, such as the humanitarian purposes intended to be served by the Act and the tenet that the situs of the disability and not the situs of the injury controls.

D.C. Official Code § 32-1508 (3)(A)-(U) details the Act’s schedule award provisions, which compensate an injured employee for the total or partial permanent loss, or loss of use of,

⁵ We express no view of that statement at this time, but note that questions concerning the nature and extent of disability under the Act have been resolved by the Court of Appeals under what looks very much like earning capacity analysis, most notably in *Washington Post v. District of Columbia Dept. of Employment Services (Mukhtar)*, 675 A.2d 37 (D.C. 1996), and *Joyner v. District of Columbia Department of Employment Services*, 502 A.2d 1027 (D.C. 1986), and more recently in *Logan v. District of Columbia Dept. of Employment Services*, 805 A.2d 237 (D.C. 2002). In each of those decisions, LHWCA cases were cited as the basis for the Court’s holdings. We also note that our colleague in dissent appears to accept that the schedule is conceptually concerned with “earning capacity”.

specifically designated “members” of the body. In contrast to the Act’s wage loss provisions, an injured employee is eligible for a schedule award in spite of whether he or she actually suffers a wage loss due to the disability. Thus, in my opinion, under the Act, these provisions have two separate purposes and the awards are given for two separate reasons. Quite simply, I believe that a schedule award compensates for the loss of wage earning capacity and the wage loss provisions compensate an injured employee for the loss of the wages that employee would have received. As such, it is loss of wage earning capacity as opposed to replacement of wages.

The Act’s schedule award is basically an arbitrary determination created by the Council of the District of Columbia, a fixed and arbitrary compensation mechanism in the Act recognizing the intention to compensate an individual with a specified impairment, for the loss of functional wage earning capacity now and in the future. Thus, the injured employee is compensated for a period of time because of the impairment to that body part. Since, it is well recognized that an underlying purpose of workers’ compensation statutes is that they are not based on tort law principles, the schedule award is not a damage award for the injury to that body part, however, it should be viewed as compensation for loss of wage earning capacity.

In looking at this matter, I feel that the majority’s concern with problems or conflicts with *Smith v. Dist. of Columbia Dep’t. of Employment Servs.*, 548 A.2d 95 (D.C. 1988), is not warranted. First, the same Court that issued *Smith*, decided *Morrison* eleven years later, without expressing any possible dilemma or concerns, as *Smith* was not even mentioned in *Morrison*. Moreover, in *Smith*, the Court upheld the denial of further temporary total disability benefits for a “flare up” of a previously compensated permanent injury, involving a claimant who had received a schedule award after earlier receiving temporary total benefits. The claimant had already received all of the benefits to which she was entitled, thus, *Smith* basically said that she could not come back for additional benefits. However, *Smith* clearly did not consider the right to concurrent schedule and non-schedule benefits that is presented in the instant matter and was embraced by the Court in *Morrison* many years later.

As mentioned earlier, under the Act, if an employee suffers an injury to a schedule member, but does not miss any time from work, the employee is compensated for the injury to that schedule body part. Although that employee did not lose any wages because of the work accident, the Council has decided that this employee should be compensated for another reason, the loss of wage earning capacity. A schedule award is not solely an economic concept as viewed by the majority, but it is a medical/economic condition that impacts a person’s functional physical wage earning capacity, now and in the future. With a schedule award, there is a present medical loss and a present economic loss which affects that person’s future wage earning capacity. The schedule should not be viewed as a purely economic concept, as the person must have one of the Act’s enumerated impairments to be eligible to receive a schedule award.

Furthermore, I disagree with the majority’s view that *Smith* links schedule awards to wage loss. It must be emphasized that in *Smith*, when the Court was discussing schedule awards, the focus of the Court’s analysis was to address and reject the claimant’s argument that a schedule award should be viewed in the nature of a tort remedy. Clearly schedule awards are not damage awards. However, as far as schedule awards are concerned, the *Smith* Court quoted 2 A. Larson, Workmen’s Compensation Law, § 58.11, at 10-323-324 (1987):

. . . the underlying principle of compensation law [is] that benefits relate to loss of earning capacity and not to physical injury as such. The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, instead of a specifically proven one based on the individual's actual wage loss experience.

The Court then continued:

Thus, the fixed and arbitrary compensation for a schedule loss represents a legislative determination that attempts to balance the seriousness of the injury with its likely effect on future earnings potential.

548 A.2d at 101.

Thus, while *Smith* emphasizes that a schedule award is not for damages, the Court also recognizes that a schedule award is not intended for wage loss or wage replacement. Rather, a schedule award is given for a completely different purpose, the “conclusively presumed” effect on functional wage earning capacity, at present and in the future. As such, in my opinion, *Smith* does not conflict with *Morrison*, as *Smith* does not stand for the proposition that schedule awards compensate for wage loss. In reality, *Smith* should be viewed as quite compatible with the *Morrison* holding that an injured employee is entitled to receive concurrent wage loss and schedule benefits.

Therefore, I disagree with the majority's concern that *Smith*, a case which did not consider the specific issue decided in *Morrison* and was decided well before *Morrison*, is at odds with an injured employee's entitlement to both schedule and non-schedule benefits that was sanctioned in *Morrison*. Instead, I believe the focus should be on the Court's recognition in *Morrison* and *WMATA* of the strong underlying purposes that are served by the longstanding principle that in cases in which an employee suffers multiple disabilities from a single work-related injury, that employee is entitled to both schedule and non-schedule benefits.

As the Court in *Morrison* stated:

Since *Kovac*, the Director has expressly held that a claimant is entitled to both schedule and non-schedule benefits for multiple disabilities stemming from the same injury. . . This approach is consistent with both our case law, *see WMATA supra*, 683 A.2d at 475 (situs of disability, not situs of injury, controls), and the overall purpose of the statute. *See, e.g. Kolson v. District of Columbia Dep't. of Employment Servs.*, 699 A.2d 357, 359 (D.C. 1997) (noting presumption of compensability “designed to effectuate the humanitarian purposes of the statute”). Therefore, we hold that when a petitioner suffers multiple disabilities from a single injury, that petitioner is entitled to both schedule and non-schedule benefits, subject to proof that the non-schedule disability led to wage loss.

736 A.2d at 226.

Further, as pointed out in *WMATA*:

Because the Director's interpretation in *Kovac* was reasonable, we conclude in the present case that the Director did not err in ruling that [the claimant] was not barred as a matter of law from receiving a schedule award for his leg, even though that disability had been caused by a non-schedule injury to his back. "Agencies like courts, must and do favor a policy of *stare decisis* unless unusual circumstances intervene." *Reichley v. District of Columbia Dep't. of Employment Servs.*, 531 A.2d 244, 247 (D.C. 1987).

683 A.2d at 476.

Accordingly, in the instant matter, I disagree with the majority's decision to limit or restrict *Morrison* in any manner and I would affirm the Compensation Order awarding Respondent concurrent schedule and non-schedule wage loss benefits.

ORDER

The Compensation Order of April 14, 2003 is hereby REVERSED. The matter is remanded to AHD for further findings of fact and conclusions of concerning Respondent's entitlement to an additional schedule award, in light of the foregoing discussion.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

August 31, 2005
DATE