

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

CRB No. 11-150

WILLIE L. WILSON, JR.,  
Claimant–Petitioner,

v.

STARBUCKS COFFEE COMPANY and GALLAGHER BASSETT SERVICES,  
Employer-Respondent.

Appeal from a Compensation Order on Remand by  
The Honorable Belva D. Newsome  
AHD No. 11-243, OWC No. 674880

Michael Kitzman, Esquire for the Petitioner  
Joseph C. Tarpine, Esquire for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE,<sup>1</sup> and JEFFREY P. RUSSELL,<sup>2</sup> *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (“CRB”) pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, (“Act”), 7 DCMR 250, *et seq.*, and the Department of Employment Services Director’s Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On October 20, 2010, Mr. Willie L. Wilson, Jr. injured his right shoulder when he lifted a crate of milk while working for Starbucks Coffee Company (“Starbucks”). Mr. Wilson declined to undergo surgery for his rotator cuff tear.

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<sup>1</sup> The Director of the Department of Employment Services (“DOES”) has appointed Judge Leslie as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

<sup>2</sup> The Director of the DOES has appointed Judge Russell as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

The parties disagreed as to the nature and extent of Mr. Wilson’s permanent partial disability for his right arm, and each side solicited an opinion from an independent medical examination physician. Following a formal hearing, an administrative law judge (“ALJ”) awarded Mr. Wilson a 16% permanent partial disability for his right arm.

On appeal, Mr. Wilson contends the Compensation Order must be vacated because it fails to make findings regarding his complaints and physical limitations and because the Compensation Order lacks an analysis of his industrial loss. Mr. Wilson requests the CRB enter an award for his claim for relief.<sup>3</sup>

Starbucks argues Mr. Wilson failed to establish entitlement to his claim for relief, the ALJ properly exercised her discretion in awarding 16% permanent partial disability for Mr. Wilson’s right arm, and the ALJ was not required to make specific findings regarding the nature of Mr. Wilson’s injury, the five subjective factors, or Mr. Wilson’s industrial loss. Even if there were such an obligation, Starbucks argues the ALJ met that obligation. For these reasons, Starbucks requests we affirm the Compensation Order.

#### ISSUES ON APPEAL

1. Is an ALJ required to specify what portion of a schedule-member, permanent partial disability award is attributable to the D.C. five factors?
2. Is the November 25, 2011 Compensation Order supported by substantial evidence and in accordance with the law?

#### ANALYSIS

From the outset, the law requires we vacate the November 25, 2011 Compensation Order. The ALJ repeatedly applied a substantial evidence standard of proof:

In interpreting the Act, it has been found, and is presently widely acknowledged, that there is no presumption of the nature and extent of claimant's disability. A claimant has the affirmative duty to present substantial credible evidence of the level of benefits sought. *Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109 (D.C. 1986). “[T]he presumption [of the compensability of a claim] has no application to the nature and extent of [a claimant’s] injury. [Claimant] is entitled to a presumption that his claim is compensable, i.e. that his injury ‘arises out of employment.’” *Dunston*, 509 A.2d at 111.

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<sup>3</sup> 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. §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).

It is well settled that in determining an injured employee's entitlement to the requested level of benefits, the claimant must present credible, supporting evidence. *Id.*<sup>4]</sup>

We cannot affirm an administrative determination that “reflects a misconception of the relevant law or a faulty application of the law.”<sup>5</sup> Thus, because the ALJ applied the substantial evidence standard of proof, as opposed to the more demanding preponderance of the evidence standard, the law requires we vacate the Compensation Order.

Furthermore, an analysis of entitlement to permanent partial disability benefits requires the ALJ weigh competing medical opinions together with other relevant evidence and arrive at a determination on the issue of the nature and extent of any schedule loss. In the end, this determination can result in accepting one physician's rating over another or in reaching a different conclusion altogether because the ALJ is not bound by the opinions of the evaluating physicians.<sup>6</sup>

Although there is no requirement that an ALJ specifically state what portion of a permanency award is attributable to the D.C. five factors,<sup>7</sup> the totality of the basis for reaching the conclusion regarding Mr. Wilson's permanency is contained in one sentence, “Taking into account Wilson's testimony regarding his ongoing complaints and the IME reports, there is a reasonable basis to conclude that Claimant has a disability rating of 16% for impairment of his right upper extremity.”<sup>8</sup> This Compensation Order contains no analysis of the medical opinions and no analysis of the other relevant evidence before arriving at a conclusion regarding the nature and extent of Mr. Wilson's schedule loss to his right arm; there simply is insufficient explanation of the analysis and reasoning necessary for us to perform an appellate review of this Compensation Order.

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<sup>4</sup> *Wilson v. Starbucks Coffee Company*, AHD No. 11-243, OWC No. 674880 (November 25, 2011), p. 4.

<sup>5</sup> *D.C. Department of Mental Health v. DOES*, 15 A.3d 692 (D.C. 2011).

<sup>6</sup> *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007).

<sup>7</sup> Section 32-1508(3)(U-1) of the Act states

In determining disability pursuant to subparagraphs (A) through (S) of this subsection, the most recent edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* may be utilized, along with the following 5 factors:

- (i) Pain;
- (ii) Weakness;
- (iii) Atrophy;
- (iv) Loss of endurance; and
- (v) Loss of function.

See also *Jones v. Howard University*, CRB No. 11-095, AHD No. 10-494, OWC No. 649331 (November 1, 2011) (“It is clear that, by utilizing the permissive “may” as opposed to the mandatory “shall”, the legislature was authorizing but not requiring that the analysis of schedule award claims include specific reference to the AMA Guides and/or the five factors.”)

<sup>8</sup> *Wilson v. Starbucks Coffee Company*, AHD No. 11-243, OWC No. 674880 (November 25, 2011), p. 4.

CONCLUSION AND ORDER

Even though an ALJ is not required to state what portion of a permanent partial disability award for a schedule member is attributable to the D.C. five factors, the November 25, 2011 Compensation Order is not supported by substantial evidence, is not in accordance with the law, and is VACATED. This matter is remanded for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES  
Administrative Appeals Judge

April 27, 2012  
DATE