

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

VINCENT C. GRAY  
MAYOR



**COMPENSATION REVIEW BOARD**

LISA M. MALLORY  
DIRECTOR

**CRB No. 11-090**

**BERNARD FLETCHER,  
Claimant–Petitioner,**

**v.**

**SAFEWAY, INC. AND SAFEWAY WORKERS' COMPENSATION,  
Employer/Carrier–Respondent.**

Appeal from an August 8, 2011 Compensation Order by  
The Honorable Belva D. Newsome  
AHD No. 04-217C, OWC Nos. 623841 and 584291

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2012 JUN 31 AM 9 59

Michael Kitzman, Esquire, for the Petitioner  
William Schladt, Esquire, for the Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and HENRY W. MCCOY, *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 12, 2002, Mr. Bernard Fletcher sustained an accidental injury arising out of and in the course of his employment. On June 18, 2004, Mr. Fletcher was awarded 8% permanent partial disability to his right arm as a result of his right shoulder impairment.<sup>1</sup>

On September 1, 2005, a can of string beans allegedly hit Mr. Fletcher on his right shoulder.

<sup>1</sup> *Fletcher v. Safeway Stores*, OHA No. 04-217, OWC No. 584291 (June 18, 2004).

A formal hearing was held on May 11, 2011 to adjudicate Mr. Fletcher's entitlement to a schedule award of 48% permanent partial disability to his right arm.<sup>2</sup> Based upon the statutorily imposed time limit for filing a request for a modification of an existing Compensation Order, an administrative law judge ("ALJ") denied Mr. Fletcher's request as untimely.

On appeal, Mr. Fletcher argues the 2011 Compensation Order fails to make all the necessary findings of fact such as whether he sustained a compensable injury on September 1, 2005 and when he was paid compensation after the issuance of the 2004 Compensation Order. In addition, Mr. Fletcher asserts his claim for benefits based upon a 2005 injury is not time barred because there is no prior Compensation Order to modify in regards to a 2005 injury. If, however, the modification provisions in the Act do apply, Mr. Fletcher asserts his claim is not barred because he requested permanent partial disability benefits following a "new and unexpected worsening of his condition to the shoulder" which was "unusual and extraordinary."<sup>3</sup> Mr. Fletcher requests we reverse the 2011 Compensation Order.

Safeway, Inc. (Mr. Fletcher's employer) asserts there is no basis to reverse the 2011 Compensation Order because Mr. Fletcher's request for a worsening of condition was not filed within one year of the last payment of compensation. Safeway, Inc. also asserts there was no request for permanent partial disability benefits as a result of a September 1, 2005 injury. Safeway, Inc. requests we affirm the Compensation Order.

#### ISSUE ON APPEAL

Is the August 8, 2011 Compensation Order supported by substantial evidence and in accordance with the law?

#### ANALYSIS

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<sup>4</sup> in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.<sup>5</sup> 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.<sup>6</sup>

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<sup>2</sup> The claim for relief in the 2011 Compensation Order requests a schedule award of 48% permanent partial disability to Mr. Fletcher's right shoulder, but the shoulder is not a schedule member. *See* §32-1508(3) of the Act.

<sup>3</sup> Petitioner's Memorandum of Points and Authorities in Support of Application for Review, unnumbered pp.6, 7.

<sup>4</sup> "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

<sup>5</sup> Section 32-1521.01(d)(2)(A) of the Act.

<sup>6</sup> *Marriott, supra*.

The record in this appeal is fraught with confusion over the law. Before reaching any conclusions, the record must be set straight.

First, the Act does provide for the modification of an existing Compensation Order:

(a) At any time prior to 1 year after the date of the last payment of compensation or at any time prior to 1 year after the rejection of a claim, provided, however, that in the case of a claim filed pursuant to §32-1508(3)(V) the time period shall be at any time prior to 3 years after the date of the last payment of compensation or at any time prior to 3 years after the rejection of a claim, the Mayor may, upon his own initiative or upon application of a party in interest, order a review of a compensation case pursuant to the procedures provided in §32-1520 where there is reason to believe that a change of conditions has occurred which raises issues concerning:

(1) The fact or the degree of disability or the amount of compensation payable pursuant thereto; or

(2) The fact of eligibility or the amount of compensation payable pursuant to §32-1509.

(b) A review ordered pursuant to subsection (a) of this section shall be limited solely to new evidence which directly addresses the alleged change of conditions.

(c) Upon the completion of a review conducted pursuant to subsection (a) of this section, the Mayor shall issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation previously paid, or award compensation. An award increasing or decreasing the compensation rate may be made and shall be effective from the date of the Mayor's order for a review of the compensation case. If, since the date of the Mayor's order for a review of the compensation case, the employer has made any payments of compensation at a rate greater than the rate provided in the new compensation order, the employer shall be entitled to be reimbursed for the difference in accordance with rules promulgated by the Mayor. If, since the date of the Mayor's order for review of the compensation case, the employer has made any payments of compensation at a rate less than the rate provided in the new compensation order, the employee shall be entitled to the difference as additional compensation in accordance with rules promulgated by the Mayor.

(d) A compensation order issued pursuant to subsection (c) of this section shall be reviewable pursuant to §32-1522.

The review of the prior Compensation Order, however, must address an issue "previously decided" in that Compensation Order. The modification provision is not intended to address new issues not previously decided.<sup>7</sup>

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<sup>7</sup> *Capitol Hill Hospital v. DOES*, 726 A.2d 682 (D.C. 1999).

The prior Compensation Order issued on June 18, 2004 awarded Mr. Fletcher temporary total disability benefits from August 21, 2003 through October 18, 2003 and an 8% permanent partial disability to his right arm as a result of disability caused by his October 12, 2002 accident. If Mr. Fletcher's 2011 request for permanent partial disability benefits flows from his October 12, 2002 accident, he had one year from the date of his last payment to request modification of the 2004 Compensation Order, and under the appropriate circumstances, that modification could address a change to his permanent partial disability caused by a change of condition such as a worsening of his medical condition.<sup>8</sup> On the other hand, if Mr. Fletcher's 2011 request for permanent partial disability benefits flows from a September 2005 injury, modification is not an issue; the 2004 Compensation Order simply could not have addressed an accident or an injury that had not yet taken place as of the date of issuance of that Compensation Order.

Next, although pleading and arguing a case in the alternative may be permissible, it must be done appropriately, not as an attempt to bootstrap the consequences of one accident to a different accident. As such, the issues to have been addressed at the May 11, 2011 formal hearing are of particular importance.

It is the Joint Pre-Hearing Statement that advises the parties of the contested issues to be addressed at the formal hearing,<sup>9</sup> and the Joint Pre-Hearing Statement jointly filed by Mr. Fletcher and Safeway, Inc. references only one date of injury- October 12, 2002.<sup>10</sup> The Stipulation Form attached to the Joint Pre-Hearing Statement also only references one date of injury- October 12, 2002. Prior to the 2011 formal hearing, there were no stipulations reached or issues raised regarding a September 1, 2005 accidental injury arising out of and in the course of employment. Thus, only benefits awarded for Mr. Fletcher's October 12, 2002 accident should have been under consideration for modification at the 2011 formal hearing.

Even so, the inquiry cannot end here. In order for the disposition of this matter to be in accordance with the law, Mr. Fletcher must have filed his request for modification "[a]t any time prior to 1 year after the date of the last payment of compensation."<sup>11</sup> The record is devoid of the date the last

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<sup>8</sup> Ordinarily the threshold question of reason to believe a change in condition has occurred is resolved by a *Snipes* hearing.

<sup>9</sup> 7 DCMR § 222. See also *Teklu v. Jurys Doyle Hotel*, CRB No. 08-016, AHD No. 05-241, OWC No. 601765 (January 23, 2008):

Pursuant to the Scheduling Order issued in proceedings before AHD, the parties are required to jointly execute and file in advance of the formal hearing a joint pre-hearing statement and stipulation identifying, *inter alia*, the issues to be presented and the claim for relief that is sought. Absent formal amendment to that documentation, [footnote omitted] Employer had every reason in the instant case to expect that the ALJ would rule on the claim for relief as presented, and adjudicate only those issues identified by the parties in their stipulation and joint pre-hearing statement.

<sup>10</sup> Admittedly, opening statements do reference a September 2005 injury, but in the absence of any findings of fact as to whether Mr. Fletcher even sustained an accidental injury arising out of and in the course of his employment on September 1, 2005, our review capacity is stifled.

<sup>11</sup> Section 32-1524(a) of the Act.

payment of compensation was made pursuant to the 2004 Compensation Order, and in order to conform to the requirements of the D.C. Administrative Procedures Act (“APA”),<sup>12</sup> (1) the agency’s decision must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings.<sup>13</sup> Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate court is not permitted to make its own finding on the issue; it must remand the case for the proper factual finding.<sup>14</sup>

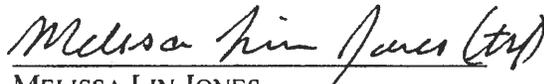
The CRB is no less constrained in its review of Compensation Orders.<sup>15</sup> Moreover, the determination of whether an ALJ’s decision complies with the APA requirements is a determination that is limited in scope to the four corners of the Compensation Order under review. Thus, when, as here, an ALJ fails to make express findings on all contested issues of material fact, the CRB can no more “fill the gap” by making its own findings from the record than can the Court of Appeals but must remand the case to permit the ALJ to make the necessary findings.<sup>16</sup>

Finally, we are at a loss as to why Mr. Fletcher believes *Cherrydale Heating*<sup>17</sup> should apply to this case. Mr. Fletcher has requested permanent partial disability benefits following an award of temporary total disability benefits and permanent partial disability benefits for a date after his period of temporary total disability benefits had ended. If Mr. Fletcher had requested additional temporary total disability benefits following an award of permanent partial disability benefits, certainly *Cherrydale Heating* would apply, but such is not the case here.

CONCLUSION AND ORDER

The August 8, 2011 Compensation Order is VACATED. This matter is REMANDED for further findings regarding the last date of payment made in the October 12, 2002 claim.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES  
Administrative Appeals Judge

January 31, 2012

DATE

<sup>12</sup> D.C. Code § 2-501 *et seq.* (2006).

<sup>13</sup> *Perkins v. DOES*, 482 A.2d 401, 402 (D.C. 1984).

<sup>14</sup> *King v. DOES*, 742 A.2d. 460, 465 (Basic findings of fact on all material issues are required; only then can the appellate court “determine upon review whether the agency’s findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law.”)

<sup>15</sup> See *WMATA v. DOES*, 926 A.2d 140 (D.C. 2007).

<sup>16</sup> See *Mack v. DOES*, 651 A.2d 804, 806 (D.C. 1994).

<sup>17</sup> *Cherrydale Heating & Air Conditioning v. DOES*, 722 A.2d 31 (D.C. 1998).