

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services  
Labor Standards Bureau

Office of Hearings and Adjudication  
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice  
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CRB No. 09-074

CHARLES TURRISI,

Claimant-Petitioner,

v.

WALKER & LABERGE AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier-Respondent.

Appeal from a Compensation Order of  
Administrative Law Judge Anand K. Verma  
AHD No. 99-176F, OWC No. 013517

Richard Link, Esquire, for the Petitioner

Curtis B. Hane, Esquire, for the Respondent

Before JEFFREY P. RUSSELL and LAWRENCE D. TARR<sup>1</sup> *Administrative Appeals Judges*, and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

## DECISION AND REMAND ORDER

### JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 250, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

### OVERVIEW

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<sup>1</sup> Administrative Law Judge Tarr is appointed by the Director of the Department Of Employment Services (DOES) as an Interim Board Member pursuant to DOES Administrative Issuance No. 09-06 (May 20, 2009) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

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 20, 2009, the Administrative Law Judge (ALJ) denied Petitioner's claim for supplemental allowances under D.C. Code § 32-1506, and made no ruling upon Petitioner's additional claims for penalties and interest, attorney's fees or "COLA"s. Petitioner filed an Application for Review (AFR) on May 18, 2009 seeking review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the denial of the supplemental allowances is unsupported by substantial evidence and is contrary to law, because Respondent had "admitted" to entitlement to supplemental allowances in its answers to interrogatories, and should have been estopped from arguing a contrary position when it submitted its trial brief to the ALJ. Petitioner raised no further appellate issues.

Respondent opposes the appeal, arguing that Petitioner's reliance upon Respondent's apparent concession in the discovery phase of the case was either absent or unreasonable, and that Petitioner failed to raise the issue of estoppel with ALJ, and should be precluded from raising it here as a result.

Because the Compensation Order does not resolve all necessary material facts in dispute that are relevant to the claim presented for resolution, and because Respondent's trial brief raised new issues, upon which the ALJ based his ruling, which were not presented or contemplated when the parties agreed to submission of the claim on briefs without a formal hearing, the Compensation Order is not supported by substantial evidence and is not in accordance with the law.

#### ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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 International v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review 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 case presently before us was brought when Petitioner filed an Application for Formal Hearing in which he sought an award of supplemental allowances under D.C. Code § 32-1506, dating back to May 1997, for an injury sustained January 11, 1983. The checklist in the Joint Prehearing Statement filed by the parties contains only one issue marked or listed as being "contested", that being "Penalties-Unreasonable delay/costs- §36-328". "Nature and Extent" is marked off as being

"No Contest". In the "Contested Issues of Law and Fact" under "Claimant" are the words "is seeking a supplemental allowance, plus cost of living increases", whereas under "Employer" all that appears is "N/A". This singularly unhelpful document discloses nothing more than that Petitioner was seeking supplemental allowances, a "cost of living" adjustment for which no statutory basis is identified, and unspecified penalties. It contains no stipulated facts of relevance to the issues of entitlement to the supplemental allowances, beyond the stipulations to Petitioner having sustained a work related injury on January 11, 1983 while earning an average weekly wage of \$533.18. The spaces where recitations of payments and disability status could have been set forth are left blank. What the nature of the dispute was concerning entitlement to the claimed relief is impossible to discern from this document.

From Petitioner's Memorandum of Points and Authorities in Support of Claimant's Application for Review, and Respondent's "Employer/Carrier's Brief in Opposition to Application for Review", it appears that a telephone conference was conducted between counsel for the parties and the ALJ on December 10, 2008. There is no record of that conversation. All that is revealed in the materials we have is that in that conference "it was agreed that the parties would submit briefs in support of their respective positions in lieu of the December 11, 2008 formal hearing" (Petitioner's memorandum, page 2) with the trial briefs to be submitted by January 30, 2009 (Respondent's memorandum, page 2).

It also appears to be undisputed that by the time of the conference call, Respondent had filed Answers to Interrogatories, in which Petitioner's question 8 was "Please state your position as to whether the Claimant is entitled to a supplemental allowance. If no, please state all the reasons that support said contention. If yes, please indicate the amount you contend is due and the manner you calculate said award" to which Respondent answered "Yes. Employer and carrier calculate the arrearage in supplemental allowance due and owing to Claimant to be \$48,171.44". Petitioner's memorandum, page 2.

While we do not have the benefit of the content of the telephone conference, in which the specifics of what was then in dispute were presumably discussed, it is reasonable to assume, based upon the interrogatory answer, legal entitlement to *some* award of a supplemental allowance was not.

However, the crux of the ALJ's decision in this matter is that Petitioner is not entitled to consideration of a claim for supplemental allowances because his disability status is not that of permanent total disability, and therefore, under *Hively v. District of Columbia Department of Employment Services*, 681 A.2d 1158 (D.C. 1996), his claim for those supplemental allowances was denied. The ALJ acceptance of this argument, is a complete agreement with that argument which was put forward by all appearances for the first time in Respondent's trial brief, submitted in lieu of a formal hearing.

Respondent argues that because Respondent had, in its answers to interrogatories, "admitted" that Petitioner is entitled to a supplemental allowance, and that Respondent in those answers asserted that the entitlement was to a specific amount, \$48,171.44, that Respondent is "estopped" from arguing that Petitioner is not entitled a supplemental allowance, and that at a minimum Petitioner should be awarded such an allowance in the amount of \$48,171.44.

We are very sympathetic to Petitioner's argument that it was quite surprised when Respondent changed horses in mid-stream and argued against Petitioner's entitlement to a benefit under the Act that it had conceded in its discovery response. However, we note that conceding entitlement to the benefit, without being asked to stipulate to the legal facts establishing that entitlement (i.e., facts establishing that Petitioner is permanently totally disabled and has been so since a specific date sufficient to invoke the supplemental allowance provisions) put the case in a posture in which an award of the supplemental allowance, in the face of the newly raised *Hively* defense, would have been clearly contrary to established law.

In this matter, there was no stipulation as to the necessary facts to establish entitlement to the specific benefit sought; indeed, there was not even a specific stipulation to the entitlement itself. And, to make matters more difficult, there is in this case an existing and currently controlling legal determination that specifically establishes that Petitioner is temporarily, not permanently, totally disabled. Thus, we are faced with an existing determination as the law of the case that disqualifies Petitioner from obtaining the benefit sought.

After first indicating that there was no dispute as to whether Petitioner was entitled to a supplemental allowance, Respondent injected the "nature" part of "nature and extent of disability" into the proceedings in its post-hearing brief, a move that might otherwise be forbidden had there been a clear stipulation that Petitioner had attained permanency. It is conceivable that, at the time Respondent provided the discovery responses, its counsel was unaware of *Hively*, only to become aware of it later, but prior to the preparation and filing of its brief. Regardless, however, an "admission" to what is essentially a legal conclusion is not an admission of fact, nor does a statement in the Joint Prehearing Statement that there was "no contest" regarding nature and extent a stipulation to permanency, particularly where, as here, the most recent and apparently controlling Compensation Order contains the determination that Petitioner's disability is "temporary".

However, Respondent's introducing this new issue, and the ALJ then rendering a decision premised upon an adverse determination regarding that issue, runs afoul of the notice and due process concerns central to the recent CRB decision in *Johnson v. Howard University*, CRB No. 09-081 (July 7, 2009), and the proscription upon deciding a case based upon issues about which a party was not on notice were being presented or considered. In *Transportation Leasing v. District of Columbia Department of Employment Services*, 690 A.2d 487 (D.C. 1997) the Court, quoting from several previous decisions of its own, as well as from the federal courts, wrote:

"We have held that 'in general, an individual is entitled to fair and adequate notice of administrative proceedings that will affect his [or her] rights, in order that he [or she] may have an opportunity to defend his [or her] position.'" *Ridge v. Police & Firefighters Retirement and Relief Bd.*, 511 A.2d 418, 424 (D.C. 1986) (alterations in original) (quoting *Carroll v. District of Columbia Dep't of Employment Servs.*, 487 A.2d 622, 623 (D.C. 1985)). We have observed, moreover, that this notice guarantee has its "roots in constitutional due process." *Abia-Okon v. District of Columbia Contract Appeals Bd.*, 647 A.2d 79, 84 (D.C. 1994) (quoting *Ammerman v. District of Columbia Rental Accommodations Comm'n*, 375 A.2d 1060, 1062 (D.C. 1977)). We also have stressed that this notice requirement embraces the proposition that an agency "may not change theories in midstream without affording reasonable notice of the change." *Arthur v. District of Columbia Nurses' Examining Bd.*, 459 A.2d 141,

145 (D.C. 1983) (citing *Rodale Press, Inc. v. Federal Trade Comm'n*, 132 U.S. App. D.C. 317, 321, 407 F.2d 1252, 1256 (1968)). Nonetheless, the "requirements of procedural due process are met if upon review the court is satisfied that a complainant was given adequate opportunity to prepare and present his [or her] position to the [hearing examiner] and that no prejudice resulted from the originally deficient notice." *Ridge*, 511 A.2d at 424 (first alteration in original) (quoting *Watergate Improvement Ass'n v. Public Serv. Comm'n*, 326 A.2d 778, 786 (D.C. 1974)).

*Transportation Leasing*, *supra*, at 489. Considering the entitlement issue a (rather than merely the amount of the entitlement) runs afoul of this due process requirement.

Clearly, it would have been better for the efficient administration of this claim had Respondent raised this dispute earlier, at the prehearing stage when the issues for resolution are identified and reduced to the Joint Prehearing Statement. Likewise it would have been more efficient if, upon receiving the brief, the ALJ had recognized that this new assertion of legal ineligibility placed the matter in a completely different context, one requiring resolution of a central fact: whether there has been a change in condition since the earlier hearing at which the evidence establishing Petitioner's temporary total disability status was presented.

In any event, the current posture of this case is that there has been no formal hearing in connection with the current request for an award of a supplemental allowance. Now that the parties have made their submissions it is evident that there is a fundamental factual dispute, and that it centers upon whether Petitioner's current disability status has changed from temporary total disability to permanent total disability, and if so, as of what date did that status change. Only upon resolution of that disputed issue can the next questions, whether Petitioner is entitled to a supplemental allowance and if so, in what amount and as of what date, be reached.

In all cases where disputes are presented for resolution by resort to a formal hearing, the parties are entitled to a decision which includes findings concerning all material facts that are in dispute, and those findings must be based upon substantial evidence. In this case, the Compensation Order fails to provide resolution of the material disputed fact of whether Petitioner's condition is permanent, and if so, when that permanent status was achieved. That failure renders the Compensation Order not in accordance with the law, and unsupported by substantial evidence. Thus, a reversal and remand are required.

This is a case in which there is a prior Compensation Order. We remind the parties that, in seeking to modify a prior Compensation Order, the party seeking a modification has the burden of showing preliminarily that there is "reason to believe" that, since the date of the Compensation Order, a "change of conditions has occurred" which raises issues concerning the fact or the degree of disability or the amount of compensation payable pursuant thereto. *Snipes v. District of Columbia Department of Employment Services*, 542 A.2d 832 (D.C. 1988). Upon such a showing, a Formal Hearing is required to consider the issue, following which the Act requires the issuance of a "new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation previously paid, or award compensation". See, D.C. Code § 32-1524 (a), (a)(1) and (c). At the Formal Hearing, the burden is upon the party seeking a modification to establish the existence of such a change in conditions. *Washington Metropolitan Area Transit Authority v.*

*District of Columbia Dept. Of Employment Services, 703 A.2d 1225 (D.C. App. 1997), (hereinafter, WMATA). The alleged change in conditions is not limited to claimant's medical condition, but also encompasses non-medical, economic circumstances. Id.*

If there is such "reason to believe" that such a change has occurred, Petitioner is entitled to a formal hearing in which he is given an opportunity to demonstrate that such a change has in fact occurred. In this case, of course, the question is whether the disability status has changed from temporary to permanent, with Petitioner bearing the burden of establishing both the change in status and the extent of disability by a preponderance of the evidence.

Lastly, we note that it is Respondent's shifting legal position after submission of the trial brief that renders these further proceedings necessary. Accordingly, Petitioner must be permitted the opportunity to submit new and additional evidence, and make new and additional legal submissions to the ALJ to address the change of conditions and nature and extent issues, without being bound by the prior agreement to submit the dispute on brief, entered into when it appeared the only issues were legal and mathematical.

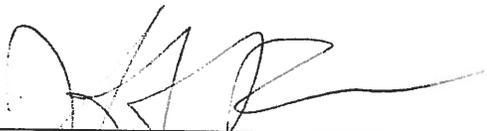
#### CONCLUSION

The Compensation Order of April 20, 2009 is not supported by substantial evidence in the record and is not in accordance with the law.

**ORDER**

The Compensation Order of April 20, 2009 is reversed and the matter is remanded to AHD for further proceedings and consideration in a manner consistent with the preceding Decision and Remand Order.

**FOR THE COMPENSATION REVIEW BOARD:**



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**JEFFREY P. RUSSELL**  
**Administrative Appeals Judge**

\_\_\_\_\_  
July 14, 2009

**DATE**