

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. 05-033

LEARIE CORBIN,

Claimant–Respondent,

v.

WASHINGTON HOSPITAL CENTER,

Self-Insured Employer-Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge E. Cooper Brown
AHD No. 01-383B, OWC No. 510964 and 544138

William S. Hopkins, Esquire, for the Petitioner

Eric M. May, Esquire, for the Respondent

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

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

DECISION AND 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 § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant 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'

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 December 16, 2004, the Administrative Law Judge (ALJ) granted Respondent's claim for temporary total disability benefits through the date of the formal hearing and continuing, and causally related medical care, and denied Respondent's claim for permanent total disability. Petitioner now seeks review of that Compensation Order, having filed a timely Application for Review (AFR) with the Office of the Director on January 14, 2005.

Respondent filed an opposition to the AFR, which opposition also contained a cross application for review (challenging the denial of permanent total disability) on January 26, 2005. Petitioner filed an opposition to the cross-appeal, seeking dismissal thereof, on the grounds that it was untimely filed. Respondent opposed the request for dismissal, asserting that under the District of Columbia Superior Court Rule of Civil Procedure (SCRCP), Rule 4, parties are given 14 days within which to file cross-appeals where the initial time for an appeal has passed, and the adverse party had filed an appeal within the time therefor. Respondent also notes that under 7 DCMR § 221.5, AHD ALJs are given permission to use the SCRCPs "as guidelines" in matters of procedure not specifically addressed in either the Act or the District of Columbia Administrative Procedure Act. Respondent argues that these provisions operate to extend the time within which he could file an appeal by 14 days beyond the filing by Petitioner of its AFR.

While the current regulations governing appeals in this agency provide that a party has seven days, beyond the filing of an AFR by an adverse party, within which to file a cross appeal, no such provision existed at the time that these proceedings were appealed to the Director. At that time, Agency rule as established and followed by the Director did not provide for additional time, beyond the statutory 30 day appeal period, within which to file a cross-appeal. *See, Onofre v. George Lorinczi, et ux, et al.*, Dir. Dkt. No. 95-48, H&AS No. 92-302A, OWC No. 209231 (June 30, 1997). Further, the permissive grant of authority to allow (but notably, not to require) the use by AHD ALJs of the court rules, as "guidelines", does not equate to a statutory extension of jurisdiction over appeals from the ALJs to the Director. Indeed, the fact that the regulations promulgated with the creation of CRB add such an additional time period suggests that, prior thereto, no such extension of time was created by the SCRCP. Accordingly, in keeping with the rules in effect at the time that this case was appealed, the cross appeal is untimely and is dismissed.

As grounds for this appeal, Petitioner alleges as error that the determination by the ALJ that Respondent had sustained a herniated lumbar disk in the stipulated work injury of February 1997 is unsupported by substantial evidence in the record. Petitioner argues further that, because Respondent's counsel stated on the record that Respondent was not claiming at the time of the formal hearing that Respondent's low back disc herniation was caused by the also-stipulated 1999 accident, asserting that it was caused by the 1997 accident, the ALJs finding that it was indeed

caused by the 1999 accident must be reversed, which in Petitioner's view, would lead to a reversal of the award of temporary total disability benefits.

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 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 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.

Turning to the case under review herein, we first note that, despite Petitioner's assertion to the contrary as contained in the subheading "ARGUMENT THE FINDING THAT CLAIMANT'S HERNIATED LUMBAR DISC ROSE OUT OF THE 1997 ACCIDENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IT IS NOT IN ACCORDANCE WITH THE LAW", the ALJ did not find that Respondent had sustained a herniated cervical disc in the 1997 accident. Whether the reference to "1997" in the subheading was a typographical error, we do not know.

Petitioner went on later in the brief to assert that the finding of a herniated disc resulting from the 1999 was unsupported by substantial evidence. *See*, AFR, page 6.

We reject Petitioner's view that a finding that Respondent sustained a herniated lumbar disc in the stipulated work injury that occurred in 1999 is unsupported by substantial evidence, where, as here, the ALJ specifically identified and relied upon the opinion of a treating physician, Dr. Gary Dennis, to that effect (Compensation Order, page 5), and review of Dr. Dennis' report confirms that as the basis for that finding. *See*, CE 9, October 3, 2003 Report (Bates stamped page 78). Further, while Petitioner argues that in its view, the lumbar disc herniation occurred while Respondent was subsequently employed as a welder, that view, while plausible, is not the only possibility, particularly in light of the evidence cited by the ALJ, including the testimony, found by the ALJ to be credible, of Respondent that he experienced ongoing and chronic low back pain ever since the 1997 accident, including following the 1999 injury, and the report of Dr. Dennis.

Petitioner also argues that the existence in this record of a negative MRI scan performed following the 1997 injury but prior to the 1999 injury, which failed to reveal a lumbar disc, establishes conclusively that the lumbar disc herniation could not have occurred in 1997. Even were we to accept this argument, it does nothing to change the fact that the ALJ found, on page 11 of the Compensation Order that "Claimant's complained-of conditions, including a herniated cervical disc and herniated lumbar disc, his neck, shoulder and lower back pain, and radiating pain to his

extremities, are causally related to Claimant's work accident and injury of June 30, 1999". It is this finding which forms the basis of the award. The neck injury that the ALJ found to have occurred in the stipulated 1999 injury was found to contribute, along with the lumbar disc injury, to the claimed period of temporary total disability (the finding of which disability has not been contested on this appeal).

While the issue of the compensability of an injury to Respondent's low back in 1997 was apparently not considered by the ALJ to have been before him (this is implied but not made explicit where, on page 7 of the Compensation Order, the ALJ stated that the 1997 injury claim, OWC No. 510964 is not the basis of the award, there having been found to be a new lower back injury in 1999), the ALJ found Respondent to be disabled due to the combined effects injuries to his low back and neck, which he found to have been at least in part due to the 1999 work injury.

Petitioner asserts that Respondent's counsel made clear that Respondent was not seeking an award for "a back injury occurring in 1999", and that he was "not proceeding with a claim for a back problem arising out of the '99 injury. There is a herniated disk in the neck which arose out of the '99 injury and that is what we are proceeding on" and "[w]e are proceeding on the back from the '97 accident and on the neck from the '99 accident. We are not claiming the back from the '99 accident". HT 28 – 29.

Were it to appear to us that there were some lack of notice to Petitioner that a back injury was involved in this case (or, these consolidated cases), the representation of counsel that the matter only involved a neck injury could lead to a due process problem under *Transportation Leasing Company v. District of Columbia Dep't. of Employment Serv's.*, 690 A.2d 487 (D.C. 1997). However, in this case, it is apparent that Petitioner was in the same position to defend a disability claim based upon a loss of wages for the claimed period based upon the claimed combined effects of two claimed injuries, involving both the neck and the low back, as it would have been absent the representation of counsel. In the absence of an argument or demonstration that there is some potential defense to one date of injury not presented or available to the other date of injury, we see no harm in the ALJ finding that the Respondent did indeed injure his low back as well as his neck in the 1999 incident, despite counsel's assertion to the contrary. Neither party made clear why there was any such distinction in this case as it relates to when, vis a vis the two stipulated injury dates, the injury to the back occurred, and none occurs to us. In particular, Petitioner has not suggested any reason why it is of any consequence whether the claimed disability is found to be related to one or the other of the stipulated injuries, particularly in light of the fact that the claimed disability period commences in 2001, after both dates of injury. The only difference that we perceive is that the average weekly wages upon which a compensation rate would be based is different for the two dates; yet they are only \$22.00 apart, yielding at most a \$15.00 per week difference in temporary total disability compensation rates. Nothing about this small difference in compensation rates suggests that Petitioner had any different motive to defend this case, or would have been in a better position to defend it had Respondent's counsel not presented his theory of the case as he did. Thus, we perceive no *Transportation Leasing* issue.

We note further that the ALJ found that the subsequent employment as a welder was not suitable alternative employment, in light of the combined effects of the neck and low back injuries, and that this finding was not appealed. Even if it had been appealed, it was a finding that was supported by

substantial evidence as well, including Respondent's testimony to the effect that from the start of his limited attempt to be a professional welder, he experienced pain and was ultimately terminated for being unable to do the work physically. The Compensation Order is accordingly affirmed.

CONCLUSION

The Compensation Order of December 16, 2004, finding that Respondent sustained an injury to his low back and neck on June 30, 1999 and is disabled as a result thereof for the period claimed, is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of December 16, 2004 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

March 15, 2006
DATE