

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



**COMPENSATION REVIEW BOARD**

**CRB No. 11-092**

**CYNTHIA YVONNE BUSH,**

**Claimant-Respondent,**

**v.**

**UNITED HEALTHCARE SERVICES,**

**Self-Insured Employer-Petitioner.**

LISA M. MALLORY  
DIRECTOR

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2011 NOV 22 AM 9 55

Appeal from a Compensation Order of  
Administrative Law Judge Belva D. Newsome, AHD No. 11-085, OWC No. 674768

Michael J. Kitzman, Esquire, for the Respondent

David M. Schoenfeld, Esquire, for the Petitioner

Before JEFFREY P. RUSSELL<sup>1</sup>, MELISSA LIN JONES, and HENRY W. MCCOY, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

OVERVIEW

Claimant/Respondent, Ms. Bush, was employed by Employer/Petitioner United Healthcare Services (UHS) as a “provider relations advocate”, a position the duties of which are otherwise unspecified in the Compensation Order under review. Ms. Bush was awarded benefits for a claimed psychological injury in that Compensation Order, which was issued August 11, 2011 by an Administrative law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the Department of Employment Services (DOES).

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<sup>1</sup> Judge Russell has been appointed by the Director of DOES as an interim CRB member pursuant to DOES Policy Issuance No. 11-03 (June 23, 2011).

In that Compensation Order, the ALJ found that, on April 19, 2010, while Ms. Bush was on a lunch break in UHS's lunchroom, she was approached by her supervisor and the medical director of UHS, who requested some otherwise unspecified "information" from her pertaining to "a provider that was not serviced by" Ms. Bush, who, following certain "continued interactions" which "occurred before [Ms. Bush's] co-workers in the lunchroom" that are otherwise un-described in the Compensation Order, Ms. Bush attempted to obtain the information by calling a co-worker/former supervisor on her cell phone, but she was unsuccessful in the attempt to obtain the information at that time. The ALJ found further that Ms. Bush and her supervisor continued to have "interactions concerning [Ms. Bush's] actions with respect to the incident of April 19, 2010", and that Ms. Bush left one meeting with the supervisor "in tears". The ALJ also found that Ms. Bush had a conversation with her supervisor on August 26, 2010 in which the supervisor advised her that she needed to e-mail the supervisor explaining why she had been off work, and to describe the contents of a disability slip she had obtained from her physician, Dr. Riendeau. The ALJ also found that Ms. Bush had a conversation or conversations with Patrick Lauer, otherwise unidentified in the Compensation Order as to his relationship to Ms. Bush or UHS, who advised her to request a leave of absence, following which Ms. Bush was placed on short term disability by UHS's human resources department.

The preceding paragraph contains all of the factual findings made by the ALJ concerning Ms. Bush's alleged "stressors" from employment.<sup>2</sup>

Relying upon the opinions of Melody Washington, a licensed social worker, and Dr. Ateiat Phillips, a psychiatrist from whom Ms. Bush received treatment after moving to North Carolina, the ALJ determined that Ms. Bush "suffered from an accidental injury without a discreet [sic] event occurring at a particular date and time. [Ms. Bush's] repeated exposure to individually minor traumas, insults, and harmful employment-related condition [sic] are compensable under the Act."<sup>3</sup> The claim for temporary total disability benefits from August 20, 2010 through the date of the hearing and ongoing was granted.

UHS timely appealed the Compensation Order, which appeal Ms. Bush has opposed.

#### DISCUSSION

First we shall address UHS's claim before the ALJ and repeated in this appeal that Ms. Bush made an "unauthorized change of physicians" when, upon moving to North Carolina, she sought

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<sup>2</sup> The Compensation Order did make reference to Ms. Bush having been subjected to "harassment", "humiliation", a "hostile work environment" and "a heavy work load". However, no facts were found concerning the conduct of third persons with regard to the so-called but un-described harassment, hostility and humiliation, and nothing in the order describes the nature of Ms. Bush's work duties or in what manner her workload was "heavy".

<sup>3</sup> We can not tell from the Compensation Order whether the term "insults" is used in it's most common sense, referring to *ad hominem* and negative remarks or conduct by one person directed at another, or in the more specialized sense sometimes used in medicine referring to stresses, strains, or other pathologies which are deleterious to the health and functioning of a tissue or organ. While we would normally assume the latter, given that this is purely a psychological injury claim, in which sense the term is used can have significance.

psychiatric treatment from Dr. Phillips.<sup>4</sup> We are at a loss to understand under what theory UHS supposes that, in a case where an employer has denied compensability *ab initio*, has paid no compensation and provided no medical care under the Act, an employee has any obligation to seek the employer's or the Office of Workers' Compensation's permission to engage a physician, or to change physicians as desired. It is only in the context of an accepted claim, or a contested claim that has been resolved in favor of compensability, that a claimant is constrained in the choice of physicians. The claim was properly not considered.<sup>5</sup>

Second, we turn to UHS's objection, made at the formal hearing and raised again in footnote 4 of UHS's "Employer's Brief in Support of Application for Review of Compensation Order" (Employer's Brief) to the introduction of CE 5, which was overruled by the ALJ. CE 5 is a letter written by Ms. Bush's counsel to Dr. Phillips, posing six questions concerning Ms. Bush's alleged psychological injury, and containing handwritten responses to each question.

Here is the objection as articulated at the formal hearing:

JUDGE NEWSOME: All Right. Are there any objections to Claimant's exhibits?

MR. SCHOENFELD [UHS's counsel]: Your Honor, I raise an objection to Exhibit Number 5. I don't believe it really forms the basis. It may go towards the weight. For the record, I'll object to Exhibit Number 5.

JUDGE NEWSOME: All right. With objection, Claimant's Exhibits 1 through 5 are admitted into the record.

HT 10, lines 13 – 22. No basis for excluding the document can be gleaned from this colloquy. The basis for the objection in Employer's Brief is only slightly less opaque: "The employer vigorously asserts that this document, produced the day before the hearing, should not have been admitted into evidence or considered." Employer's Brief, page 11, footnote 4. One might surmise from this that the basis of the objection to admitting the document is its late production. However, that objection was not raised at the time of the formal hearing and no request for leave to adduce additional evidence or to depose Dr. Phillips in order to undermine the contents of CE 5 was made by UHS at the formal hearing. By failing to articulate a basis for objection to CE 5 at the time of the formal hearing, UHS waived any objection it might have had.<sup>6</sup>

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<sup>4</sup> Although identified as a contested issue, the ALJ, in a footnote in the Compensation Order, denied UHS's Motion to Amend the Pre-Hearing Statement to include the issue as a contested matter at the formal hearing scheduled a week later.

<sup>5</sup> We note that, while under *Renard v. DOES*, 731 A.2d 413 (D.C. 1999) the adjudicatory hearings office of DOES is without authority to entertain a claimant's request for authorization to change attending physicians, it does have authority to determine whether there has been an unauthorized change for the purpose of establishing responsibility for payment of medical bills. See, e.g., *Velasquez v. DOES*, 723 A.2d 401 (D.C. 1999) and *Washington Hospital Center v. DOES and Roberta West, Intervenor*, 789 A.2d 1261 (D.C. 2002).

<sup>6</sup> Numerous foundational objections could have been raised, such as the fact that the document is not admissible as a business or medical record, that it is offered as evidence of a medical opinion yet it is unsigned (leaving its authorship open to serious question) and contains no history, specific findings on examination, or explanation concerning the basis of the opinions expressed therein. Although UHS's counsel raised some of these points in attacking the weight that should be given the document in closing argument and in Employer's Brief, none of these matters were raised with

Before proceeding to the central crux of this case and this appeal, some discussion of the formulation of the remaining issues is required.

In the Compensation Order, the ALJ described the issues to be resolved as follows:

1. Was Claimant's injury the result of a distinct work-place event or the result of cumulative injury to determine whether Claimant suffered an accidental injury?
2. Is there a causal relationship/arising out of and in the course of employment to Claimant's injury?
3. Is there a medical causal relationship to Claimant's injury?<sup>7</sup>

Compensation Order, page 2.

Regarding issue number 1, it is not clear to us what the ALJ meant in formulating the issue as she did. It is grammatically problematic, but we assume that what the ALJ was saying is that, for some reason, it was necessary to decide whether Ms. Bush's psychiatric injury was the result of a single, isolated event, or was the result of a series of events over a period of time. While it is true that, under the Act compensable injuries can result from both scenarios, it is unclear to us why the ALJ felt that this was an "issue" in the sense that it is identified as such in the listing of "Issues" to be resolved. Typically one would expect an ALJ to consider this type of question in the context of determining whether there has been an injury as that term is defined under the Act and its case law. In any event, as we understand what the ALJ was expressing, issue number 1 is a subsumed as a subpart of issue number 2.

Issue 2, with its reference to "arising out of and in the course of Claimant's employment", appears to relate to what is sometimes called "legal causal relationship", which focuses upon whether the activities or events alleged to have caused a claimed injury are employment related, on the one hand, or outside of the employment on the other. In this case, then, the identified issue requires that the Compensation Order include findings of fact concerning whether there existed specific work-related events or conditions—conditions or events occurring in the course of the employment and arising out of them—that caused the psychological injury that from which Ms. Bush suffers.

In this case, there are no findings as to (1) what the workplace events or conditions were that Ms. Bush and her health care personnel allege caused the disabling psychological condition, (2) whether Ms. Bush, on the one hand, or UHS's witnesses, on the other, or both, were credible, or (3) whether the alleged workplace events or conditions were in fact the actual events or conditions of her workplace. In this context it is necessary to remember that the medical evidence in this case is to the effect that Ms. Bush suffered a psychological injury due to a "heavy work load" and a "hostile work environment", and not merely a "perception" of such conditions. That is, Ms. Bush's social worker

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regard to admissibility. Thus, we view the state of the record as being the functional equivalent of a stipulation as to authenticity.

<sup>7</sup> Three additional issues, relating to change of physicians, nature and extent of disability, and voluntary limitation of income, were also listed, but have either already been dealt with in this Decisions and Remand Order, or are not germane to this appeal.

and her psychiatrists all appear to have accepted as true Ms. Bush's assertions that she was subjected to hostility and was overworked. Thus, it is necessary that the ALJ make findings of fact on what the alleged conditions were, what the actual conditions were, and in so doing, make credibility findings and a determination as to whether the medical causal relationship evidence includes "competent medical evidence" that the actual workplace conditions had the potential to cause the disabling psychological condition. The failure to make specific findings on the actual work conditions or events renders the Compensation Order's conclusions unsupported by substantial evidence requiring a remand for further consideration.

The next matter is the resolution of issue number 3, being whether the psychiatric condition from which Ms. Bush suffers is the result of the alleged work-related events and conditions, on the one hand, or of "biological" factors, on the other. That is what is termed "medical causation", i.e., are the work conditions a medical cause of the psychiatric injury.<sup>8</sup>

As the ALJ recognized, the District of Columbia Court of Appeals (DCCA) has revised the standards under which this issue is to be analyzed, having done so in *Ramey v. DOES*, 950 A.2d 33 (D.C. 2008). In *Ramey*, the DCCA directed the CRB to consider whether there are any special "tests" to be applied in the class of psychological injury cases known as "mental-mental" cases, being those cases in which the claimed injury is purely psychological, and the claimed cause is purely psychological (i.e., there is no physical component of the alleged cause of the injury or disability). In so doing, the DCCA directed that any such test be one that does not have the effect of disqualifying individuals who suffer from a pre-existing psychological condition from recovering under the Act.

Following the direction of the DCCA in *McCamey v. DOES*, 947 A.2d 1191 (D.C. 2008), and *Ramey, supra*, the CRB has established the following standard for such cases:

An injured worker alleging a mental-mental claim invokes the presumption of compensability by showing a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury. The injured worker's showing must be supported by competent medical evidence. The ALJ, in determining whether the injured worker invoked the presumption, must make findings that the workplace conditions or events existed or occurred, and must make findings on credibility. If the presumption is invoked, the burden shifts to the employer to show through substantial evidence, the psychological injury was not caused or aggravated by workplace conditions or events. If the employer succeeds, the presumption drops out of the case entirely and the burden reverts to the injured worker to prove by a preponderance of the evidence that workplace conditions or events caused or aggravated the psychological injury.

*Ramey v. PEPCO*, CRB No. 06-038, AHD No. 03-035C (July 24, 2008).

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<sup>8</sup> Although the nature and extent of Ms. Bush's disability and whether she has voluntarily limited her income were listed as issues, UHS appears to agree that Ms. Bush suffers from a psychiatric condition that renders her unable to work. See, EE 1, Report of Dr. Bruce Smoller.

In the case under review, the ALJ acknowledged the existence of *McCamey* and *Ramey*, but she expressly declined to apply them, writing “Since Claimant does not have a preexisting mental health problem, the above cases are not dispositive in the determination of whether Claimant suffered an accidental injury”. Compensation Order, page 5. In this, the ALJ was in error. These cases, particularly *Ramey*, are the necessary starting point in the analysis of this claim.

We next note that UHS raised the issue of untimely notice of injury as a defense to the claim for temporary total disability benefits, without objection from Ms. Bush. See, HT 8 – 9. It appears that the ALJ acknowledged that the issue was before her. HT 9, line 5 – 6. While there is an obvious typographical error in HT where it reports that “Judge Kitzman” spoke the words “Okay. Timely notice and unauthorized change of physicians”, we believe that those words are attributable to the ALJ. This is because it would make little sense for Mr. Kitzman, Ms. Bush’s counsel, to have made that remark in that context at that time, while it would be perfectly consistent for the comment to be made by an ALJ acknowledging the addition of the two new issues with the consent of claimant’s counsel.<sup>9</sup>

In a contested case, in order to conform to the requirements of the District of Columbia Administrative Procedure Act, D.C. Code § 2-501 *et seq.*, an agency’s decision must (1) state findings of fact on each material issue in contest, (2) those factual findings must be supported by substantial evidence, and (3) the conclusions of law must flow rationally from those factual findings, and the failure to satisfy these requirements renders an agency decision unsupported by substantial evidence. *Perkins v. DOES*, 482 A.2d 401 (D.C. 1984). The ALJ’s failure to address this material contested issue renders the Compensation Order unsupported by substantial evidence.

There is an additional matter that needs to be addressed on remand, that being the fact that two of UHS’s exhibits, EE 3 and EE 4, were admitted at the beginning of the formal hearing (HT 12) but were subsequently excluded in the Compensation Order as being “irrelevant”. Because the ALJ admitted them at the hearing without UHS needing to argue their relevance, UHS never was given the opportunity to make its case on that point. On remand, the ALJ must either re-admit and consider the exhibits, or permit UHS to argue for their admission.

Lastly, any remaining issues raised in this appeal shall be deferred as not being ripe, pending the issuance of a new Compensation Order on Remand.

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<sup>9</sup> In its brief, UHS raised other matters that it did not raise, as far as we can tell, at the formal hearing. The first is its assertion on page 41 of its brief that this is not a workers’ compensation claim at all, but rather is a claim for “harassment”, and that her remedies, if any there be, lie in the civil courts. One might argue that this is a jurisdictional matter that can be raised here without being raised at the hearings level. Assuming that to be the case, we reject the argument, noting that there is nothing in the Compensation Order suggesting that the claim was solely based upon alleged sexual or racial harassment, thus the claim is not jurisdictionally barred under *Estate of Underwood v. National Credit Union*, 665 A.2d 621 (D.C. 1995) or *Wright v. DOES and PEPCO, Intervenor*, 924 A.2d 284 (2007). As the claim is framed in the Compensation Order, the matter is purely one of compensability, not jurisdiction.

It also argues that there is some fundamental error in permitting hearsay evidence on what it deems evidence “critical to the merits” of the case (see, Employer’s Brief, footnote 7), and that Ms. Bush’s behavior at the psychiatric IME somehow constituted an unreasonable refusal to submit to an IME, warranting suspension of benefits. We decline to entertain these arguments. “Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived”. *Enders v. District of Columbia*, 4 A.3d 457 at 471, n. 21 (D.C. 2010), quoting *McFarland v. George Washington University*, 935 A.2d 337 (D.C. 2007).

## CONCLUSION

The ALJ's declining to consider the unauthorized change of physicians defense interposed by UHS is in accordance with the law. UHS not having articulated any basis for its objection to the admission of CE 5, the admission thereof into the record by the ALJ was within her discretion. The exclusion of EE 3 and EE 4 without affording UHS the opportunity to argue for their admission is prejudicial error. The ALJ's failure to consider the defense of untimely notice of injury, and the ALJ's rejection of the applicability of *Ramey* were erroneous, and the lack of findings of fact as detailed above render the Compensation Order unsupported by substantial evidence.

**ORDER**

The ALJ's admission of CE 5 into evidence and the ALJ's declining to entertain UHS's claim that Ms. Bush had engaged in an unauthorized change of physicians are affirmed. The award of temporary total disability benefits and medical care contained in the Compensation Order of August 11, 2011 is reversed, and the matter is remanded to the ALJ for further consideration, with the ALJ addressing UHS's notice defense, for application of the standards governing the compensability of psychological injury claims as enunciated in *Ramey v. PEPCO*, CRB No. 06-038 (July 24, 2008), including making additional specific findings of fact as detailed in the foregoing Decision and Remand Order, and for further consideration relating to the admission of EE 3 and EE 4, all in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

  
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JEFFREY B. RUSSELL  
Administrative Law Judge

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November 22, 2011  
DATE