GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-004

ALLAN B. DOWNING,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Self-Insured Employer-Petitioner

Appeal from a December 12, 2012 Compensation Order on Remand by
Administrative Law Judge Anand K. Verma
AHD No. PBL 11-015, DCP No. 30090824958-0001

Richard K. Link, Esquire, for the Claimant-Respondent
Sharmineh C. Jones, Esquire, for the Self-Insured Employer-Petitioner

Before: HENRY W. MCCOY and HEATHER C. LESLIE, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This is the fourth appeal in this case from the Hearings and Adjudication section of the Office of Hearings and Adjudication (OHA) in the Department of Employment Services (DOES). The underlying claim was Claimant's request for temporary total disability benefits (TTD) from April 17, 2011 through August 25, 2011 and medical care for his left wrist, in the nature of carpal tunnel surgery.

In the initial December 15, 2011 Compensation Order (CO), the Administrative Law Judge (ALJ) awarded TTD benefits for the abbreviated period April 17, 2011 through May 24, 2011 and causally related medical expenses. Both parties appealed.

On April 2, 2012, the Compensation Review Board (CRB) issued a Decision and Remand Order (DRO 1) affirming the limited period of TTD awarded but vacating the denial of the remainder of the TTD award because the ALJ had not made findings of fact concerning the physical requirements of the pre-injury job.[1] The CRB also vacated the award of medical care because the ALJ had stated erroneously that the parties had stipulated to the compensability of the left wrist injury, while the record did not support that finding.

On April 27, 2012, the ALJ issued a Compensation Order on Remand (COR 1) where he made the same limited award of TTD benefits and specifically granted authorization for left wrist carpal tunnel surgery.[2] Both parties appealed again.

On August 3, 2012, the CRB issued a second Decision and Remand Order (DRO 2).[3] In remanding, the CRB again vacated the denial of TTD from May 25, 2011 through August 25, 2011 because the ALJ again failed to make findings of fact concerning Claimant's pre-injury job duties as directed in DRO 1. The award for left wrist carpal tunnel surgery also was vacated because the ALJ had not identified the evidence upon which he relied in finding the claimed carpal tunnel syndrome to be causally related to the work injury and because the statutory utilization review procedures did not appear to have been undertaken. On remand, the CRB directed the ALJ to:

> 1. Make further findings of fact and conclusion (sic) of law as to whether Claimant's physical condition has changed such that he is able to return to his former pre-injury employment without restrictions, based upon weighing the totality of the medical and other relevant evidence of record; and
> 2. Make further findings of fact and conclusion (sic) of law as to whether or not a Final Determination was issued regarding the Claimant's left wrist condition. If the ALJ determines a Final Determination has not issued, then the ALJ lacks jurisdiction to adjudicate any issues regarding the left wrist.[4]

On August 13, 2012, the ALJ issued a second Compensation Order on Remand (COR 2) where he found the specific requirements of Claimant's pre-injury job exceeded the physical

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[1] *Downing v. District of Columbia Public Schools*, CRB No. 12-004, AHD No. PBL 11-015, DCP No. 30090824958-0001 (April 4, 2012) (DRO 1).

[2] *Downing v. District of Columbia Public Schools*, AHD No. PBL 11-015, DCP No. 30090824958-0001 (April 27, 2012) (COR 1).

[3] *Downing v. District of Columbia Public Schools*, CRB No. 12-081, AHD No. PBL 11-015, DCP No. 30090824958-0001 (August 3, 2012) (DRO 2).

[4] *Id.*

restrictions imposed upon him by his treating physician.[5] However, the ALJ again limited the TTD award to April 17, 2011 through May 25, 2011. In addition, the ALJ again awarded the requested carpal tunnel surgery based upon his finding that there had been a final Notice of Determination denying the requested care and therefore Hearings and Adjudication had jurisdiction to consider the claim. Again, both parties appealed.

On November 28, 2012, the CRB issued a third Decision and Remand Order (DRO 3).[6] The CRB concluded that the ALJ's determination that the physical requirements of Claimant's pre-injury job exceeded the physical restrictions imposed by his treating physician for the period claimed and his finding that Claimant, as a result of those restrictions and ongoing complaints, is unable to perform the duties of his pre-injury job are supported by substantial evidence. This compelled an award of TTD benefits for the entire period claimed and the failure to make that award constituted error. The CRB remanded this issue with instructions to enter an award granting Claimant's claim for TTD from May 25, 2011 through August 25, 2011.

The CRB affirmed the ALJ's determination that a final Notice of Determination had been issued denying Claimant's request for further medical care of his left wrist. The CRB also affirmed the determination that the left wrist injury is causally related to the work injury. Both determinations were found to be supported by substantial evidence.

On December 12, 2012, the ALJ issued a third Compensation Order on Remand (COR 3) that is the subject of the instant appeal.[7] As directed by the CRB in DRO 3, the ALJ granted Claimant's claim for TTD benefits from May 25, 2011 through August 25, 2011. In addition, the ALJ again granted Claimant's claim for authorization for left carpal tunnel surgery and all causally related medical expenses. Employer has timely appealed with Claimant filing in opposition.

On appeal, Employer argues that the ALJ's finding that the Office of Risk Management (ORM) issued a Notice of Determination denying Claimant's left wrist injury and that the ALJ's conclusion that Claimant's left carpal tunnel syndrome is medically causally related to the work injury are both not support by substantial evidence. As there is no medical causal relationship, Employer further asserts that the award for left wrist carpal tunnel surgery is not supported by substantial evidence and is erroneous as a matter of law.

Claimant counters that COR 3 should be affirmed insofar as the CRB affirmed the ALJ's findings as to the Notice of Determination and medical causal relationship in DRO 3. As the

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[5] *Downing v. District of Columbia Public Schools*, AHD No. PBL 11-015, DCP No. 30090824958-0001 (August 13, 2012) (COR 2).

[6] *Downing v. District of Columbia Public Schools*, CRB No. 12-081, AHD No. PBL 11-015, DCP No. 30090824958-0001 (November 28, 2012) (DRO 3).

[7] *Downing v. District of Columbia Public Schools*, AHD No. PBL 11-015, DCP No. 30090824958-0001 (August 13, 2012) (COR 3).

CRB's affirmance in DRO 3 established the law of the case on both issues, we again affirm. With regard to the award granting carpal tunnel surgery, we vacate.

ANALYSIS[8]

Employer's first argument on appeal is that the ALJ's finding that ORM issued a Notice of Determination denying Claimant's left wrist injury is not supported by substantial evidence. This jurisdictional issue was remanded initially as a directive to the ALJ in the CRB's DRO 2, addressed by the ALJ in COR 2, and resolved by the CRB in DRO 3.

Regarding the issuance of a Notice of Determination for the left wrist injury, the CRB in DRO 3, stated:

> The ALJ found as fact that the original claim was accepted and treatment authorized for several specific body parts (head, back, left arm, and right leg). He found as fact that Mr. Downing also complained of wrist pain from the very first doctor visit with his attending physician, and that it was treated on occasion by the physician, along with treatments for the back, head, left arm and right leg. This treatment was paid for by ORM.
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> The ALJ also found that the March 16, 2011 notice of "Final Determination" didn't reference any specific body parts; rather, it stated that "per Dr. Robert Gordon's Independent Medical Examination on January 20, 2011, you were allowed to return to work full duty with no further medical treatment necessary" and "Your public sector workers' compensation claim is hereby DENIED for any further medical treatment."
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> All these factual findings are supported by substantial evidence.
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> The ALJ therefore reasoned that, since the doctor had treated the wrist (to the point where he now is recommending CTS surgery), and since the IME exam included an evaluation of the wrist (finding it to be in fine fettle and not needing surgery), and since the "Final Determination" is a blanket denial of any future medical care, it constitutes a denial of the care for the wrist, and hence AHD has jurisdiction.

[8] The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally limited to making a determination as to whether the factual findings of a written 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq*., (the Public Sector Workers' Compensation Act (PSWCA)), at § 1-623.28(a), and *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

While we recognize that there has never been a specific acceptance of a compensable wrist injury explicitly, the injury that was accepted included the "left arm", which has been treated by the treating physician and the IME doctor as including the left wrist. As the ALJ notes, Mr. Downing, who was injured on August 26, 2009, was seen by Dr. Rida Azer, his attending physician, on September 2, 2009, six days later. At that time Mr. Downing's "left arm" complaints were noted to include injuries to his "left forearm, wrist and hand". These described injuries were known to the Employer when, on March 23, 2009, it accepted as compensable the claim for injuries to Mr. Downing's "head, back, left arm and right leg". And, they were known by Employer's IME physician to include wrist complaints, as evidenced by his having included the wrist as part of his evaluation. That acceptance of the claim by the Employer was found by the ALJ to include the wrist, and that conclusion and finding is reasonable under the circumstances.

We also note, as did the ALJ, that Employer at the hearing never argued that the wrist complaints had never been part of this claim. Further, in the jointly executed Pre Hearing Conference Order the type of injury is described as follows:

Neck, Left elbow, Left wrist, Right Knee. (contested)

Employer did not question whether Mr. Downing's claimed injuries included the wrist at the opening of the formal hearing, or in her closing argument. Rather, Employer repeatedly argued that whatever injuries had been sustained in the work injury had resolved, and that by logical implication any injuries Mr. Downing my now have are not causally related to the work injury.

Based upon the aforegoing (sic) record based facts as found by the ALJ, we conclude that the ALJ's finding that Employer (1) had accepted the wrist injury as part of the claim and (2) ORM's final Notice of Determination denying further ongoing medical care was a final determination covering the left wrist. Accordingly, the ALJ's conclusion that AHD had jurisdiction over the claim is in accordance with the Act. (Citation omitted).[9]

[9] DRO 3, p. 5. The CRB conducted this detailed analysis on whether a Final Notice of Determination was issued based on its perception of the ALJ's lack of understanding of the claims procedure owing to the ALJ's repeated reference to the Office of Workers' Compensation (OWC) as the entity that would issue such a notice when in fact this matter falls under the Public Sector Workers' Compensation Act (PSWCA), administered by the Office of Risk Management (ORM), Public Sector Workers' Compensation Program (PSWCP). Although this confusion was brought to the ALJ's attention in DRO 3, he has perpetuated, in COR 3, his obvious lack of understanding or appreciation in the difference between OWC, which processes private-sector claims, and ORM/PSWCP, which processes public-sector claims. As the instant matter is a public-sector claim, the ALJ's repeated reference to

As can be seen, the CRB addressed Employer's argument comprehensively in its November 28, 2012 DRO. There it was determined that the ALJ's finding that ORM had issued a Notice of Determination denying the left wrist injury was supported by substantial evidence. As such, the ALJ's conclusion that AHD had jurisdiction over the claim rationally followed and was in accordance with the Act. This became the law of the case and upon further review we find no basis at this time to rule otherwise.[10] Employer's argument is rejected.

Employer's second argument on appeal is that the ALJ's conclusion that the left carpel tunnel syndrome is medically causally related to the work injury is not supported by the record. Employer argues that although the CRB in DRO 2 instructed the ALJ to cite to the medical evidence that supported his conclusion that Claimant's carpal tunnel syndrome is causally related to the work injury, the ALJ failed to do so in COR 2 and the CRB's conclusion in DRO 3 that the ALJ's determination that the left wrist injury is causally related to the work injury is supported by substantial evidence failed to address the issue with respect to carpal tunnel syndrome.

In DRO 2, the ALJ was instructed on remand to cite to the medical evidence or opinion that supported his conclusion that Claimant's carpal tunnel syndrome was causally related to the work injury.[11] On remand in COR 2, the ALJ stated he was relying upon the findings made by Dr. Azer as detailed in the original December 15, 2011 CO. The ALJ deemed Dr. Azer's findings on the causal relationship between Claimant's carpal tunnel syndrome and the work injury to be more rationally based on the objective evidence in the record and therefore more persuasive.[12]

"OWC's Notice of Determination" is not only misleading but erroneous. Equally so is his statement that "the record of proceedings before OWC are not made a part of the record." First, this case had no proceedings at OWC. Second, as this claim was initially processed by ORM/PSWCP, those documents, in particular a Notice of Determination, are regularly submitted into evidence at any formal hearing at Hearings and Adjudication. We again direct the ALJ's attention to our discussion of the difference in the claims procedures between public and private sector workers' compensation claims and we deem his continued confusion as expressed in COR 3 to be harmless error.

[10] The "law of the case" doctrine recognizes that "once the court has decided a point in a case, that point becomes and remains settled unless it is reversed or modified by a higher court." *Kristidimas v. Sheskin*, 411 A.2d 370, 371 (D.C. 1980).

[11] The ALJ misses the point and mischaracterizes the CRB's instruction when he repeats the generally accepted principle that the trier of fact "is not required to inventory the evidence and explain why a particular part of it was accepted or rejected." Although the CRB has frequently stated that an ALJ need not present an inventory of all the evidence that was considered in making the necessary factual findings, in order for the CRB to carry out its statutory obligation to conduct an appellate review, a compensation order must identify with sufficient specificity the evidence that was relied upon in making those factual findings, and acknowledge and address evidence that is presented in direct support of or in opposition to a claim. See, *Toure v. Fairmont Hotels and Resorts*, CRB No. 13-059, AHD No. 11-167B, OWC No. 679676 (June 26, 2013); *Kyle v. Safeway Stores, Inc*., CRB No. 12-117, AHD No. 12-116, OWC No. 685101 (October 9, 2012); *Green v. Palomar Hote*l, CRB No. 11-065, AHD No. 10-582, OWC Nos. 673571 and 673273 (November 10, 2011).

[12] The ALJ noted in COR 3, page 4, that the mandatory treating physician preference in the public sector Act has been stricken. In that regard however, we direct the ALJ to the CRB's recent decision in *Abbott v. DCPS*, CRB No. 12-153 (June 4, 2013) where it was determined that while the repealed language required not only persuasive reasons but also compelling reasons in order for the treating physicians opinion to prevail, the state of the law upon

A review of the record evidence shows that while Claimant's accepted injury for treatment was categorized as left wrist sprain/strain, Dr. Azer first noted in his November 24, 2009 treatment report that Claimant showed "typical findings of left carpal tunnel syndrome". In his May 28, 2010 report, Dr. Azer noted:

> I reviewed his records and it appears that he did complain about his left wrist as a result of the injury of 08/26/09. The EMG/NCV done on 09/03/09 was negative for carpal tunnel which indicates there was certainly no pre-existing carpal tunnel prior to the incident of 08/26/09. Clinically today he has clear-cut carpal tunnel. (CE #3, p. 33).

In the June 29, 2010 treatment report, Dr. Azer further stated:

> The EMG and nerve conduction studies performed 06/05/10 indicate: "Left carpal tunnel syndrome."
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> Diagnosis:
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> 1. Left carpal tunnel syndrome with tenosynovitis over the flexor tendon, left wrist and hand
> 2. De Quervain's disease, left wrist. (CE #3, pp. 31-32).

This culminated in Dr. Azer's opinion as to causal relationship on July 14, 2010:

> I reviewed the patient's medical records, his conditions and diagnoses, or recommendation including the surgery recommended, namely decompression of the left carpal tunnel syndrome with excision biopsy synovium flexor tendon left wrist and hand release first dorsal compartment, left wrist, are caused by his work injury….The patient's condition occurred when he was injured at work on 08/26/09. He was climbing a 10 ladder, the ladder broke and the patient fell sustaining multiple injuries. (CE #3, p. 30).

Contrary to Employer's argument that Dr. Azer does not provide an explanation as to how a fall from a ladder caused carpal tunnel syndrome, it can be seen from the treatment notes that the determination was made based on objective diagnostic testing. It is this reasoning upon which the ALJ relied in giving more persuasive weight to Dr. Azer's determination that Claimant's left carpal tunnel syndrome is causally related to the work injury. Concomitantly, it was the ALJ's reliance on Dr. Azer's determination that Claimant injured his left wrist in the fall from the ladder on August 26, 2009 that became carpal tunnel which became the basis for the CRB to determine in DRO 3 that the ALJ's determination that the left wrist injury is causally

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removal of that language reverted to the treating physician preference standard endorsed by the D.C. Court of Appeals in *Kralick v. DOES*, 842 A.2d 705 (D.C. 2004). In other words, it is the position of the CRB that a treating physician preference remains in public sector cases.

related to the work injury is supported by substantial evidence and therefore affirmed. Thus, we find no error.

It remains for us to revisit again the ALJ's award authorizing left carpal tunnel surgery. As the CRB stated in DRO 3:

> We turn now to a third matter that was part of the CRB's DRO 2, that being that "As utilization review (UR) was not undertaken by either party, the ALJ lack authority to consider the reasonableness and necessity of the requested surgery." The CRB was referring, of course, the [sic] D.C. Code § 1-623.23 (a-2) through (a-2)(5), which provides that disputes concerning the reasonableness and necessity of medical care be submitted to a UR process described therein.
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> The inclusion in the DRO of the reference to UR was the result of the phraseology employed by the ALJ in making the award of carpal tunnel surgery, and his stating in that award that the surgery was "reasonable and necessary". The ALJ's insertion of that phrase was unnecessary and beyond the scope of the issues presented to him for resolution. Reasonableness and necessity for carpal tunnel surgery was never identified as an issue in contest, and was not before the ALJ at the time of the formal hearing.[13]

As the reasonableness and necessity for carpal tunnel surgery was not before the ALJ as a contested issue for resolution, there was no authority to make an award for the surgery. Accordingly, the award is vacated.

[13] DRO 3, p. 6.

CONCLUSION AND ORDER

The award of temporary total disability benefits for the period May 25, 2011 through August 25, 2011 is supported by substantial evidence in the record is affirmed. The determination that Claimant's left carpal tunnel syndrome is causally related to the work injury to his left wrist is supported by substantial evidence in the record and is affirmed. The award authorizing left carpal tunnel surgery is not in accordance with the law as it was never determined to be reasonable and necessary pursuant to utilization review under the Act and is VACATED.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

July 24, 2013
DATE