

**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 No. 06-83**

**GILDEON ISRAEL,**

**Claimant – Petitioner,**

**v.**

**WASHINGTON HOSPITAL CENTER,**

**Self-Insured Employer – Petitioner.**

Appeal from an Order of  
Claims Examiner Selwyn Johnson  
OWC No. 624682

Benjamin T. Boscolo, Esq., for the Petitioner

Michael S. Levin, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, LINDA JORY and SHARMAN J. MONROE, *Administrative Appeals Judges*.

E. COOPER BROWN, *Chief Administrative Appeals Judge*, on behalf of the 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 § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).<sup>1</sup>

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<sup>1</sup> 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for

## BACKGROUND

The instant Application for Review (AFR) was filed on April 9, 2004 with the Office of the Director, now the Compensation Review Board (CRB), requesting review of the rejection by the Office of Workers' Compensation (OWC) of a request for modification of a previously-issued OWC Compensation Order. Notwithstanding the rather tortured procedural history of this case leading up to the Application for Review now under consideration before the CRB,<sup>2</sup> the following is of particular relevance:

Petitioner alleges he sustained a work-related injury on or about August 6, 2002. Following an Application for Informal Conference filed with OWC seeking temporary total disability benefits and medicals, an Informal Conference was held on December 13, 2002 at which Petitioner testified and at which he presented two hospital medical reports generated immediately following his alleged work-related injury. A Memorandum of Informal Conference was issued on January 3, 2003 rejecting Petitioner's claim, which was subsequently converted on March 7, 2003 to a Final Compensation Order pursuant to 7 DCMR §219.22.

Subsequently, on November 12, 2005, Petitioner filed an Application for Informal Conference seeking modification of the March 7, 2003 Compensation Order pursuant to D.C. Official Code §32-1524(a). On November 19, 2003, OWC denied Petitioner's Application for Informal Conference on the grounds that OWC "lacked jurisdiction in this matter."

On February 19, 2004, Petitioner filed a second Application for Informal Conference seeking modification of the March 7, 2003 Compensation Order. In response, on February 24, 2004, the OWC Claims Examiner wrote Petitioner's attorney stating that the issues raised by Petitioner's request had been previously addressed at the time of the informal conference conducted pursuant to Petitioner's original claim, and because those proceedings had resulted in an OWC Final Compensation Order, "OWC lacks jurisdiction in this matter."

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administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

<sup>2</sup> Notwithstanding that the Application for Review was received by the Office of the Director in 2004, the CRB, having assumed jurisdiction over agency administrative appeals for the Director (*see* footnote 1, *supra*), a CRB docket number has been assigned. Due to various and convoluted procedural maneuvers before OWC too numerous to articulate (and irrelevant to the disposition of the instant matter), including numerous and often repetitive motions and orders, some orders of which were presented by the presiding Claims Examiner in correspondence, as occurred in issuing the March 10, 2004 order from which the instant appeal is taken, applications for formal hearing concurrently filed with and subsequently dismissed by the Office of Hearings and Adjudication (now the Administrative Hearings Division), and an appeal filed with the Office of the Director that was simultaneously filed with OWC identical in caption and content to that filed with the Director that led to the continued assertion of jurisdiction over Petitioner's claim by OWC until it was brought to the Claims Examiner's attention that appeal to the Director had been filed, whereupon the Claims Examiner dismissed the then-pending proceedings before OWC, perfection of the instant appeal for disposition by the Compensation Review Board was effected only with the greatest of difficulty. Because of this difficulty, the instant appeal was not assigned to a CRB Review Panel for disposition until March 13, 2007, subsequent to the issuance by the CRB Clerk's Office of an Administrative Order of Dismissal, dated December 28, 2006, that is by this Decision and Order vacated, and following thereafter the receipt of the necessary evidentiary record from OWC.

Subsequently, on March 10, 2004 in follow-up to correspondence from Petitioner's attorney requesting an explanation of why OWC would not consider Petitioner's modification request, the Claims Examiner indicated that, "OWC has determined that there was insufficient medical evidence to support the issue that a change of condition has occurred regarding [Petitioner's] alleged work-related injury of August 6, 2002", and advised Petitioner that if he disagreed with the Claims Examiner's decision, Petitioner could exercise his appeal rights.<sup>3</sup>

In submitting the instant appeal, Petitioner asserts that the Claims Examiner's refusal to consider modification of the previously issued OWC Compensation Order was in violation of D.C. Official Code §32-1524(a) and (b).

#### ANALYSIS

In the review of an appeal from OWC, the Board must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, §51.93 (2001).

As an initial matter we address Petitioner's motion seeking reconsideration of the Administrative Order of Dismissal issued by the CRB Clerk on December 28, 2006. For the reasons set forth in Petitioner's motion, and upon further review of the record herein, Petitioner's motion is granted and the Administrative Order of Dismissal is herewith rescinded.

Turning to the merits of the instant appeal, the issue presented is whether the Claims Examiner's rejection of Petitioner's request for a modification of OWC's Final Compensation Order issued March 7, 2003 was in accord with the controlling statutory provision dealing with modification of final decisions under the Act, D.C. Official Code §32-1524, which provides in pertinent part:

- (a) . . . at any time prior to 1 year after the rejection of a claim . . . the Mayor<sup>[4]</sup> 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 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.

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<sup>3</sup> Accordingly, we have treated the Claims Examiner's March 10, 2004 correspondence as the final OWC decision denying Petitioner's request for modification.

<sup>4</sup> The Mayor has delegated his responsibility under the Act to the Director of the Department of Employment Services. Mayor's Order 82-126, D.C. Reg. 2843 (1982). *Dell v. D.C. Dept. of Employment Services*, 499 A.2d 102, 105 (D.C. 1985).

- (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 . . . .

Before OWC, Petitioner had originally sought an award of temporary total disability benefits based on injuries to both hands, his right shoulder and lower back. In support, Petitioner relied upon medical records from two visits for treatment immediately following his alleged work accident showing a diagnosis of contusion to his right hand and lower back pain. The Claims Examiner denied Petitioner's claim on the grounds that Petitioner had failed to present sufficient evidence to invoke the Act's presumption that the injuries of which he complained were work-related.<sup>5</sup>

In subsequently seeking modification of the Claims Examiner's denial of his claim, Petitioner relies upon medical reports that diagnosed Petitioner with a work-related lumbosacral spinal strain and right hand contusion based upon further medical assessments and treatment conducted after the March 7, 2003 OWC Compensation Order. In explaining his rejection of Petitioner's modification request,<sup>6</sup> the Claims Examiner in his March 10, 2004 correspondence cited the reasons contained in his previous rejection letters of November 19, 2003 and February 24, 2004, indicating that OWC had previously considered "all evidence" regarding Petitioner's case in denying his request and "determined that there was insufficient medical evidence to support the issue that a change of condition has occurred regarding [Petitioner's] alleged work-related injury of August 6, 2002."

Examination of the previous correspondence cited by the Claims Examiner indicates that the basis for rejecting Petitioner's first request for modification was that "OWC lacks jurisdiction in this matter." CE's correspondence of November 19, 2003. The reason provided in the Claims Examiner's letter rejecting Petitioner's second modification request is the same, *lack of jurisdiction*, which the Claims Examiner explained as follows: "Based upon the evidence of file, I find that the issues you are requesting an informal conference were addressed in the informal conference conducted on December 13, 200[2]" and that because the Memorandum of Informal Conference that thereafter resulted was subsequently converted into a Final Compensation Order, "OWC lacks jurisdiction in this matter." CE's correspondence of February 24, 2004.

On appeal to the CRB, Petitioner asserts that the subsequently-generated medical evidence constitutes "new evidence" sufficient to invoke the threshold requirement of D.C. Official Code § 32-1524(a)(1), and further that the Claims Examiner failed to take this new medical evidence into consideration. Thus, Petitioner argues, the Claims Examiner's rejection of Petitioner's modification request constitutes reversible error.

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<sup>5</sup> The March 7, 2003 OWC Compensation Order denying Petitioner's claim was issued initially as a Memorandum of Informal Conference and subsequently converted to a Final Order pursuant to 7 DCMR §219.22. The Claims Examiner's Memorandum of Informal Conference of January 6, 2003 provides the stated explanation for the Claims Examiner's denial of Petitioner's claim: "I do not find credence in the claimant's testimony. I find that the claimant has not established the presumption of an employment connection claim provided by Section 32-1521(a) of the Act. Wherein, the employer's rebuttal evidence does satisfy its burden of a non-employment related injury."

<sup>6</sup> As noted in the Background Statement, *supra*, Petitioner's modification request was filed with OWC in the form of an Application for Informal Conference on November 12, 2003 and again on February 19, 2004.

Based upon a thorough review of the OWC records provided in this matter, it appears that the Claims Examiner was operating under a misconception both as to the nature of Petitioner's request and as to the permissible scope of OWC's jurisdiction. Where, as in the instant case, a compensation order is issued by OWC that is not appealed, thus constituting the final agency decision with respect to the claim therein adjudicated, it is within OWC's jurisdiction to entertain a subsequent motion seeking modification of that compensation order based upon a change of conditions. A modification request pursuant to Section 32-1524(a) does not constitute an impermissible relitigation of issues and/or claims addressed and disposed of pursuant to the previously-issued final compensation order. Rather, a modification proceeding is authorized by statute in order to determine whether there has been a change of conditions subsequent to the issuance of the final compensation order (with respect to "the fact or the degree of disability or the amount of compensation payable pursuant thereto") that warrants issuance of a new compensation order pursuant to D.C. Official Code § 32-1524(c).

Within the context of modification petitions pertaining to compensation orders decided upon an evidentiary record, pursuant to a formal hearing proceeding before the Office of Hearings and Adjudication (now the Administrative Hearings Division), the Court of Appeals has affirmed the two-step process adopted by DOES requiring: (1) an initial determination that there is reason to believe that a change in the claimant's condition has occurred, and (2) an evidentiary hearing if the ALJ concludes, based upon a preliminary examination of the evidence that the moving party intends to rely upon in seeking modification to the original compensation order, that there is reason to believe that a change of conditions has occurred. *Snipes v. D.C. Dep't of Employment Servs.*, 542 A.2d 832, 835 (D.C. 1988); *WMATA v. D.C. Dept. of Employment Services*, 703 A.2d 1225, 1228 (D.C. 1997). See, *Johnson v. Greater S.E. Community Hospital*, CRB No. 05-224, OHA No. 03-541B (June 9, 2005). The purpose of the evidentiary hearing is to determine, based upon all relevant evidence submitted by both parties, taking into consideration the prior agency determination awarding or denying the original claim, whether *as a matter of fact* a change of conditions has occurred. *WMATA*, 703 A.2d at 1229; *Snipes*, 543 A.2d at 835. A change of conditions may be demonstrated through either (1) a physical change of condition that impacts upon the employee's ability to maintain gainful employment, or (2) an economic change in the employee's condition. *Cather v. D.C. Dept. of Employment Services*, 808 A.2d 766, 769 (D.C. 2002).

Given the informal nature of its proceedings, OWC cannot be held to the same procedural and evidentiary standards as that applicable in "contested case" proceedings before OHA/AHD. Nevertheless, the cited case authority does require of OWC, when presented with a modification request submitted pursuant to D.C. Official Code § 32-1524(a), the scheduling of an Informal Conference where the moving party can present the "new evidence" claimed to support a change of conditions. Based upon a preliminary examination of this evidence, the Claims Examiner must initially determine whether the new evidence is sufficient to establish a *reason to believe* that a change in claimant's condition within the meaning of Section 32-1524(a)(1) or (2) has occurred since issuance of the original compensation order. While the "reason to believe" standard in § 32-1524(a) requires something short of full proof, nevertheless the moving party must make an affirmative factual showing that a change of conditions has occurred. *Snipes*, 542 A.2d at 835; *WMATA*, 703 A.2d. at 1230.

Assuming that the Claims Examiner preliminarily determines, based upon the evidence presented by the moving party, that there is “reason to believe” that a change of conditions has occurred, the Claims Examiner is then obligated to determine, based upon all relevant evidence submitted by both parties, taking into consideration OWC’s prior determination awarding or denying the original claim, whether *in fact* a change of conditions has occurred. *WMATA*, 703 A.2d at 1229; *Snipes*, 543 A.2d at 835. If so, the original compensation order should be amended, initially by way of recommendation contained within a Memorandum of Informal Conference issued pursuant to 7 DCMR § 219.18.

Based upon our review of the OWC record in this matter, this Review Panel is of the opinion that the Claims Examiner failed to comply with the dictates of Section 32-1524 as herein explained. To begin with, and as previously noted, the Claims Examiner was under the impression that OWC did not have jurisdiction over Petitioner’s modification request, perhaps because the Claims Examiner was under the impression that Petitioner was seeking to relitigate those issues previously decided as a result of his initial claim (although this is not clear from the record). Certainly, a claimant should not be allowed to relitigate a claim for relief that has been finally adjudicated based upon evidence previously presented and issues previously raised and decided. However, that is not what is involved in a Section 32-1524(a) modification request, which expressly provides for the reopening of a previously awarded claim (or rejection thereof) where there has been a change in claimant’s condition, whether medical or economic, that developed *after* the original claim was awarded or denied. In making that determination, as the Court of Appeals has noted, it may well be that evidence previously presented and issues previously resolved will necessarily require reconsideration and/or resolution, but this is *not* the same as a party seeking to reopen a claim based exclusively on the evidence previously presented and/or the issues previously addressed. *Res judicata* principles do not bar raising the same issues related to a claimant’s medical condition that were previously determined because “the statute provides for re-examination of previously determined issued upon a proper showing that a change of circumstances has occurred warranting a modification of the order.” *WMATA*, 703 A.2d at 1231

Regarding the Claims Examiner’s assertion that “all evidence” was considered in rejecting Petitioner’s modification request, it is noted that it does not appear that the Claims Examiner had the medical record upon which Petitioner relied before him at the time he reached his initial decision rejecting Petitioner’s modification request for lack of jurisdiction. The OWC records indicate that Petitioner’s new medical records were, with one exception, received by and filed with OWC on February 19, 2004. (The exception is a 10/27/03 medical progress report that was filed with OWC on November 14, 2003.) Arguably, the Claims Examiner may have looked at these medical records in reaching his subsequent decision again rejecting Petitioner’s modification request. However, consideration of Petitioner’s medical records in the absence of an Informal Conference where Petitioner or his legal counsel could formally present those records, plus any related and supporting evidence, does not satisfy the requirements of Section 32-1524(a).

Remand of the instant case is thus required. Upon remand, the Claims Examiner should preliminarily determine, consistent with the foregoing discussion, whether there is reason to

believe, based upon the new medical records upon which Petitioner relies, that there has been a change in his condition, either as to the fact or degree of disability, that has arisen since issuance of the OWC Final Compensation Order of March 7, 2003. If the answer to the foregoing question is in the negative, the Claims Examiner should explain why in order to assure a proper basis for subsequent agency review should Petitioner deem such review warranted. If the answer to the foregoing question is in the affirmative, all relevant evidence must then be assessed to determine whether there has *in fact* been a change in Petitioner's medical or economic condition since issuance of that Compensation Order, or whether the medical evidence presented constitutes nothing more than a re-diagnosis of the condition(s) that had been previously diagnosed and upon which Petitioner relied in support of his original claim.

#### CONCLUSION

Under D.C. Official Code § 32-1524(a), OWC has jurisdiction over a request seeking modification of a prior OWC final compensation order based upon a change of conditions. The Claims Examiner in the instant case thus committed reversible error by rejecting Petitioner's modification request without having made the necessary determinations required by Section 32-1524(a) requiring, among other things as discussed herein, the conduct of an Informal Conference.

#### ORDER

The Administrative Order of Dismissal entered by the CRB on December 28, 2006 is RESCINDED. The Decision and Order of the Office of Workers' Compensation herein appealed is hereby VACATED. The case is REMANDED to OWC for further proceedings consistent with the foregoing discussion and this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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E. COOPER BROWN  
Chief Administrative Appeals Judge

April 4, 2007  
DATE