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. 03-137 AND CRB No. 03-142

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CRB (Dir. Dkt.) **No. 03-137**

NORITA GOODEN,

Claimant –Respondent,

v.

NATIONAL CHILDREN'S CENTER AND D.C. GUARANTY FUND,

Employer/Carrier – Petitioner.

Appeal from an Order of
Claims Examiner Jevan T. Edwards
OWC No. 529469

AND

CRB (Dir.Dkt.) **No. 03-142**

GAIL STONE,

Claimant-Petitioner,

v.

OGDEN ENTERTAINMENT AND AMERICAN HOME INSURANCE,

Employer-Carrier – Respondent.

Appeal from an Order of
Claims Examiner Shelby J. Stevens
OWC No. 552703

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DECISION AND ORDER

Mary G. Weidner, Esq., for Petitioner National Children's Center *et al* (CRB No. 03-137)

Manuel R. Geraldo, Esq., for Respondent Norita Gooden (CRB No. 03-137)

Merri R. Lane, Esq., for Petitioner Gail Stone (CRB No. 03-142)

Joel E. Ogden, Esq., for Respondent Ogden Corporation *et al* (CRB No. 03-142)

BEFORE: E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS, LINDA JORY, SHARMAN MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*, presiding *en banc*.[1]

E. COOPER BROWN, *Chief Administrative Appeals Judge*, on behalf of the Majority presiding *en banc*; JEFFREY P. RUSSELL, *Administrative Appeals Judges*, dissenting:

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 No. 05-01 (February 5, 2005).[2]

[1] Although Administrative Appeals Judges Russell and Jory were the respective ALJ's in *Stone* and *Gooden* that remanded the cases to OWC, the appeal in each case to CRB is from a Final Order issued by OWC. Because it is the action of the OWC claims examiner from which appeal is taken in each case that is at issue before the Board, and not that of the ALJs, D.C. Official Code § 32-1521.01(b)(3) and 7 DCMR § 262.2 do not require either administrative appeals judge to recuse themself from review of the instant appeals.

[2] Pursuant to Administrative Policy Issuance No. 05-01, 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 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.

BACKGROUND

In *Gooden v National Children's Center*, CRB No. 03-137, the employer filed an Application for Formal Hearing (AFH) challenging the Claims Examiner's Memorandum of Informal Conference (Memorandum) favoring the claimant. Prior to issuance of a compensation order by the Office of Hearings and Adjudication (now the Administrative Hearings Division (AHD)), the AFH was ordered dismissed without prejudice upon the employer's request for dismissal. The Office of Workers' Compensation (OWC) took no action and the employer filed a subsequent AFH. The employer again sought voluntary dismissal of its AFH. The second dismissal was granted "with prejudice." Pursuant to *Boucary Sacko v. Radio Shack*, Dir. Dkt. No. 02-89 (August 23, 2003), which the Board had just issued, the claimant sought, and obtained, a Final Order from OWC based upon the previously issued Memorandum. Appeal of that Final Order which is now before the Compensation Review Board (CRB).

In *Stone v. Ogden Entertainment*, CRB No. 03-142, the claimant filed an AFH following denial of her claim before OWC. She subsequently sought and obtained an order remanding her case to OWC pursuant to a dismissal "without prejudice" – although without the consent of the opposing party. Upon the employer's subsequent motion before OWC, the Claims Examiner treated the dismissal as if it were "with prejudice" pursuant to *Boucary Sacko* and converted the previously issued Memorandum of Informal Conference into a Final Order. The claimant appealed this Final Order to the CRB.

The claims examiners in both *Gooden* and *Stone* relied on the Director's decision in *Boucary Sacko* for the authority to issue the Final Order which was appealed and is now before the Board. Because both appeals draw into question the continued efficacy of the Director's holding in *Boucary Sacko*, the Board has consolidated the two appeals for the purpose of addressing the legal effect, if any, that the dismissal of an AFH has upon OWC's jurisdiction over the underlying claim. Given the importance that this issue has to the integrity of the claims process established pursuant to the D.C. Workers' Compensation Act and to the rights of parties thereunder, this matter has been assigned for review *en banc* pursuant to CRB Regulations 7 DCMR §§ 255.3, 255.8 and 268.6.

ANALYSIS

In its review of an appeal from the Office of Workers' Compensation, the Board must affirm the compensation order or final order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 7 DCMR § 266.4. *See* 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, § 51.03 (2001).

The Workers' Compensation Act presupposes that a claim for benefits will be initiated by the injured employee or his/her beneficiary. D.C. Official Code § 32-1514 and § 1520.[3] The claim may be filed with either OWC or directly with AHD. *See National Geographic Society v. D.C.*

[3] *See also*, 7 DCMR § 207.1 ("all claims shall be made by the injured employees or their beneficiaries") and 7 DCMR § 299.1 (a "claim" constitutes "an application for benefits made by an injured employee or his or her beneficiary").

Dept. of Employment Services, 721 A.2d 618, 621-622 (D.C. 1998) (acknowledging the claimant's right under the Act to by-pass OWC's informal claims process in favor of the formal hearing procedure afforded parties before OHA). Where resolution of a claim for benefits is initially sought pursuant to the informal procedures available before OWC, and where the parties fail to reach agreement through that process, a Memorandum of Informal Conference (hereafter, "Memorandum") setting forth a recommended resolution will be issued by the presiding claims examiner. 7 DCMR § 219.18.[4] Where a party disagrees with the Claims Examiner's recommended resolution, that party must file a notice of disagreement with OWC within the prescribed time period set forth at 7 DCMR § 219.20.[5] *In addition*, the party disagreeing with the Memorandum must subsequently file an Application for Formal Hearing (AFH) with the Administrative Hearings Division lest the Memorandum become final and dispositive of the rights of the parties.[6] 7 DCMR § 219.22 provides:

> If an application for formal hearing is not filed in accordance with § 220 of the chapter within thirty-four (34) working days after the issuance of the Memorandum of Informal Conference, said Memorandum shall become final. Thereafter, the Office shall issue a Final Order which shall be sent by certified mail to the parties and their representatives, and the Hearings and Adjudication Section [AHD]. An aggrieved party may request a review by the Director, DOES.

As the Director has held, "If the AFH [Application for Formal Hearing] is not filed within the thirty-four (34) days, the memorandum becomes final by operation of law and the parties become bound by it." *Sandoval v. Washington Metro Transit Authority*, Dir. Dkt. No. 99-57, OHA No. 99-177, 1999 DC Wrk. Comp. LEXIS 432 at *6 (Nov. 1, 1999). *See also, Moore v. Sheraton Washington Hotel*, Dir. Dkt. No. 00-55, OHA No. 89-446A, 2000 DC Wrk. Comp. LEXIS 497 (Nov. 29, 2000). Where, however, an AFH is timely filed (by either party), the Administrative Hearings Division assumes exclusive jurisdiction over the claim for benefits, and the proceedings before OWC with respect to the claim terminate. *National Geographic*, 721 A.2d at 622 (citing 7 DCMR § 219.23).[7]

In *Boucary Sacko* the Director was confronted with the question of the legal effect of a voluntary dismissal of an AFH upon a previously issued Memorandum of Informal Conference. The Director held that absent the consent of the opposing party to the requested dismissal, the ALJ's dismissal, whether designated "with" or "without" prejudice, reinvests OWC with jurisdiction

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[4] 7 DCMR § 219.18 provides: "If at the close of an informal conference, the parties have not reached an agreement on all of the disputed issues, the Office shall evaluate all the available information and prepare a Memorandum of Informal Conference containing recommendations."

[5] 7 DCMR § 219.20 provides: "The parties shall have fourteen (14) working days after receipt of the Memorandum of Informal Conference within which to signify in writing whether they agree or disagree with the terms of the memorandum."

[6] This does not preclude the prevailing party before OWC from also filing an Application for Formal Hearing. D.C. Official Code § 32-1520(c) of the permits "any interested party" to apply for a hearing. *See also* 7 DCMR § 220.1.

[7] 7 DCMR § 219.23 provides: "All informal procedures shall terminate before [OWC] when the an [sic] application for formal hearing is filed."

over the original claim and the claims examiner with authority to convert the original Memorandum of Informal Conference into a Final Order. Specifically, the Director stated:

> [W]hen a party to an informal workers' compensation proceeding files an Application for Formal Hearing and subsequently voluntarily dismisses that application, the presiding claims examiner in that proceeding is immediately reinvested with the jurisdiction over the matter that he or she had prior to the filing of the subject Application for Formal Hearing. The voluntary dismissal of an Application for Formal Hearing may only be made *with prejudice* [in the absence of consent to the requested dismissal by the opposing party].

Boucary Sacko, Slip op., at 4-5.

The Director's decision articulated a new rule of law governing non-consented dismissals of Applications for Formal Hearing. Up until *Boucary Sacko*, the Agency had interpreted its governing regulations as divesting OWC of jurisdiction over a claim for benefits once a party rejected a Memorandum of Informal Conference and filed an Application for Formal Hearing. In thoroughly upending this existing case law, and the practice and procedure that had developed thereunder, the Director sought to put an end to a practice that had resulted in abuse of the claims process under this long-standing interpretation. Specifically, the Director sought to prevent a party from using the Agency's procedures governing the disposition of claims "to unfairly delay the resolution of a claim" and "in effect, vitiate 7 DCMR § 219.22 (1986)." Slip op. at 5. "[B]y simply engaging in a cycle of filing an application for formal hearing and then subsequently withdrawing that application," the Director noted, a party could make it "impossible for a claims examiner's Memorandum of Informal Conference to ever become a Final Order." *Id*.

While the concern the Director sought to address in *Boucary Sacko* was surely well-founded, we nevertheless are of the opinion that the Director's reinterpretation of the Agency's governing regulations in an effort to address this concern is not legally supportable. As hereafter more fully explained, the decision in *Boucary Sacko* ignores the informal nature of the proceedings before OWC, ignores the fact that an Application for Formal Hearing is not an appeal from OWC but instead an original action before AHD, ignores the legal effect of the filing of an AFH upon the proceedings before OWC, and otherwise misconstrues the governing regulations.

As the regulations set forth at 7 DCMR § 219 attest, the proceedings on a claim before OWC are informal and non-adjudicatory in nature, involving informal conference in person or by telephone. Participation by the parties is voluntary. There is no testimony under oath, no cross-examination of witnesses, and no recorded transcript of the proceedings. *See Raynor v. May Company,* CRB No. 06-10, 2005 DC Wrk. Comp. LEXIS 355, n.4 (Dec. 27, 1005). The purpose underlying the informal procedures before OWC is to "resolve in a manner acceptable to all interested parties any matter in dispute regarding a claim," 7 DCMR § 219.1, and to do so expeditiously. *Banks v. Greater S.E. Community Hospital*, Dir. Dkt. No. 90-86, OWC No. 198514 (Sept. 29, 1985).[8] The Memorandum of Informal Conference that issues is, in effect, a

[8] Underscoring the informal nature of the OWC proceedings is that, in the absence of the entry of a Final Order pursuant to 7 DCMR § 219.22, neither *collateral estoppel* nor *res judicata* bars the subsequent relitigation of issues

recommendation for settlement -- which the parties can either accept or reject. The Memorandum only acquires the force of law if it is either accepted by the parties, or where it is rejected by one of the parties *but* the party fails to timely file an AFH with the Administrative Hearings Division.

In *Russell v. Vertrans,* CRB No. 03-56, OWC No. 579689 (Oct. 7, 2005**),** the presiding Review Panel held that a party's timely rejection of a Memorandum of Informal Conference pursuant to 7 DCMR § 219.20 renders the Memorandum null and void, such that it cannot be revived and converted into a Final Order following a voluntary dismissal of a subsequently filed Application for Formal Hearing. While we agree with *Russell* that a rejected Memorandum is rendered null and void, and thus not subject to revival upon a subsequent dismissal of an AFH, we do not agree with the analysis by which the Review Panel in that case reached this conclusion. 7 DCMR § 219.22 provides that the Memorandum becomes final, and thus subject to conversion to a Final Order, upon lapse of 34 working days from the date of the Memorandum's issuance *if no AFH is within that period filed*. Thus, a party could reject a Memorandum pursuant to § 219.20 yet, if no AFH is timely filed, the Memorandum would nevertheless become final by operation of law upon lapse of the 34-day period.

Rather than a party's initial rejection of a Memorandum pursuant to 7 DCMR § 219.23, it is the effect of 7 DCMR § 219.20 that renders the Memorandum a nullity. As the Court of Appeals noted in *National Geographic*, 7 DCMR § 219.23 dictates that "Once an application for a formal hearing is filed . . . all informal procedures [before OWC] must be terminated." 721 A.2d at 622. Consequently, as a result of the filing of the AFH and the assumption of jurisdiction over the claim by the Administrative Hearings Division, the previously issued Memorandum is effectively rendered null and void, and thus not subject to revival upon a subsequent dismissal of the AFH.

There is an additional reason why an ALJ's dismissal of an AFH cannot revive a previously issued Memorandum. Upon the filing of an AFH with the Administrative Hearings Division, jurisdiction over the claim vests with AHD as a *de novo* action. Because 7 DCMR § 219.22 requires a party aggrieved by a Memorandum of Informal Conference to file a timely AFH lest the Memorandum become final by operation of law, this proviso (and the resulting practice that evolved thereunder) has no doubt led to a general misconception that an AFH constitutes, in effect, an appeal from the proceedings before OWC. Indeed, this appears to be a major (albeit unstated) fallacy in *Boucary Sacko* leading to the Director's conclusion therein that the voluntary dismissal of the AFH reinvested jurisdiction over the matter with the previously presiding claims examiner. However, such is clearly *not* the case. A claim, once filed in the form of an AFH with the Administrative Hearings Division, regardless of whether filed by the employee or the employer, constitutes a *de novo* proceeding before AHD in disregard of the prior proceedings before OWC and any disposition recommended by the claims examiner as a result thereof. *See* 7 DCMR § 223.1 *et seq*.[9] *See also, Aviles v. George Hyman Construction Co.*, H&AS No. 97-54,

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or claims addressed before OWC. *See Oubre v. D.C. Dept. of Employment Services,* 630 A.2d 699, 703 (D.C. 1993) (noting that neither doctrine applies where the agency does not act in a judicial capacity).

[9] Compare, on the other hand, 7 DCMR § 219.22, which expressly provides for agency appellate review of OWC Final Orders to the Compensation Review Board (formerly the Office of the Director) in limited circumstances.

OWC No. 288039 (June 16, 1997), and *Hansborough v. WMATA*, H&AS No. 86-601A, OWC No. 088262 (June 2, 1988) (disallowing introduction into evidence of the Memorandum of Informal Conference, citing 7 DCMR § 223.3).

Because an Application for Formal Hearing constitutes, from a legal perspective, an original action before AHD, an ALJ's subsequent dismissal of the AFH (whether upon the voluntary motion of the party filing the AFH, or upon motion of the opposing party, or by the stipulation and mutual consent of both parties) is to be treated as would a similar dismissal by a court of original jurisdiction. Certainly, there are instances under the Act where a remand to OWC is authorized which would invest OWC with renewed jurisdiction over the claim -- as where there has been a settlement reached by the parties, 7 DCMR § 226.1 *et seq*., or where the parties jointly wish to return the matter to mediation, 7 DCMR § 219.2.[10] However, in the absence of such particularized authorization dictating referral of the claim for further proceedings before OWC, where dismissal of an AFH is sought the presiding ALJ's authority, just as that of a trial judge, is limited to issuing a dismissal of the AFH either *with* or *without* prejudice.[11]

For the foregoing reasons, the Board rejects the decision in *Boucary Sacko*,[12] holding instead that in the absence of express authority requiring or otherwise permitting remand to OWC, the dismissal of an Application for Formal Hearing neither reinvests OWC with jurisdiction over a previously filed claim nor reinvests a claims examiner with authority to enter a Final Order dispositive of the parties' rights based upon a previously issued Memorandum of Informal Conference.

Finally, before addressing the issue raised by Judge Russell in his dissent, we express the assurance that our rejection of *Boucary Sacko* does not leave the Agency without remedy to guard against the underlying concern that led to the Director's holding therein. Inherent in an ALJ's discretionary authority to determine whether a dismissal is warranted *with* or *without* prejudice lies the ability of the ALJ to guard against any abuse of the claims process designed to thwart the award of benefits under the Act. As discussed below, should an ALJ be confronted with the concern the Director sought to address in *Boucary Sacko*, the Agency is not without recourse. A presiding ALJ has available within his inherent authority a well-recognized sanction against abuse of the claims process: that of dismissal *with* prejudice.

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[10] Even so, in such instances the remand does not reinvest OWC with jurisdiction over the *prior* proceeding. Rather, the consequence of such remand is to invest OWC with jurisdiction and authority to address the matter then at hand (albeit, of course, OWC may, for administrative and case record keeping purposes, choose to rely upon the same OWC case number ascribed to the claim in the earlier proceeding).

[11] Of course, where a party seeks dismissal because the party is not prepared to proceed to Formal Hearing, the ALJ has the prescribed option, upon good cause being shown, of instead continuing the Formal Hearing for a reasonable period of time. 7 DCMR § 220.5.

[12] As a prior decision of the Director, *Boucary Sacko* constitutes persuasive authority only. 7 DCMR § 255.7. *See Leroy Palmer v. George Washington University Medical Cntr.*, CRB No. 02-64, OHA No. 01-61C (January 23, 2006).

In the event of a dismissal *without* prejudice, either party is free, absent a timeliness issue,[13] to refile an Application for Formal Hearing with AHD. A party may also file a new application for an informal conference with OWC -- which would constitute a new claim before OWC rather than reinstitution of the party's original claim. On the other hand, where a dismissal *with* prejudice is ordered against the party filing the AFH, the claim embodied therein is effectively resolved on its merits. As the D.C. Court of Appeals has held, a dismissal *with* prejudice is "the functional equivalent of a final decision on the merits, thus effectively closing [the] case. Such a dismissal is a final judgment with the preclusive effect of *res judicata* 'not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit.'" *Thornton v. Norwest Bank of Minnesota*, 860 A.2d 838, 841 (DC 2004). *Accord, Waters et al. v Castillo*, 755 A.2d 478, 481 (DC 2000); *Wilson v. Hart*, 829 A.2d 511, 515 (DC 2003); *Molovinsky v. Monterrey Cooperative*, 689 A.2d 531, 533 n.1 (DC 1996); *District of Columbia v. Morris*, 367 A.2d 571, 573 n.4 (DC 1976).

Accordingly, where it is the employer who has filed the AFH and against whom the order of dismissal with prejudice is subsequently issued, the claimant will be deemed to have prevailed on the merits of his or her claim as presented. In similar fashion, where it is the claimant who files the AFH that is subsequently dismissed with prejudice, the employer will be deemed the prevailing party with respect to the merits of the claim presented.[14] In either event, of course, the losing party (*i.e*. the party whose rights have been adversely affected by the dismissal order) would not necessarily be left remediless. As with the any compensation order issued by an ALJ, the losing party could appeal the dismissal order to the CRB. Additionally, the losing party could seek modification of the dismissal order, to the extent that it operates as a compensation order, pursuant to D.C. Official Code §32-1524 (assuming the conditions set forth therein are met).[15]

Finally, we turn to the matter raised by Judge Russell in his dissent, *i.e.*, whether there is legal authority for the Compensation Review Board to review and decide appeals presiding *en banc*.

Under the Workers' Compensation Act, the D.C. Council delegated to the Mayor broad authority to administer the Act, including rulemaking. *See, e.g.* D.C. Official Code §§ 32-1502(a), - 1520, -1522, -1529, -1530. In turn, the Mayor delegated his authority to the Director of the Department of Employment Services. Mayor's Order No. 82-126, 29 D.C. Reg. 2843 (July 2, 1982). *See Hughes v. D.C. Dept. of Employment Services*, 498 A.2d 567, 570 (DC 1985). This delegated authority formed the basis for DOES Administrative Policy Issuance No. 05-01, issued

[13] It is noted that in *Blanken v. D.C. Dept. of Employment Services*, 825 A.2d 894 (D.C. 2003), the Court of Appeals raised the prospect that a re-filed Application for Formal Hearing following dismissal of the original AFH could in certain circumstances be deemed untimely.

[14] Of course, due process requirements warrant that an order of dismissal *with prejudice* not issue in the absence of an Order to Show Cause affording the parties an opportunity to be heard prior to such dismissal.

[15] D.C. Official Code § 32-1524(a) provides for the review of a compensation decision "where there is reason to believe that a change of conditions has occurred which raises issues concerning: (1) the fact or the 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."

February 5, 2005, wherein the Director, in establishing the Compensation Review Board, expressly authorized *en banc* review when so directed by the Chairman of the CRB:

> . . . the Compensation Review Board shall sit, review appeals, and render decisions, and perform all other delegated and related functions, in panels of three Members as shall be assigned by the Chairperson [Chief Administrative Appeals Judge], unless the Chairperson specifically directs that an appeal or review will be decided by the full membership of the Board.

Administrative Policy Issuance No. 05-01, Section 5(e).

Pursuant to the foregoing, the Director issued regulations governing practice and procedure before the Compensation Review Board. *See* 7 DCMR §§ 118 and 250-271, D.C. Register Vol. 52 DCR 11092 (Dec. 23, 2005). Consistent with Administrative Policy Issuance No. 05-01, these regulations expressly provide for review by the full Board in certain instances, where so directed by the Chief Administrative Appeals Judge:

> The Chief Administrative Appeals Judge may also direct that an appeal or review by decided by the full membership of the Board as specified in section 255.8.

7 DCMR § 255.3.

> Where two or more Review Panels disagree concerning the resolution of an issue, the Chief Administrative Appeals Judge may direct that the issue be reviewed and resolved by the full Board sitting *en banc*. In such instance, official action of the full Board can be taken only on the concurring vote of at least three Board members.

7 DCMR § 255.8.

> Notwithstanding the filing of a request for reconsideration, the Chief Administrative Appeals Judge may, *sua sponte*, order reconsideration *en banc* of a Review Panel Decision and Order within ten (10) days of any Review Panel decision.

7 DCMR § 268.6.

Administrative regulations that are validly promulgated pursuant to statutory authority, as in the instant case, have the force and effect of statutes. *Dankman v. D.C. Board of Elections and Ethics*, 443 A.2d 507, 513 (DC 1981) (*en banc*). *Accord, J&C Associates v. D.C. Board of Appeals & Review*, 778 A.2d 296, 303 (DC 2001); *Davis et al. v. Moore et al.*, 772 A.2d 204, 216 (DC 2001); *Hutchinson v. District of Columbia*, 710 A.2d 227, 234 (DC 1998). As such, they are to be accorded controlling weight in the construction and refinement of the statute pursuant to which they were adopted. "Particularly where there is broad delegation of authority to an administrative agency, we must give deference to a reasonable construction of the regulatory statute made by the agency . . . . whether the agency construes and refines the statue

through rule making or adjudication." *Hughes, supra*; 498 A2d at 570 [citations omitted]. *Accord, Reichley v. D.C. Dept. of Employment Services,* 531 A.2d 244, 248 n.4 (DC 1987). *See also, United States v. Mead Corp*., 533 U.S. 218, 226-227 (2001); *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Consistent with the foregoing, the D.C. Court of Appeals has articulated the deference to be accorded an agency's interpretation of the statute it enforces:

> We must give great weight to any reasonable construction of a regulatory statute that has been adopted by the agency charged with its enforcement. . . . The interpretation of the agency is binding unless it is plainly erroneous or inconsistent with the enabling statute. . . . Consequently, we sustain the agency decision even in cases in which other, contrary, constructions may be equally as reasonable as the one adopted by the agency.

Lee v. D.C. Dept. of Employment Services, 509 A.2d 100, 102 (DC 1986) (citations omitted). *Accord, WMATA v. D.C. Dept. of Employment Services*, 683 A.2d 470, 473 (DC 1996).

As the Supreme Court has noted, deference to an agency's regulatory interpretation of a statute it enforces is particularly appropriate where the regulation seeks to clarify or resolve ambiguities in the statute. *Chevron,* 467 U.S. at 842-845. Admittedly the City Council's amendment to the D.C. Workers' Compensation Act establishing the Compensation Review Board is silent on the subject of CRB *en banc* review, as Judge Russell in his dissent notes. *See* D.C. Official Code § 32-1521.01. At the same time, the amendment in question is fraught with sufficient ambiguity that clarification by agency regulation on this particular matter was required. Having established a five-member Compensation Review Board, the provision adopted by the Council bestows upon the Board's Chairperson (and Chief Administrative Appeals Judge) the authority to create Review Panels from among the full membership of the Board with authority to "decide matters before it by majority vote." D.C. Official Code § 32-1521.01(b). Contrary to the assertion in the dissent, this proviso neither requires the disposition of appeals by three-member Review Panels, nor precludes disposition by the full membership of the Board. Since the language of the amendment does not *direct* the Chairperson to establish Review Panels for every appeal presented to the Board, presumably all appeals could be decided by the full membership of the Board in the absence of action by the Chairperson establishing the three-member panels.

Rather than leave to the Chairperson's discretion the matter of when Review Panels, as opposed to the entire Board membership, would be required to decide appeals filed with the CRB, the Agency sought to clarify this matter through promulgation of the afore-referenced regulations. By providing for *en banc* review, the Agency also resolved a matter the legislation unintentionally created by its authorization for appellate decisions by Review Panels. The Agency resolved the question of how it would reconcile conflicting rulings on the same subject that will inevitably result where appeals are initially decided by panels of less than the full membership of the Board. *See also* 7 DCMR § 255.6 ("A Review Panel decision with respect to an issue constitutes persuasive authority for and with respect to any subsequent Review Panel decision rendered addressing the same issue.")

By providing through the regulations for initial panel review of appeals filed with the CRB, followed in certain prescribed instances by *en banc* consideration, the Director made reasonable policy decisions clarifying ambiguities inherent in the Council's legislation. The decision-making process established through the Agency's implementing regulations affords maximum independence of each Review Panel over the case before it, in so doing permitting the law to develop to the fullest extent possible through the interpretations of the law afforded by multiple panels. At the same time, by providing for *en banc* consideration in prescribed situations, the Director has assured that conflicts and uncertainties in the law as it develops under the auspices of the multiple Review Panels are resolved by the full Board sitting *en banc*.

CONCLUSION

In the absence of express authority requiring or otherwise permitting remand to OWC, the dismissal of an Application for Formal Hearing neither reinvests OWC with jurisdiction over a claim previously filed with OWC nor reinvests the Claims Examiner with authority to enter a Final Order dispositive of the parties' rights based upon a previously issued Memorandum of Informal Conference.

ORDER

Pursuant to the foregoing, the respective Claims Examiner's Final Orders in *Gooden* and *Stone* are herewith VACATED. Petitioners' respective Applications for Review are REMANDED to OWC for further proceedings consistent with this Decision and Order.

ON BEHALF OF THE COMPENSATION REVIEW BOARD *EN BANC*:

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E. COOPER BROWN
Chief Administrative Appeals Judge

April 14, 2006
Date

Jeffrey P. Russell, *Administrative Appeals Judge, Dissenting*:

This matter is under consideration, not by a duly constituted three person Compensation Order Review Panel, but by all five Administrative Appeals Judges, sitting, according to the Decision and Order, "*en banc*". I have reviewed the statute creating the Compensation Order Review Board, which governs this proceeding, and have sought in vain to identify any basis therein under which matters on appeal are to be decided by majority vote of five judges, rather than the three judge panels that are readily recognizable under the Act. Granted, the regulations drafted (primarily by the Chief Administrative Appeals Judge, in a process commenced prior even to the

constitution of the CRB by the Agency Directive cited in footnote one, supra) purport to authorize this process, but it is a commonplace that an agency may not by regulation change or alter the fundamental terms of a legislative scheme. Regulations may fill in blanks left by vacancies in legislation; they may not amend the fundamental legislative scheme to satisfy the whim of the drafter of the regulations.

The legislative scheme allows that two Administrative Appeals Judges resolve the matter under review; the process used by the majority in this case substitutes three for two.

To those who feel that *en banc* review by five rather than three judges is a good idea, the remedy lies in having the legislature amend the appellate process to accommodate that view. As it is, I do not recognize the legal authority of this panel, and decline therefore to cast a vote on the merits of this appeal.

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JEFFREY P. RUSSELL
Administrative Appeals Judge