

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-027

**IVETTE RAMOS,
Claimant-Respondent,**

v.

**PARTS AUTHORITY SOUTHERN, LLC and
HARTFORD INSURANCE COMPANY CONSTRUCTION
Employer/Carrier-Petitioner**

Appeal from an January 22, 2015 Compensation Order by
Administrative Law Judge Douglas A. Seymour
AHD No. 12-414C, OWC No. 674723

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JUN 19 PM 2 33

Benjamin E. Douglas for Claimant
Chad A. Michael for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On October 7, 2010, Claimant, an office assistant, injured her neck when she lifted a case of soda and struck her head. Claimant came under the care of Dr. Mark Cohen, who continued to treat claimant until January 25, 2013. Based on Claimant securing alternative employment with other employers at reduced average weekly wages, Employer agreed at the formal hearing to pay temporary partial disability benefits from February 7, 2011 to July 12, 2012.

A full evidentiary hearing occurred on June 13, 2014. The claimant sought an award of permanent partial disability (PPD) benefits pursuant to the schedule set forth at D. C. Code, § 32-1508(a)(3) for a thirty seven (37%) permanent partial disability (PPD) of the right upper extremity and temporary partial disability (TPD) benefits from July 13, 2012 to the present and continuing. At the conclusion of the formal hearing, the Administrative Law Judge (ALJ) advised the parties that the record would remain open for ten calendar days to allow Claimant to supplement the record with a clarification of the amount of temporary partial disability owed.

On June 17, 2014, Claimant filed with the Administrative Hearing Division (AHD) "Claimant's Clarification of Temporary Partial Disability Owed and on June 18, 2014, Claimant filed "Claimant's Revised Clarification of Temporary Partial Disability Owed". Employer did not object to either of Claimant's filings. The ALJ who conducted the hearing left the agency without issuing a Compensation Order (CO) and the matter was re-assigned. Following the issuance of a Show Cause Order, neither party objected to another ALJ deciding the matter based on the record which closed on June 23, 2014.

A Compensation Order (CO) issued on January 22, 2015. Therein, an ALJ concluded Claimant's right upper extremity condition is not causally related to her October 7, 2010 work injury and denied the request for PPD benefits. The ALJ found Claimant had established entitlement to temporary total disability (TTD) benefits from June 14, 2012 to the present and continuing.

Employer timely appealed. Employer asserts that the ALJ did not have jurisdiction to order Employer/Insurer pay TTD benefits from June 14, 2012 to the present and continuing as Claimant never pursued TTD benefits. Employer further asserts that the finding of TTD is not supported by substantial evidence. Claimant opposed Employer's appeal, asserting the ALJ applied the law correctly and the ALJ has discretion to decide issues that are not raised by either party citing 7 DCMR § 221.3.

ISSUE ON APPEAL

Is the January 22, 2015 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS¹

We first shall discuss a procedural matter. Employer has submitted, in addition to its supporting Memorandum of Points and Authorities, 15 exhibits marked A through O. The CRB does not have the power to conduct additional fact finding, and "[n]o additional information shall be submitted by the claimant or other interested parties after the date of hearing, except under unusual circumstances as determined by the Mayor." D. C. Code § 32-1520(c).

The purpose underlying the requirement of "unusual circumstances" is "to prevent a hearing from being reopened simply for the purpose of introducing new or additional evidence when that

¹ The scope of review by the Compensation Review Board (CRB) and this Review Panel (Panel) as established by the Act and as contained in the governing regulations is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this panel are bound to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

evidence could have reasonably been presented at the hearing." *Charles P. Young Co. v. DOES*, 681 A.2d 451, 454 (D.C. 1996) In other words, reasonable grounds must exist for not introducing the evidence before the ALJ because the CRB does not have the power to accept additional evidence or to compel an ALJ to consider additional evidence unless:

- (a) that the additional evidence is material, and
- (b) that there existed reasonable grounds for the failure to present the evidence while the case was before the Administrative Hearings Division or the Office of Workers' Compensation (depending on which authority issued the compensation order from which appeal was taken).

Bennett v. DOES, 629 A.2d 28, 30 (D.C. 1993) citing *King v. DOES*, 560 A.2d 1067, 1073 (D.C. 1989).

Claimant has correctly asserted in her response brief that Employer repeatedly references a deposition transcript that was not admitted into the record by the original ALJ and Employer did not appeal the ALJ's decision to exclude the deposition transcript (E10). and consented to limited use of the deposition transcript for rebuttal. However, Claimant asserts Employer only referred to one page of the transcript during cross examination and Employer did not move to include either that page or the deposition transcript into the record. Claimant's Brief at 4.

Employer's exhibit package includes the deposition testimony which was excluded by the ALJ along with several exhibits that either were admitted into the record or are part of AHD's administrative file. Nevertheless, the Panel has reviewed the record created by the ALJ and has taken official notice of the AHD's administrative files; however, absent a showing by Employer that the documents attached to its Application for Review are material and could not reasonably have been presented to the ALJ except for unusual circumstances, the CRB has not reviewed the attached documents because it is not permitted to do so.

Neither party has challenged the ALJ's determination that Claimant's right upper extremity is not causally related to the injuries Claimant sustained on October 7, 2010 and this conclusion is accordingly affirmed.

In response to Employer's assignment of error that the ALJ improperly awarded TTD benefits, Claimant asserts the ALJ has discretion to decide issues whether or not they are raised by the parties. Claimant further argues that the ALJ's determination that she is temporarily and totally disabled is supported by substantial evidence.

Employer asserts that it agreed to pay temporary partial disability benefits only through June 13, 2012, and that at no time during the formal hearing did the claimant request temporary total disability benefits.

In addition, Employer references documents which the ALJ requested at the conclusion of the formal hearing which should have been made part of the record. Employer argues:

Not only do the Court Pleadings and the claimants June 2, 2014 deposition transcripts support that the claimant is not entitled to temporary total disability benefits, but also claimants counsels own documentation provided subsequent although the subsequent to the June 13, 2014 Formal Hearing. On June 17, 2014, claimants counsel filed a Memorandum entitled Claimant's Clarification of Temporary Partial Disability Owed. See Exhibit E. This document in fact argues that the claimant is entitled to temporary partial disability benefits post July 13, 2012 on an 'ongoing basis'." Exhibit E. Claimants counsel even filed a clarification memorandum on June 18, 2014 entitled Claimant's Revised Clarification of Temporary Partial Disability Owed. See Exhibit F. This document once again argues that the claimant is entitled to temporary partial disability benefits post June 18, 2012 on an 'ongoing basis'. Exhibit F.

Since June 18, 2014, claimant's counsel continues to seek the claimant's wages earned post June 18, 2014 from Nationwide Insurance and Securitas. See Exhibit G.

As a result of the pleadings, deposition transcripts, Memorandums by claimants counsel and subpoenas, it is clear that the claimant has never requested an Order on the issue of temporary total disability benefits. The Office of Hearings and Adjudications had no jurisdiction to resolve an issue that has never been requested or litigated. As such, this Compensation Order is not based on substantial evidence and it must be reversed.

Employer's Brief at 6.

We agree with Employer. The ALJ stated in the Claim for Relief section of the CO that "Claimant seeks the payment of temporary partial disability benefit from July 13, 2012 to the present and continuing" which is consistent with the Joint Pre-Hearing Statement filed by the parties. The JPHS also included a hand written notation that states "ER will voluntarily pay temporary partial disability benefits from 2/7/11 – 7/12/12." This notation is initialed CAM and BED which appear to be the initials of Claimant's and Employer's attorneys. Also initialed by CAM and BED are the dates listed in the Claim for Relief which was originally TPD from 2/7/2011 to date and continuing. Above the scratched out date (2/7/2012), 7/13/2012 is written.

Nevertheless, the ALJ utilized the burden shifting process set forth in *Logan v. DOES* 805 A.2d 237, 242-243 (D.C. 2002) and awarded TTD, concluding Employer did not meet its burden of showing availability of suitable alternative employment:

Having presented no evidence or testimony at the June 13, 2014 hearing that there was suitable alternative employment available to the claimant, the employer has failed to meet its burden under *Logan*. Because the employer has failed to rebut the presumption that the claimant was temporarily and totally disabled, I find that the claimant has been temporarily and totally disabled since June 14, 2012.

CO at 7.

The record does not explain, nor did the CO state why the ALJ decided to award a claim for relief that was not requested, nor is there any explanation why the CO awarded benefits beginning on June 14, 2012 as opposed to July 13, 2012, the date through which benefits were voluntarily paid. Further, this Panel finds the record does not support Claimant's contention that the conclusion that Claimant has been temporarily totally disabled is supported by substantial evidence. To the contrary, review of the hearing transcript reveals numerous references to Claimant's employment with other employers which led to the ALJ requesting clarification from Claimant post hearing of the wages she earned. As the CRB held in *Teklu v. Jury's Doyle Hotel*, CRB No. 08-016, AHD No. 05-241(January 23, 2008)(*Teklu*):

Pursuant to the Scheduling Order issued in proceedings before AHD, the parties are required to jointly execute and file in advance of the formal hearing a joint pre-hearing statement and stipulation identifying, *inter alia*, the issues to be presented and the claim for relief that is sought. Absent formal amendment to that documentation,² Employer had every reason in the instant case to expect that the ALJ would rule on the claim for relief as presented, and adjudicate only those issues identified by the parties in their stipulation and joint pre-hearing statement. In light of this well-established procedure, we find Employer assertion of prejudice well-founded.

Citing the D.C. Court of Appeals opinion in *Transportation Leasing v. DOES*, 690 A.2d 487 (D.C. 1997), the CRB held "The due process protection recognized by the court in *Transportation Leasing* stands as a bar not merely to the grant of relief that has not been requested, but as a bar to reaching and deciding the underlying issues giving rise to that relief where, as in the instant case, the lack of notice and opportunity to present evidence and argument addressing such issues results in prejudice to the opposing party." *Teklu, supra* at 7.

Accordingly, we must vacate the Compensation Order's determination that the *extent* of Claimant's disability was total, and remand the case to AHD for further proceedings consistent with this opinion. On remand the ALJ should determine the nature and extent of Claimant's disability, consistent with the established law. See *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986); *Logan, supra*.

² The Scheduling Order requires submission by the parties of the Joint Pre-Hearing Statement (JPHS) in advance of the formal hearing. Once signed and submitted, as the JPHS expressly states, the JPHS "may not be altered, changed or modified after submission to the Office of Hearings and Adjudication except by Order of the Administrative Law Judge", and all motions to amend the JPHS or the stipulation form, as the Scheduling Order further directs, must also be filed with AHD in advance of the formal hearing.

CONCLUSION AND ORDER

The Compensation Order herein appealed is AFFIRMED IN PART AND REVERSED AND REMANDED IN PART. The Compensation Order's conclusion that Claimant's right upper extremity is not causally related to the October 7, 2010 work injury is AFFIRMED. The Compensation Order's conclusion that Claimant is temporarily and totally disabled is VACATED and the matter REMANDED to AHD for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



LINDA F. JORY

Administrative Appeals Judge

June 19, 2015

DATE