

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

CRB 13-022

**ADESINA F. JAIYEOLA,
Claimant–Petitioner,**

v.

**DISTRICT OF COLUMBIA PUBLIC SERVICE COMMISSION,
Self-Insured Employer–Respondent.**

Appeal from a February 5, 2013 Compensation Order on Remand by
Administrative Law Judge Fred D. Carney, Jr.
OHA No. PBL 00-058B, DCP No. LT2-DPE000340

Harold L. Levi, Esquire, for the Claimant
Andrea G. Comentale, Esquire, for the Self-Insured Employer

Before: LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, HENRY W. MCCOY and
JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, for the Review Panel:

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review of the February 5, 2013, Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Department of Employment Services Hearings and Adjudication Section.¹ For the reasons stated we AFFIRM the ALJ's decision.

BACKGROUND

On April 20, 1998, the claimant, Adesina F. Jaiyeola, a safety officer for District of Columbia Public Service Commission (employer), sustained work-related injuries when the vehicle in which he was traveling was struck from behind by another vehicle. The employer initially accepted the claim and voluntarily paid the claimant workers' compensation benefits. The

¹ In the COR, the ALJ referred to the Hearings and Adjudication section as AHD (Administrative Hearings Division). For consistency, we also will utilize this designation.

employer issued a Notice of Determination on December 13, 1999 advising the claimant that it stopped voluntary payments, after it received a medical opinion from a doctor that said the claimant could return to work.

The claimant filed an Application for Formal Hearing (AFR) challenging this action and on June 21, 2000, was awarded reinstatement of his disability claim, restoration of sick and annual leave he used in connection with the April 28, 1998 accident and payment of all medical expenses causally related to that accident. *Jaiyeola v. D.C Public Service Commission*, OHA No. PBL 00-58, OBA No. 000420 (recommended decision adopted into Final Compensation Order on June 21, 2000).

In June 2001, the claimant settled a third party claim relating to the 1998 work accident, in which he received about \$133,000.00. No money has been paid to the employer as subrogation or reimbursement as a result of the settlement.

In October 2002, the employer issued a Notice of Intent to Reduce Disability Compensation in which it advised the claimant that his wage loss benefits would be reduced because a labor market survey showed the claimant was capable of earning wages that were less than his pre-injury wage. After his benefits were reduced, the claimant filed an AFR. The AFR was dismissed without prejudice on January 10, 2003.

On February 23, 2003, the employer notified the claimant that his reduced benefits would end because he had not reimbursed the employer after his third-party settlement. The claimant was advised that the employer was taking a credit for any future indemnity and medical benefits and that the claimant “was barred from receiving future compensation pending full reimbursement” of monies paid relative to the third party settlement.

Thereafter, the claimant filed an AFR that was heard on June 3, 2003. On August 13, 2004, the Assistant Director for Labor Standards adopted the ALJ’s findings in a Final Compensation Order and held that the employer’s benefit adjustment was not done in accordance with the law, that the employer was not obligated to reinstate the claimant to his former job², and that because

² At that time, D.C. Code § 1-624.45 contained language that provided an injured worker was entitled to reinstatement in his or her former position if disabled for more than 2 years. The full text of this now-repealed Code section stated:

(b) Under rules and regulations issued by the Mayor the department or agency which was the last employer shall:

(1) Immediately and unconditionally accord the employee, if the injury or disability has been overcome within 2 years after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the District of Columbia government, the right to resume his or her former, or an equivalent, position as well as all other attendant rights which the employee would have had or acquired in his or her former position had he or she not been injured or disabled, including the rights to tenure, promotion, and safeguards in reduction-in-force procedures; and (2) If the injury or disability is overcome within a period of more than 2 years after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing, the employee in his or her former or equivalent position within such department or agency, or within any other department or agency.

of the third party settlement, the claimant was liable to the employer for an overpayment. *Jaiyeola v. D.C Public Service Commission*, OHA No. PBL 00-005B, DCP No. LT2-DPE00340 (August 13, 2004).³

The claimant appealed. In its March 23, 2006 decision, the CRB referred to most of the ALJ's holdings but only discussed the ALJ's decision that the employer was not obligated to reinstate the claimant to his former position. The CRB did not address the merits of the appeal but instead granted the claimant's request to submit new evidence and remanded the case to the ALJ. *Jaiyeola v. D.C Public Service Commission*, CRB No. 08-084, OHA No. PBL 00-005B, DCP No. LT2-DPE00340 (March 23, 2006).

The ALJ, on remand, issued two orders with respect to submitting the new evidence. The claimant did not respond to either order. On April 20, 2010, the ALJ issued a decision that stated:

On March 4, 2010, the ALJ issued a Show Cause Order in which he reopened the record to allow Claimant to adduce the material new evidence [permitted by the CRB]. On March 16, 2010, the ALJ issued another Order instructing Claimant to submit the material new evidence. The Order also indicated that the record would close on March 31, 2010. To date, Claimant has not submitted the new evidence.

Therefore, I incorporate the findings and conclusions of law of the Final Compensation Order of August 13, 2004.

Jaiyeola v. D.C Public Service Commission, OHA No. PBL 00-005B, DCP No. LT2-DPE00340 (April 20, 2010).

On review, the CRB vacated and remanded the ALJ's decision because it was not sent to the claimant's last known address. *Jaiyeola v. D.C Public Service Commission*, CRB No. 11-010, OHA No. PBL 00-005B, DCP No. LT2-DPE00340 (May 6, 2011).

After the remand, the claimant submitted several documents that were accepted by the ALJ, as noted in the COR:

Claimant offered in evidence, records of payments from DCP,^[4] copies of documents and pleadings filed in the DC Superior Court, the Court of Appeals, and the US Bankruptcy Court, an internal memorandum from the Attorney

(c) Nothing in this provision shall exclude the responsibility of the employing agency to re-employ an employee in a less than full-duty status.

³ As the employer noted, some of the earlier decisions incorrectly identified the PBL number as 05B, when it should have been 058. We shall correct the PBL number for this decision but the citations shall use the PBL numbers as stated on earlier decisions.

⁴ DCP stands for the Disability Compensation Program, the governmental unit that administers the public sector workers' compensation program. DCP is now known as the Public Sector Workers' Compensation Program, or PSWCP.

General's Office, disability slips from Claimant's treating physician, and a print of the wage loss payments made by DCP to Claimant.

In the COR, the ALJ made several determinations. The ALJ, as he previously had, held the claimant was overpaid because of the June 2001 settlement, finding that the claimant received dual recovery for his damages resulting from the April 1998 work injury.

As to the dispute whether the claimant returned to work within two years, the ALJ made alternative findings with respect to this issue. The ALJ first held that since the employer had not made a final determination with respect to this matter: "AHD^[5] lacks jurisdiction to decide the issue of Claimant job retention."

The ALJ then determined that even if OHA had jurisdiction to decide this issue, the claimant would not prevail. The ALJ reasoned:

Claimant contends that the January 9, 2004 payment history shows that he did not receive any compensation benefits of any kind as a result of his April 20, 1998 injury prior to October 25, 2001. However, a careful reading of the January 9, 2004 payment history indicates Claimant was paid benefits pursuant to the August 13, 2004 Compensation Order. That Compensation Order contains language that indicates Claimant received some payments from DCP prior to the August 13, 2004 Compensation Order. The language reads as follows:

"In this instance there is no issue of law or fact that which is in dispute between the parties as no initial determination has been reached regarding the amount due or the amount of benefits claimant received thus far."

Therefore, it is determined that Claimant has not exhausted his administrative remedies and not presented evidence sufficient to establish at what date he began receiving benefits to calculate whether he recovered and returned to work within two years.⁶

⁵ Administrative Hearings Division, now referred to as Hearings and Adjudication or "OHA"

⁶ In his August 13, 2004 Recommended Decision that was adopted as a Final Compensation Order on the same day, the ALJ identified another reason why he would find the claimant was disabled for more than two years before he sought to return to work; the June 21, 2000, Final Compensation Order. In 2004, the ALJ said:

That order indicate [sic] that there was no dispute that claimant's benefits were accepted by the TPA. *Jaiyeola v. DC Public Service Commission*, OHA No. PBL 00-058, p.3 (June 21, 2000). As stated herein, that order granted claimant leave restoration and payment of related medical services. Therefore the weight of the evidence of record, as well as the administrative history of this case, indicate claimant's benefits began before February 2000, the date of the Final Order of Denial. It therefore follows that claimant's disability benefits began in excess of two years before he sought to return to work in January 2003. Having been disabled from work for more than 2 years, claimant is not entitled to return to his former position with all rights as provided by §1-624.45. (b)(1).

The ALJ also decided that the claimant could not now pursue his claim for reimbursement of certain medical expenses (a new motor vehicle, home improvements, travel abroad for the claimant and family members, and medical treatment received by the claimant while out of the country) because the employer had not made a determination on these claims.

The ALJ held:

I find Claimant has yet to seek authorization from the Disability Compensation Program (DCP) now referred to as the Public Sector Worker's (sic) Compensation Program (PSWCP) for his acquisition of a new motor vehicle, improvement to his home, travel abroad or the medical treatment he received abroad. I find as a result, no initial determination has been made regarding the reasonableness or necessity of these items by TPA.

Jaiyeola v. D.C. Public Service Commission, OHA No. PBL 00-058B, DCP No. LT2-DPE00340 (February 13, 2013).

The claimant timely filed for review of the COR, with the employer timely filing opposition.

DISCUSSION AND ANALYSIS⁷

On review the Claimant first argues that the ALJ erred by finding that AHD did not have jurisdiction to hear the reinstatement claim because DCP has not made a final determination as to whether the claimant is entitled to reinstatement to his former employment. We affirm the ALJ's decision.

It is now settled that a Final Determination by DCP is a prerequisite to AHD's adjudication of a request for benefits. That is to say, AHD does not have jurisdiction to determine a claim unless the employer has issued a determination denying liability for that claim.

In 2012, the CRB overruled *Tellish v. D.C. Public Schools*, CRB No. 07-001, OHA No. PBL 05-028A, DCP No. DCPS 007013 (February 16, 2007) and held that the plain language of D.C. Code §1-623.24 (b) (1) requires that the employer make a determination with respect to a claim before an injured worker may obtain a formal hearing. *Sisney v. DCPS*, CRB No. 08-200, OHA No. PBL08-066, DCP No. DCP007970 (July 2, 2012). Since *Sisney*, the CRB consistently has held that a notice of determination is a prerequisite for AHD to have authority to hold a formal hearing: *Downing v D.C. Public Schools*, CRB No. 12-081, AHD No. PBL 11-015, DCP No. 30090824958-0001(August 3, 2012), *Brooks v. DCDMH*, CRB No. 10-062, OHA No. PBL 96-065B, DCP No. 7610100001199-0016 (August 16, 2012), *Newby v. DCPS*, CRB No 10-162, OHA No. PBL 01-064D, DCP No. LT-PARK001712 (September 11, 2012), *Freeman-Cunningham v. D.C. Dept. of Transportation*, CRB 12-104, AHD PBL No. 11-022A, OWC No.

⁷ The CRB reviews a Compensation Order to determine whether the factual findings are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB will affirm 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

30110173190-0001 (September 19, 2012, *Jackson v. D.C. Housing Authority*, CRB 12-104, AHD PBL No. 11-022A, OWC No. 30110173190-0001 (November 11, 2012), *Bonds. v. D.C. Dep't of Corrections*, CRB No. 12-038, AHD No. PBL08-061D, DCP No. 300903255759-001 (December 6, 2012) and *Buitrago v. D.C. Health HIV/AIDS Administration*, CRB No. 12-076, AHD No. PBL10-032C, DCP No. 761010-006-0001 (March 20, 2013).

Here, the claimant does not dispute that DCP has not made a determination with respect to his retention rights under former Code §1-624.45. Rather, the claimant at page 8 of his memorandum argues:

The CRB has held since 2004 that the matter of Petitioner's retention rights under former D.C. Code Section 1-624.45 is ripe for determination and it has repeatedly directed OHA to make that determination based on the record inclusive of Petitioner's workers' compensation as finally admitted over Employer's objection.

We disagree with the claimant's argument for several reasons. Our previous decisions in this case did not hold that AHD has jurisdiction to hear this matter even though there has been no final determination by DCP. That issue is not discussed in the previous CRB decisions or in the earlier appellate decisions because that issue was not raised as a defense until the most recent COR was under consideration by the ALJ.

Receipt of a final determination is a jurisdictional requirement for AHD to hear a claim. Jurisdiction may not be waived and can be raised at any time. Therefore, the employer may raise this defense now.

We recognize that much of this claim was litigated post-*Tellish* and pre-*Sisney*. However, this case was still in litigation when *Sisney* was decided. Therefore the jurisdictional failure to receive a final determination can legitimately be raised now.

Because DCP has not issued a final determination on this matter, we affirm the ALJ's decisions that AHD does not have jurisdiction to consider the claim for job retention.

For the identical reason, we affirm the determination that AHD does not have authority to consider the claims for reimbursement of certain medical treatments and expenses.⁸ The ALJ correctly held that DCP must first issue a notice of determination.

The remaining issue concerns the undisputed fact that the claimant received a \$133,000 net recovery from his third-party action and did not reimburse the employer.

The employer argues that this issue is not before the CRB because it was not addressed in the CRB's March 23, 2006 Decision and Order. We disagree with the employer. The claimant's 2006 Memorandum of Points and Authorities in Support of Petition for Review identified this

⁸ The ALJ denied these in the August 13, 2004 Recommended Decision that was adopted as a Final Compensation Order. Although the claimant appealed the Final Compensation Order, the CRB's 2006 decision failed to identify this decision by the ALJ.

issue as one of the issues for which review was sought. Like the claim for reimbursement of medical treatment just discussed, this issue was appealed by the claimant but not decided by the CRB in 2006.

Moreover, the ALJ's April 20, 2010, Compensation Order on Remand, issued in response to the March 23, 2006 Decision and Order, restated the ALJ's determination that "Claimant received dual recovery for his damages resulting from the April 1998 work injury." Similarly, the ALJ's February 5, 2013, COR written in response to our most recent Decision and Remand Order, made this determination. We find the issue is before us.

D.C. Code § 1-623.32, titled "Adjustment after recovery from third person" states:

If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the District of Columbia government to pay damages, and a beneficiary entitled to compensation from the District of Columbia government for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by him or her in his or her behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the District of Columbia government the amount of compensation paid by the District of Columbia government and credit any surplus on future payments of compensation payable to him or her for the same injury. No court, insurer, attorney or other person shall pay or distribute to the beneficiary or his or her designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the District of Columbia government. The amount refunded to the District of Columbia government shall be credited to the Employees' Compensation Fund. If compensation has not been paid to the beneficiary, he or she shall credit the money or property on compensation payable to him or her by the District of Columbia government for the same injury. However, the beneficiary is entitled to retain, as a minimum, at least one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted, and, in addition to this minimum and at the time of distribution, to retain an amount equivalent to a reasonable attorney's fee proportionate to the refund to the District of Columbia government.

Thus, in a case such as this, where the claimant obtained a monetary recovery from a third party for his work-related accident, the claimant is to repay the employer, less 20% and costs.

The claimant argues that the CRB should not require repayment pursuant to D.C. Code § 1-623.32 but rather asks "to have the overpayment issue resolved in accordance with the findings of the United States Bankruptcy Court."⁹ The CRB does not have authority to interpret the

⁹ Included with the documents submitted to the ALJ was an August 5, 2004, order from the United States Bankruptcy Court, District of Maryland, Greenbelt Division, Case No. 98-11940, Chapter 7, that ordered "The debtor(s) is/are granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code)." The document also contains a list of creditors. Several D.C. government agencies appear on this list but neither the

United States Bankruptcy Code. Therefore, the CRB is not the appropriate forum to decide whether the claimant's bankruptcy discharged his responsibility to repay the employer under with D.C. Code § 1-623.32.

CONCLUSION AND ORDER

The ALJ's rulings that AHD lacks jurisdiction to hear the issues of claimant's job retention and reimbursement of medical expenses and his finding that the employer is entitled to repayment pursuant to D.C. Code § 1-623.32 are AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Lawrence D. Tarr

LAWRENCE D. TARR

Chief Administrative Appeals Judge

July 26, 2013

DATE

employer nor DCP appears on this list. In light of our determination, we need not decide if the bankruptcy action discharged the claimant's debt under D.C. Code § 1- 623.32.