GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-084

JAMES HARRISON,
Claimant–Respondent/Cross-Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Employer-Petitioner/Cross-Respondent.

Appeal from a May 26, 2016 Amended Compensation Order
by Administrative Law Judge Gwenlynn D'Souza
AHD No. PBL 16-002, DCP No. 0468-WC-00041

(Decided October 20, 2016)

Robert Taylor for Claimant-Respondent/Cross-Petitioner
Milena Mikailova for Employer-Petitioner/Cross-Respondent

Before JEFFREY P. RUSSELL, HEATHER C. LESLIE, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND PARTIAL REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

James Harrison ("Claimant") was injured on August 3, 1998, while employed by the District of Columbia Department of Corrections ("Employer"). His claim for disability compensation under the District of Columbia Comprehensive Merit Personnel Act, D.C. Code § 1-623.01, *et seq.* (the "Act") was accepted by Employer, and Claimant has been receiving disability compensation and medical care for the work injuries since the date of the injury.

Over the course of the approximately 16 years that Claimant has been receiving disability compensation, the work-related disability provisions of the Act have been administered by numerous different internal and third-party entities. At the time that the disputes involved in the instant matter came to fruition, the Act was, and continues to be, administered by the District of Columbia Office of Risk Management ("ORM") under the umbrella program title the "Public Sector Workers' Compensation Program" (" PSWCP" or the Program").

On January 24, 2007, Claimant's benefit check was significantly reduced from what it had been prior thereto. On March 8, 2007, Claimant sent to the Program a fax stating "I feel that the [disability check] is not being adjusted properly."

On October 1, 2015, the Program issued a "Notice of Change in Unadjusted Benefits Rates" to Claimant which, as set forth in "Petitioner's Memorandum of Points and Authorities Supporting Petitioner's Application for Review" ("Employer's Brief"), was for the purpose of:

> ... informing him that he was entitled to an upward modification of his unadjusted benefits rate. According to the Notice, the upward modification incorporated a correction to Claimant's biweekly rate and previously omitted night differential, overtime pay, and cost-of-living adjustments (COLA).[1] Prior to the issuance of this Notice, Claimant never filed a cause of action to recover any additional payments allegedly due to him despite the availability of a sufficient remedy.[2]
>
> Additionally, the Notice and the Program had issued a payment to Claimant in the amount of $95,056.43. This sum reflected retroactive payments owed to Claimant after the application of the aforementioned adjustments to his unadjusted benefits rate for the period from May 5, 2012 to August 22, 2015. The Program limited the retroactive payment to three (3) years prior to May 5, 2012, the date it determined Claimant was entitled to receive the adjustments, pursuant to D.C. Official Code § 12-301 [the general three (3) year statute of limitations for civil actions in the District of Columbia].[3] The Notice further explained that if Claimant disagreed with the Program's decision, he could either filed a request for reconsideration with the Office of Risk Management or a request for a hearing with the Office of Hearings and Adjudication ("OHA") within thirty (30) days of the date of the Notice. Consequently, Claimant filed a request for a hearing with OHA on October 19, 2015.
>
> [1]The new unadjusted rate was listed as $1,666.48.
> [2] Pursuant to Rule 21 of the Rules of the District of Columbia Court of Appeals, Claimant could have filed a petition for a writ of mandamus but failed to do so. Furthermore, Claimant should have filed a suit in the Superior Court to recover any payments that he believed were due him.
> [3] To compensate for its delay in issuing the Notice, the Program included in this sum the benefits owed to Claimant from May 5, 2015 to August 22, 2015 as well.

Employer's Brief at 2 (footnotes in original).

Although the matter was thereafter assigned to an Administrative Law Judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Office of Hearings and Adjudications ("OHA") within the District of Columbia Department of Employment Services ("DOES"), and although a scheduling order was issued, discovery undertaken, a Joint Prehearing Statement and Stipulation form and exhibits were filed, no formal hearing occurred.

Rather, the ALJ solicited briefs from the parties concerning the applicability of D.C. Code § 12-301, which were submitted on January 22, 2015 (from Employer) and January 29, 2016 (from Claimant).

On February 2, 2016, the ALJ issued an order finding that the general statute of limitations did not apply to workers' compensation or entitlement to benefits under the Act. A week later, the ALJ issued a new briefing schedule, pursuant to which the parties submitted: Employer's Brief on February, 22, 2016; Claimant's Response on March 7, 2016; Employer's Reply Brief on March 14, 2016, and Claimant's Surreply Brief on March 21, 2016.

On April 29, 2016, the ALJ issued a "Compensation Order" ("the CO"). In it the ALJ awarded an adjustment for underpayment beginning April 29, 1999, awarded interest at a 4% rate on accrued benefits, and granted Claimant adjustments in his compensation rate for raises given to D.C. government employees in Claimant's pre-injury job classification and grade on April 7, 2013, October 5, 2014 and October 4, 2015.

On May 13, 2016, Employer filed a "Motion for Clarification" seeking an amended compensation order that "(1) included the correct wage loss and biweekly unadjusted compensation rates for the time period after October 4, 2015; (2) clarifies that Claimant is entitled to 4% simple interest on accrued benefits; and (3) indicated the total amount of accrued benefits due to Claimant" and "in response, Claimant filed a Concurrence and Opposition in Part on May 19, 2016 arguing that compound rather than simple interest was appropriate." *See* Employer's Brief at 4.

On May 26, 2016, the ALJ issued an "Amended Compensation Order" (the "ACO") replacing the CO and addressing the issues raised in the Motion for Clarification and Claimant's response.

THE AMENDED COMPENSATION ORDER

In the ACO, the ALJ ruled that:

(I) The general statute of limitations in D.C. Code § 12-301 (8) does not apply to claims under the Act, which has its own thirty (30) day statute of limitations at D.C. Code § 1-623.34 (f), which provides:

> A claimant who is not satisfied with a decision under subsection (d) of this section may, within 30 days after the issuance of a decision, request a hearing on the claim before a Department of Employment Services Disability Compensation Administrative Law Judge under subsection (b) of this section.

ACO at 7.

(II) The provision establishing an augmented compensation rate for claimants with dependents does not apply to Claimant because under the 1995 amendments to § 1-624.10 (a-1) of the Act, the definition of "dependents" was changed so as to exclude a spouse for employees hired after

December 31, 1979 and who made a claim under the Act after December 29, 1994, limiting that class of persons to:

> ...the natural issue of the employee or minor legally adopted by the employee prior to the injury who is: (1) under 18 years of age and dependent upon the employee for support; (2) Over 18 years of age and incapable of self-support because of physical or mental disability.

ACO at 8.

(III) Claimant was entitled to upward adjustments in his compensation rate as a result of government-wide salary increases to employees in Claimant's job category, grade, and step that went into effect April 7, 2013, October 5, 2013, and October 4, 2015, all in the amount of 3%. ACO at 9 – 10.

(IV) Claimant is entitled to 4% interest on accrued benefits (i.e., pre-judgment interest) calculated at a compound rather than simple interest rate, citing D.C. Code § 28-3302 for the rate, recognizing *Rastall v. CXS*, 679 A.2d 46 (D.C. 1997) for the general principle that absent a contract to the contrary, "interest" is calculated on a simple interest basis, but deciding pursuant to *Burke v. Groover, Christie & Merritt*, 26 A.3d 292 (D.C. 2011) that the ALJ had discretion to award a compounding of interest, and so awarded compound rather than simple interest. ACO at 10.

(V) Claimant is not entitled to post-judgment interest, reasoning that D.C. Code § 1-623.24 (b) provides a separate, adequate non-interest based provision for obtaining additional compensation in the event that payments are not timely following an award. ACO at 23.

(VI) DOES lacks the authority to order payment of an award, citing *Linnin v. D.C. Public Schools*, CRB No. 15-111 (November 23, 2015) which states that "Enforcement of awards is a matter left to the judicial branch in the nature of imposition of a lien in [the] Superior Court [of the District of Columbia]." ACO at 23 – 24.

(VII) DOES lacks authority to adjudicate the reasonableness and necessity of certain claimed medical care because the matter had not been subjected to the Utilization Review (UR) procedures established in D.C. Code § 1-623.23 and 7 DCMR 128.18, and because enforcement of awards and review of UR decisions are within the jurisdiction of the Superior Court. ACO at 24.

PETITIONER'S APPLICATION FOR REVIEW

On June 27, 2016, Employer filed "Petitioner's Application for Review of Amended Compensation Order" and a memorandum in support thereof ("Employer's Brief"). Employer raises four general arguments, each of which it maintains require that the ACO be vacated. Before addressing these arguments, we shall address a comment contained in Employer's Brief, but which is not addressed substantively in any identified Argument.

In the "Background" portion of the brief, Employer asserts:

> ... [the ALJ] issued an Amended Compensation Order on May 26, 2016, which corrected Claimant's biweekly T[emporary] T[otal] D[isability] payment and specified Claimant is entitled to 4% compound interest on accrued benefits. Accordingly [the ALJ] awarded Claimant $233,255.94 and biweekly TTD payment in the amount of $1,717.85 from the present and continuing. *Despite numerous attempts, the Program has been unable to replicate [the ALJ's] calculations based on information provided in the CO and believes them to be inaccurate.*

Employer's Brief at 4 (emphasis added).

Employer does not discuss which of the two figures in the quote it believes to be inaccurate. The portion of the ACO discussing the $1,717.85 figure is included in the discussion titled "3. Cost-of-Living Increases". The specific place where the figure is determined is page 10, and is found in an untitled chart as the "Biweekly Unadjusted Compensation Rates" for "FY 2015 Post October 4, 2015". The paragraph preceding the chart purports to identify the record-based sources of the numerical bases for the chart's contents, and to describe how they were calculated.

The specific place in the ACO where the $233,255.94 figure is determined is the "Balance" corresponding to May 15, 2016 on page 23 of the ACO, and is the final tally of a 12 page chart purporting to represent on a month-by-month basis, commencing June 6, 1999, the amount of accrued unpaid benefits and accrued compound interest on those benefits, yielding a total figure the ALJ calculates was due and owing, including compound interest, as of 11 days prior to the issuance of the ACO. On page 10, in the paragraph preceding the chart, the ALJ purports to explain the methodology used to calculate the figure, including identifying the source of the "inputs" and the particular spreadsheet software employed to calculate the figure (Excel).

Nowhere does Employer identify in what way or for what reason it deems the figures to be "inaccurate". Most notably, Employer fails to identify any theory upon which the numerical findings are unsupported by record evidence, and provides no independent calculation of its own, proffers no alternative methodology for what it contends is a proper determination of the figure, and does not specify if or to what extent the claimed inaccuracy is prejudicial to Employer.

We don't have any way to assess the merits or effect of Employer's isolated comment. As the CRB has noted before, ""Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Enders v. District of Columbia*, 4 A.3d 457, 471 n. 21 (D.C. 2010) quoting *McFarland v. George Washington University*, 935 A.2d 337, 351 (D.C. 2007); *see also Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993) (arguments raised but not argued in briefing are treated as waived)." *Nocket v. Lockheed Martin*, CRB No. 15-171, at 4 n.1 (April 4, 2016).

Accordingly, we will not consider further whether the calculations of the ALJ are arithmetically correct or premised upon inaccurate inputs. We accept that, to the extent that the ALJ's

reasoning concerning the legal outcome of the issues in dispute is in accordance with the law, specific figures in the ACO are supported by substantial evidence.

As a final preliminary matter, although Employer challenges the assessment of compound interest as opposed to simple interest on accrued benefits, it does not challenge the legitimacy of the award of interest on accrued benefits generally. We only point this out because Employer has raised such challenges in the past, but has not in this case, and the matter has recently been settled by the District of Columbia Court of Appeals ("DCCA") in favor of interest awards, in *D.C. Public Schools v. DOES*, 123 A3d. 947 (D.C. 2015), affirming the CRB's decision in *Mitchell v. D.C. Public Schools,* CRB No. 11-007 (October 5, 2011).

PETITIONER'S ARGUMENTS AND ANALYSIS

Argument I. *DOES lacks jurisdiction to review a determination by the PSWCP concerning adjustments of compensation rates.*

Employer states this first argument as follows:

> Chapter XXIII of the District of Columbia Government Comprehensive Merit Personnel Act confers jurisdiction on DOES over three distinct types of decisions; (1) utilization review; (2) initial acceptances or denials of claims for workers' compensation benefits; and (3) modifications of compensation awards based on changed condition. *See* D.C. Official Code § 1-623.01 *et seq.*

Except for the single citation to the Act as a whole, this assertion is unsupported by reference to any specific statutory provision or decisional authority from either the CRB or the DCCA.

While it is true that the Act specifically grants the right to have UR disputes "resolved by the Mayor upon application for a hearing", and that "The decision of the Mayor may be reviewed by the Superior Court of the District of Columbia" D.C. Code § 1-623.23(a)(4), the statute does not specify where the hearing is to be held, i.e., before whom.

Although we have no difficulty accepting Employer's assertion that this provision confers jurisdiction upon DOES to conduct formal hearings in UR cases, since "decisions of the Mayor [related to the UR process] may be reviewed by the Superior Court of the District of Columbia", and not the CRB, we have no authority to consider that question one way or the other. That is, once a DOES ALJ issues a decision relating to a UR dispute, that decision will never properly come before the CRB, since the Act bestows review of UR decisions upon the Superior Court.

There are, however, other bases (that is, other than the UR provisions) upon which DOES obtains jurisdiction over disputes arising under the Act, and these are found generally in D.C. Code § 1-623.24.

The first is found at subsection (2) and deals with a limitation on the Program recouping overpayments from a claimant until after "all administrative remedies to the Department of Employment Services have been exhausted under subsection (b) of this section [the formal

hearing process before an ALJ in DOES] and under § 1-623.28 [the internal Agency review process over ALJ decisions under the Act.]"

While neither of these provisions is directly related to the case before us, they are instructive inasmuch as they demonstrate that DOES ALJ's have jurisdiction over determinations concerning matters other than those three posited by Employer in this appeal. And just as important, "recoupment" proceedings clearly can involve matters relating after-the-fact adjustments to what a claimant should have received, and what the claimant actually received, situations highly analogous to the facts in this case. Determinations about whether there has been an overpayment, the amount thereof, the reasons therefor, whether a claimant is at fault in the rather obscure manner in which "fault" is defined by the overpayment recoupment provisions of D.C. Code § 1-623.29 are all part of the recoupment adjudication the Act assumes is within the jurisdiction of DOES.

A second set of jurisdictional references is inferable from the following:

> (b)(1) Before review under § 1-623.28(a) [the internal DOES process for review of ALJ decisions following formal hearings], a claimant for compensation not satisfied with a decision of the Mayor or his designee [in this instance, the Program] under subsection (a) of this section [the determination of the Program as to finding facts and making an award for or against compensation under the Act] is entitled, on request within 30 days after the date of issuance of the decision, to a hearing before a Department of Employment Services Administrative Law Judge. At the hearing, the claimant and the Attorney General are entitled to present evidence. Within 30 days after the hearing, the Mayor or his or her designee [in this instance, the DOES ALJ] shall notify the claimant, the Attorney General, and the Office of Personnel in writing of his or her decision and any *modifications of the award* [of the Program] he or she may make and the basis of the decision.
>
> (b)(2) In conducting the hearing, the representative of the Mayor [in this instance, the DOES ALJ] is not bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, or by the provisions of the District of Columbia Administrative Procedure Act, except as provided by this subchapter, but may conduct the hearing in such a way as *to best ascertain the rights of the claimant.* For this purpose, he or she shall receive such evidence as the claimant adduces and such other evidence as he or she determines necessary or useful in evaluating the claim.

D.C. Code § 1-623.24 (b)(1) and (2) (bracketed material supplied, italics added).[1]

What is clear is that the Act at least initially bestows upon the ALJ jurisdiction to adjudicate all aspects of a claim that are first decided by the Program. Nothing in this language limits the

[1] This provision is rather convoluted, and suffers from the unfortunate assignment of different meanings to "the Mayor" and "the Mayor or his or her designee" in multiple contexts, in some cases meaning the Program, and in others meaning the DOES ALJ.

ALJ's authority over any subject matter that the Program has first had an opportunity in which to issue a decision. Nothing in this grant of authority limits DOES from considering any and all aspects of a claim, once the Program has issued an award concerning that aspect of the claim.

The "determination of the Program as to finding facts and making an award for or against compensation under the Act" (§ 1-623.24 (a)) is a wide undertaking, involving not just resolving questions of compensability generally, but also involving the degree of disability and compensation payable for that disability, the extent of an injury as a medical matter, the need for medical care to treat the work injury, the timeliness of notification by a claimant to the employer of the injury, and many more potential areas of contest.

It is incorrect to assert, as implied by Employer in this appeal, that DOES lacks jurisdiction over any specific "subject" related to claims under the Act; it has such jurisdiction so long as it pertains to a dispute under the Act that the Program has first rendered a determination.

Lastly, although conceding that DOES has jurisdiction to review a "modification" of an award, Employer argues that DOES lacks jurisdiction over disputes concerning determinations made by the Program to increase a claimant's compensation rate when it discovers an error that has persisted over the years, and voluntarily corrects it, because in its view, this is not a "modification" of an award. Employer's rationale for this position is that the modification statute provides that an award may be modified based upon a "change of condition", and that detecting and correcting an error in calculating the compensation rate does not involve a "change in condition".

As Employer notes, the Act specifically bestows jurisdiction upon DOES ALJs to review Program decisions regarding changed conditions. D.C. Code § 1-623.24 reads in pertinent part:

> (d)(1) The Mayor may modify an award of compensation if the Mayor or his or her designee [in this instance, the Program] has reason to believe a change of condition has occurred. The modification shall be made in accordance with the standards and procedures as follows:
>
> (A) The Mayor [in this instance, the Program] shall provide written notice to the claimant of the proposed modifications with the supportive documentation relied upon for the modification;
>
> (B) The claimant shall have at least 30 days to provide the Mayor [in this instance, the Program] written information as to why the proposed modification is not justified; and
>
> (C) The Mayor [in this instance, the Program] shall conduct a full review of the reasons for the proposed modification and the arguments and information provided by the claimant.
>
> (2) If the Mayor [in this instance, the Program] determines that modification of the award is required, the Mayor shall provide written notice to the claimant of

the modification, including the reasons for the modification and the claimant's right to seek review of the decision under subsection (b) of this section [which, as is discussed above, is the provision affording a claimant the right to a formal hearing before a DOES ALJ, which ALJ is also referred to in that provision as "the Mayor or his or her designee"].

* * *

(4) An Award for compensation may not be modified *because of a change to the claimant's condition* unless:

(A) The disability for which compensation has ceased or lessened;

(B) The disabling condition is no longer causally related to the employment;

(C) The claimant's condition has changed from a total disability to a partial disability;

(D) The employee has been released to return to work in a modified or light duty basis;

(E) The Mayor or his designee determines based upon strong compelling evidence that the initial decision was in error.

(e) The Mayor shall provide claimant and his or her attorney with access to the claimant's file within 5 business days after a request to view the file is made. The claimant shall be provided, upon request, with one set of copies of the documents in the file.

(f) A claimant who is not satisfied with a decision under subsection (d) of this section [the subsection which deals, in sub-subsection (d)(1), with "a change in condition", and in sub-subsection (d)(4), with a "*change of claimant's condition*"] may, within 30 days after the issuance of a decision, request a hearing on the claim before a Department of Employment Services Disability Compensation Administrative Law Judge under subsection (b) of this section.

(emphasis added).

This provision describes two instances where a hearing before a DOES ALJ may be obtained to modify an existing compensation award: under (d)(1) when the Program "has reason to believe a change of condition has occurred", without referring to the change being a change in a claimant's condition; and under (d)(4) prohibiting modification based upon *a change in claimant's condition* except in five enumerated instances.

Employer argues that the modification provisions only apply where there has been a "change in a claimant's condition", and that such a change must be an improvement of that condition given

the first four of the five enumerated circumstances in sub-subsection (4), or a "compelling" showing that the award was issued in error.

We disagree.

First, the provision discusses two distinct circumstances, either of which might cause the Program to modify an award, the first being a "change in conditions", which could be a change in *any* relevant fact or circumstance concerning what a claimant is owed under the Act, and a subset of circumstances in which, where the change in circumstances relate to a claimant's "condition", in which circumstances the provision limits the authority to modify the compensation award to one of four changes in the claimant, or a finding of error in issuing the initial award.

While Employer would argue that these are merely two provisions envisioning the same preconditions, we disagree. A "change of condition" need not be a positive change in a claimant's physical capacity. It could be, for example, the worsening of that capacity, from partial to worse, or total incapacity, or the passage of time and a lack of improvement leading to a change in the nature of a disability from temporary to permanent. Or, it could be as in this case, a change in the underlying manner in which a compensation rate is calculated. The changed condition referred to in the first reference above is decidedly not limited to a medical or functional improvement. If it were, there would be no need for the second statutory reference prohibiting a modification based upon such a medical or functional improvement except in one of four enumerated circumstances.

Employer in its brief asserts that, under *Lightfoot v. District of Columbia*, 448 F.3d 392 (D.C. Cir. 2006). "a modification of benefits due to a change in condition is fundamentally different from a *correction* of benefits based on an administrative error" because the term "change of condition", the court wrote "obviously means a reduction or elimination of the condition that caused the disability." Employer's Brief at 7, (emphasis in original) quoting *Lightfoot* at 394.

The actual language of the court in context is as follows:

> Plaintiffs challenge the procedural adequacy of the District of Columbia's employee disability compensation program (governed by Title 23 of the District of Columbia Government Comprehensive Merit Personnel Act (CMPA) of 1978) specifically, the circumstances under which class members lose benefits. Under the CMPA, District employees who are injured in the performance of their duties are entitled to monetary compensation, medical services and appliances, and vocational rehabilitation. The compensation levels depend on whether an employee's disability is partial or total, and is further based on a statutory schedule. After an employee is determined to be disabled, "[i]f the Mayor or his or designee has reason to believe a change of condition has occurred, the Mayor or his or her designee may modify the award of compensation." (Emphasis added). *For purposes relevant to this suit*, a "change of condition" obviously means a reduction or elimination of the condition that caused the disability, which of course is the governing statutory standard.

Id. (emphasis added).

The court did not say the term "change of condition" means, at all times and in every context, a "reduction or elimination of the condition that caused the disability". Rather, the court made clear that this meaning was ascribed to that phrase "for purposes relevant to this suit". This reading of *Lightfoot* is entirely consistent with our discussion and analysis above, wherein "reduction or elimination of the condition that caused the disability" is a sub-set of a larger universe of potential condition changes, and a sub-set that has limitations attached that do not attach to other such potential condition changes.

And, just as importantly, Employer asserts but does not explain why "correction" of an error is not "a change in condition" regardless of whether the error relates to compensability *ab initio*, calculation of a proper rate of compensation, or any of the other manifold issues that could have initially been in dispute. Condition "A" could be the fact that a specific compensation rate was calculated. Then an error in the calculation is discovered, creating Condition "B", knowledge of the correct calculation. This change is, in any meaningful sense of the word, a change of condition.

Similarly, under the Act, the provisions mandating compensation rate increases as wage rates for similarly situated workers change over time are by their very nature changing the condition under which a particular claimant's entitlement under the Act is determined.

Also, "correction" of an inaccurately calculated compensation rate fits quite logically within the category of modifying the award because of "'compelling' showing that the award was issued in error". An award with an erroneously determined compensation rate has been at least partially "issued in error".

Accepting Employer's narrow view of what constitutes a change of condition would eliminate a broad category of cases, most notably cases of worsening physical or functional conditions, discovered factual or procedural errors, and changes in the underlying basis upon which a compensation rate is calculated, which would render impossible the ultimate goal of compensating injured workers in an amount commensurate with the levels contemplated under the Act.

Argument II. *The ALJ's finding that Claimant is entitled to retroactive payment of benefits since June 1999 is not in accordance with the applicable law.*

A. D.C. Official Code § 12-301 provides the applicable statute of limitations.

B. Each bi-weekly payment constitutes a new cause of action to which the three year statute of limitations applies.

The basis of this argument (and sub-arguments) is that relief for any complained-of error in calculation of Claimant's compensation rate should have been sought elsewhere and earlier, specifically, by Claimant either seeking a mandatory injunction via a writ of mandamus from the DCCA to correct the underpayments, or bringing a civil action for underpayment in the Superior Court, and doing so within the three years of each allegedly under-calculated payment so as not

to be barred by D.C. Code § 12-301 (8), the general three year civil liability statute of limitations in this jurisdiction.

Employer argues in this regard that "the ALJ's award of retroactive payments since June 20, 1999 has set an alarming precedent" because doing so "is essentially penalizing the Program for voluntarily issuing retroactive payments" for the period that Employer maintains it is still liable under the general statute of limitations, three years. Employer's Brief at 9.

Employer elaborates that:

> [S]uch an award [payments for underpayment back to June 20, 1999] undercuts the policy of the statute of limitations against stale claims. Collecting data to accurately calculate seventeen (17) years worth of retroactive payments in this case was very challenging considering numerous pay records were missing, the Program transitioned to a different provider of healthcare management services, and Claimant's filed was handled by a number of different individuals. Therefore, for both legal and equitable reasons, the ALJ's award of retroactive payments since June 20, 1999 must be reversed.

Employer's Brief at 10.

Rather than permit Claimant to recover the 17 years of underpayments, Employer argues that each bi-weekly payment that was underpaid constituted a separate, new cause of action which became barred by limitations after three years, claiming such a rule is "In accordance with the precedent set by the Court of Appeals", citing *Davis v. Young*, 412 A.2d 1187 (D.C. 1980). *Id.*, at 12.

Claimant counters that the ALJ's determination that D.C. Code § 12-301 (8) has no application to the facts of this case is correct, given that a judicial statute of limitations doesn't begin to run until an aggrieved plaintiff has exhausted all available administrative remedies. Claimant's Brief at 3.

Claimant asserts that "Employer points the CRB" to several cases to support its argument that the three year statute of limitations bars Claimant from seeking recovery all the way back to June 20, 1999, being *Capitol Hill Restoration Society v. More,* 410 A.2d 184 (D.C. 1980), *Artis Construction v. D.C. Contract Appeals Board*, 549 A.2d 315 (D.C. 1988), *Kennedy v. Barry*, 516 A.2d 176 (D.C. 1986), *Barry v. Wilson*, 448 A.2d 244 (D.C. 1982), and *Kegley v. District of Columbia,* 440 A.2d 1013 (D.C. 1982). Claimant then argues that these cases are inapposite because "none of these cases involve the PSWCP" and "More importantly, each of these cases involves a Plaintiff seeking review of a final determination by an agency where Plaintiff had exhausted all administrative remedies and a final order existed" that was capable of being reviewed judicially. Claimant's Brief at 14 (underscoring in original).

Claimant is mistaken in stating that Employer directs the CRB to these cases; nowhere in Employer's Brief are they to be found. Instead, they were cited and relied upon in "Employer's

Brief on the Application of D.C. Official Code § 12-301" filed before the ALJ in AHD on January 22, 2016. Employer has apparently abandoned its reliance on these cases in this appeal.

Nonetheless, they are instructive, and they support Claimant's general opposition to Employer in that they stand for the proposition, either directly or by implication, that exhaustion of administrative remedies is required before a court action can be brought challenging an agency decision.

And we do find it inequitable for Employer to argue that the complexity and difficulties wrought by the Program and its predecessors' poor record keeping, and a lack of program management continuity, are legitimate reasons to absolve Employer from 17 years of admitted mistakes in calculating Claimant's benefit amount.

We agree with Claimant and find the ALJ's rejection of Employer's argument that D.C. Code § 12-301 (8) has any application to the facts of this case is in accordance with the law.

Argument III. *The ALJ's finding that Claimant is entitled to 4% compound interest on accrued benefits is not in accordance with the applicable law.*

There does not appear to be any dispute that the statutory provision governing the applicable rate of interest to be applied to any award of accrued back benefits is D.C. Code § 28-3302 which provides:

> § 28-3302. Rate of interest not expressed and on judgments.
>
> (a) The rate of interest in the District upon the loan or forbearance of money, goods, or things in action in the absence of expressed contract, is 6% per annum.
>
> (b) Interest, when authorized by law, on judgments or decrees against the District of Columbia, or its officers, or its employees acting within the scope of their employment, is at the rate of not exceeding 4% per annum.
>
> (c) The rate of interest on judgments and decrees, where the judgment or decree is not against the District of Columbia, or its officers, or its employees acting within the scope of their employment or where the rate of interest is not fixed by contract, shall be 70% of the rate of interest set by the Secretary of the Treasury pursuant to section 6621 of the Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2744; 26 U.S.C. § 6621), for underpayments of tax to the Internal Revenue Service, rounded to the nearest full percent, or if exactly 1/2 of 1%, increased to the next highest full percent; provided, that a court of competent jurisdiction may lower the rate of interest under this subsection for good cause shown or upon a showing that the judgment debtor in good faith is unable to pay the judgment. In the case of the judgments entered prior to the effective date of the Consumer Credit Interest Rate Amendment Act of 1981, that are not satisfied until after the effective date of the Consumer Credit Interest Rate Amendment Act of 1981, the rate of interest thereon shall be the rate of interest prescribed in this

> subsection from the effective date of the Consumer Credit Interest Rate Amendment Act of 1981, until the date of satisfaction.

What is in dispute is whether that 4% rate established by subsection (b) is calculated on a compound basis, or a simple basis.

The ALJ determined that the appropriate method was to award compound interest. The following is the complete discussion of the subject from the ACO:

> Employer, relying on *Rastall v. CSX Transp. Inc.* and its progeny, contends that "absent a contractual provision, prejudgment and judgment interest are not usually compounded. [sic] *Rastall*, 679 A.2d 46, 53 (D.C. 1997). Claimant argues that the District of Columbia Court of Appeals in *Burke v. Groover Christie & Merritt* held that a court may, in the exercise of discretion, award compound interest in no-contract actions to make an injured party whole. *Burke*, 26 A.3d 292, 301 & n. 11 (D.C. 2011). Applying the concept of the time value of money, I find that a compound interest rate is appropriate to make the Claimant whole.

ACO at 10.

Employer argues that this case is governed by *Rastall*, which does in fact hold that "absent a contractual provision, prejudgment and judgment interest are not usually compounded." *Rastall* at 53.

Employer argues further that DOES precedent, relying upon *Rastall*, establishes that "'absent any statutory authority for compound interest, interest should be calculated on a simple basis in compensation cases.' *Marie Clark v. Verizon Commc'ns.*, OHA No. 92-793B, Dir. Dkt. 03-92 (Feb. 10, 2004)." Employer's Brief at 16 (footnotes omitted).

As Employer notes in a footnote, because *Clark* "was a private sector workers' compensation case, the applicable provision was D.C. Official Code § 28-3302 (c) [which] concerns the interest rate ... where 'the judgment or decree is not against the District of Columbia'", and "similar to subsection (b), also does not specify whether the interest rate is compound or simple." Employer's Brief at 16, n. 7.

Claimant argues that the Director misinterpreted *Rastall*, when he determined that interest on compensation awards should be calculated on a simple rather than compound basis because the interest provision doesn't specifically state that awards should be calculated on a compound basis.

Rather, Claimant argues that the ALJ's reliance upon *Burke v. Groover Christie & Merritt*, 26 A.3d 292 (D.C. 2011) to support her exercising the discretion to employ compound calculation is correct. Although not quoted in the ACO, the following language from *Burke* is illuminating:

> The crux of appellant's argument is that, once the parties agreed in March 2007 (after this court's decision in the first appeal determined that the Maryland cap

applied to non-economic damages) on the judgment amount owed, see note 1, supra, the post-judgment interest was calculable within a range, even if the exact rate of interest was subject to the trial court's decision on the parties' competing cross-motions for summary judgment. Because the parties agreed that, at a minimum, interest at three percent would be due, that amount was capable of precise calculation, and became a liquidated debt. Thus, according to appellant, her request for interest to compensate for the delay in payment of the undisputed post-judgment interest is similar to one for pre-judgment interest for a liquidated debt pursuant to D.C. Code § 15-108. Appellees do not dispute they had agreed that a minimum amount of post-judgment interest at three percent was owing as of March 2007. They counter appellant's claim with a legal argument, that there is no authority to award "interest on interest."[11]

D.C. Code § 15-108 (2001) provides:

> In an action in . . . the Superior Court of the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid.

We have noted that, as a "remedial" statute, section 15-108 "should be generously construed so that the wronged party can be made whole." *Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1255 (D.C. 1990). Nonetheless, we do not think that, even under a generous reading, D.C. Code § 15-108 mandates payment of pre-judgment interest in this case because the statutory conditions are not met. This was not an action to recover a liquidated debt but a suit to establish liability in tort and ascertain compensatory damages. Moreover, the interest appellant claims is not on principal, but on post-judgment interest. Thus, the interest claimed by appellant does not come within the terms of D.C. Code § 15-108.

Another statutory provision, D.C. Code § 15-109, authorizes the award of pre-judgment interest in contract actions where the debt is not liquidated, "if necessary to fully compensate the plaintiff." *Pierce Assoc.*, 527 A.2d at 310 (noting that trial court has "broad discretion" to award pre-judgment interest under § 15-109); *id.* at 311 (noting that courts are gradually "giv[ing] up the traditional dichotomy between liquidated and unliquidated debts," as evidenced by "the creation of statutes and judicial exceptions, such as that in D.C. Code § 15-109, which give the court discretion to allow prejudgment interest even when the debt amount is unliquidated").

D.C. Code § 15-109 (2001) provides:

> In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only. This section does not preclude the jury, or the court, if

> the trial be by the court, from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff. In an action to recover damages for a wrong the judgment for the plaintiff shall bear interest.

We have interpreted section 15-109 as mandating the award of post-judgment interest in tort actions. *See Duggan v. Keto*, 554 A.2d 1126, 1140 (D.C. 1989). Although the statute does not provide for pre-judgment interest in tort actions, as it does in contract cases, we have concluded that such interest is "neither authorized nor forbidden by statute." *Id.*

The question remains, therefore, whether the trial court has equitable discretion — even if not compelled by section 15-108 or expressly authorized by section 15-109 — to award interest to compensate an injured party for unwarranted delay in payment of an undisputed amount of post-judgment interest. We recognize the force of appellant's argument that, just as in 2004, appellees elected not to pay any part of the jury's verdict, and did not satisfy the judgment until three years later, *see note 1, supra*, so too in March 2007, appellees elected not to pay any post-judgment interest — not even the minimum amount that was undisputably due at the fixed three percent rate appellees claimed applied rather than the higher fluctuating rate that appellant claimed (and we now hold) the statute mandated. If the delay in payment of the underlying judgment entitles her to post-judgment interest to compensate for the loss of the time-value of the money she was owed, appellant asks, why shouldn't she be similarly compensated for the time during which appellees withheld payment of the agreed-upon minimum amount of interest? Appellant poses an interesting question. We have defined a "liquidated debt" as one "which at the time it arose . . . was an easily ascertainable sum certain." *Schwartz v. Swartz*, 723 A.2d 841, 843 (D.C. 1998) (quoting *Pierce Assoc.*, 527 A.2d at 311). Thus, even though appellant's claim does not come within the mandatory purview of section 15-108, interest at the minimum rate agreed upon is a "liquidated debt" because it was readily ascertainable in March 2007. Unless there is a prohibition, similar considerations should apply in determining whether interest is appropriate in order to preserve the value of the undisputed amount of interest owed to the plaintiff.

Though D.C. Code § 15-108 and, to a lesser extent, D.C. Code § 15-109, may appear to "occupy the space" in connection with pre-judgment interest, as noted, we have concluded that they do not prohibit the award of pre-judgment interest in tort actions.[12] *See Duggan,* 554 A.2d at 1140. Significantly, the obligation to pay pre-judgment interest arises under the common law and may be payable even in the absence of a statutory authorization to that effect. *See Riggs Nat'l Bank*, 581 A.2d at 1254 ("[N]o explicit statutory authority is required for an award of pre-judgment interest. . . ."); *see also In re Huber*, 708 A.2d 259, 260 (D.C. 1998) ("The obligation to pay interest is intertwined with the obligation to make restitution."). Whether to award pre-judgment interest in such circumstances is a determination that lies in the equitable discretion of the trial court. *See Riggs Nat'l*

Bank, 581 A.2d at 1253 ("[I]n equity, interest is allowed as a means of compensating a creditor for the loss of the use of his [or her] money." (quoting *United States v. United Drill & Tool Corp.*, 87 U.S. App D.C. 236, 237, 183 F.2d 998, 999 (1950)); *see also Owen v. Bd. of Directors of Wash. City Orphan Asylum*, 888 A.2d 255, 270 (D.C. 2005) ("The equitable powers of the trial court to effect remedies are wide and absent an abuse, they should not be circumscribed." (*citing Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S. Ct. 1463, 36 L. Ed. 2d 151 (1973))).

We, therefore, clarify that in a tort action a trial court has the equitable power to award "pre-judgment" interest on that part of an interest award whose validity is undisputed [footnote omitted]. Because the trial court did not consider appellant's request for this additional component of interest, we remand the case for the court's consideration and exercise of equitable discretion.

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[11] Appellees cite our opinion in *Rastall v. CSX Transp., Inc.*, 697 A.2d 46 (D.C. 1997), for the proposition that "[§§; 15-108 and 28-3302] do not specify that compound interest may be awarded. Absent a contractual provision, pre-judgment and post-judgment interest are not usually compounded." *Id.* at 53. *Rastall*, however, does not address whether the trial court has authority to award pre-judgment interest outside the purview of § 15-108. Rather, *Rastall* held, consistent with the language of § 15-108, that where the parties by contract have agreed on the rate of interest, the court is bound to apply that rate in its award of pre-judgment interest. *Id*; *accord Allen v. Yates*, 870 A.2d 39, 52 (D.C. 2005). Otherwise, the rate specified in section 28-3302 (c) applies to interest awards. *See District of Columbia v. Pierce Assoc.*, 527 A.2d 306, 311 (D.C. 1987); *Giant Food, Inc. v. Jack I. Bender*, 399 A.2d 1293, 1303 (D.C. 1979). The holding of *Rastall* was in the context of a contract action, where the contract itself specified a (non-compounding) rate of interest. 697 A.2d at 53. *Rastall* is inapposite to a tort action, where, as we explain in the text, the trial court has equitable discretion to award interest.

[12] Federal courts applying 28 U.S.C. § 1961 permit the award of pre-judgment interest even though that statute requires only that a court award post-judgment interest. *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 100 (2d Cir. 2004) (award of post-judgment interest is "mandatory" under § 1961); *In re Burlington Northern*, 810 F.2d 601, 609 (7th Cir. 1986) ("While [§ 1961] does not preclude pre-judgment interest, the award of such interest is committed to the discretion of the [trial] court and is to be based upon equitable considerations.").

Burke, supra, at 304 – 306.

We include this extended quotation from *Burke* to illustrate two main points: first, *Burke* does not resolve the issue before us without analysis beyond that which appears in the ACO, particularly in light of *Burke* being a tort case, a field of law generally not relevant to workers' compensation matters unless a reason for analogizing is apparent, and second, because footnote 11 in *Burke* sheds additional light on the meaning of *Rastall*, which is the sole basis upon which the Director of DOES relied when ruling in *Clark* that interest awardable on workers' compensation awards is to be calculated on a simple as opposed to compound basis. Specifically, the Director wrote:

District of Columbia Municipal Regulation (DCMR) § 7-209.11, which pertains to the voluntary payment of compensation benefits, provides that "Interest on accrued benefits shall be calculated at the same rate as that utilized by the Superior Court of the District of Columbia for civil judgments." DCMR § 7-209.11. It is further noted that D.C. Official Code § 28-3302 (2001) is applicable to the interest rate on civil judgments in the District of Columbia. The rate of interest under the Act is governed by D.C. Official Code § 28-3302 (c). That Code Section provides, in pertinent part, that:

> The rate of interest on judgments and decrees, where the judgment or decree is not against the District of Columbia, or its officers, or its employees acting within the scope of their employment or where the rate of interest is not fixed by contract, shall be 70% of the rate of interest set by the Secretary of the Treasury pursuant to section 6621 of the International Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2744; 26 U.S.C.S. § 6621), for underpayments of tax to the Internal Revenue Service, rounded to the nearest full percent, or if exactly of 1%, increased to the next highest full percent; provided, that a court of competent jurisdiction may lower the rate of interest under this subsection for good cause shown or upon a showing that the judgment debtor in good faith is unable to pay the judgment. . .

D.C. Official Code § 28-3302(c)(2003).

The D.C. Court of Appeals, in *Rastall v. CSX Transportation*, 697 A.2d 46 (D.C. 1997), held that in the absence of statutory authority or a contractual agreement, interest should be simple rather than compound. Therein, the railroad company argued that the trial court erred in allowing the jury to consider an award of compound interest. In that case, the Court of Appeals noted that § 28-3302 did not specify that compound interest may be awarded. The Court determined that absent a contractual provision, prejudgment and judgment interest is not usually compounded. *Id* at 53 (citing *Giant Food, Inc. v. Bender*, 399 A.2d 1293, 1304 (D.C. 1979)). Since there was no contractual provision for compound interest, the Court of Appeals reversed the jury's award of compound interest and remanded the case to the trial court to enter simple interest.

The Director concludes that interest payments should be made on simple rather than compound interest. D.C. Official Code § 28-3302, relied upon by Claimant, does not provide for the payment of compound interest.[3] Based upon the previous holding of the D.C. Court of Appeals, the Director concludes that in the absence of any statutory authority for compound interest, interest should be calculated on a simple basis in compensation cases. *See Rastall, supra.*

[3] The Director rejects Claimant's argument that the language in 28-3302(b) containing the phrase "per annum" establishes that interest should be compounded. Employer is correct in that the applicable is 28-3302(c), which does not contain the phrase "per annum." Furthermore, in *Rastall*, the Court of Appeals stated that 28-3302 does not specify that compound interest may be awarded.

Rastall at 53. It is clear that the Court of Appeals has interpreted 28-3302 to mean that interest cannot be compounded.

Clark, supra at 6 – 9.

It is the final paragraph of *Clark* that controls the outcome of our review of the ACO. It has been the announced, expressed and applied interpretation of this agency at least since 2004 that the interest payable upon accrued benefits are subject to interest calculated on a simple and not a compound basis. The ACO award conflicts with this and accordingly must be vacated, and the matter remanded for entry of an award that calculates the interest due on a simple rather than compound basis.

Therefore, since the Council has taken no action to upend the established and unequivocal rule against assessing compound interest announced in *Clark*, we decline to interpose a contrary rule under these circumstances. *See Marzullo v. Molineaux*, 651 A.2d 808, 810, n. 3 (D.C. 1994) (the court noting that Council inaction to modify a longstanding court interpretation of a statute supports an inference of Council approval).[2]

Argument IV. *The ALJ's finding that the general salary increases effective April 7, 2013, October 5, 2014 and October 4, 2015 constituted COLAs is not in accordance with the applicable law.*

It is undisputed that the Council of the District of Columbia passed legislation authorizing salary increases of 3% to government employees that went into effect April 7, 2013, October 5, 2014, and October 6, 2015. Those salary increases were the result of the submission by the Mayor, on May 2, 2013, of what the Mayor denominated as the "Career, Educational, Excepted, Management Supervisory, Legal and Executive Services Non-Collective Bargaining Unit Employees Compensation System Changes Emergency Declaration Approval Resolution of 2013" and "Career, Educational, Excepted, Management Supervisory, Legal and Executive Services Non-Collective Bargaining Unit Employees Compensation System Changes Emergency Approval Resolution of 2013".

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[2] The ACO explained in very spare terms why the ALJ felt empowered to exercise discretion in this case to divert from the rule established unequivocally in *Clark*: "Applying the time value of money, I find that a compound rate is appropriate to make the Claimant whole." ACO at 10.

However, we recognize that Claimant has raised strong arguments for permitting compound interest, particularly in light of the court's discussion of *Rastall* in *Burke*, which could cast doubt upon the continuing vitality of the logic underpinning *Clark*. In stating that regarding interest "*Rastall* is inapposite to a tort action", the court could be saying by implication that "*Rastall* is inapposite to a workers' compensation award of accrued unpaid benefits". This reading has special appeal in compensation cases given that they are remedial in nature and humanitarian in purpose, and must fully compensate for proven disability, and ought to be liberally construed to affect their humanitarian purposes. *See, Marsden v. DOES*, 142 A.3d 525 (D.C. 2016); *Brown v. DOES*, 140 A.3d 1144, 1146 (D.C. 2016); *Howard University Hospital v. DOES*, 952 A.2d 168, 173 (D.C. 2008); *Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229 (D.C. 1990).

At the time of this submission, the D.C. Code governing compensation rate increases for disabled workers under the Act, in pertinent part stated:

> **D.C. Code § 1-623.41. Cost-of–living adjustment of compensation.**
>
> On or after April 1, 1990, increases in compensation payable due to disability or death shall be in the same percentage amount and shall have the same effective date as any base salary increase granted pursuant to §§ 1-611.05 and 1-611.06, to employees in the career and excepted Services not covered by collective bargaining. To be eligible for the increase, the disability or death of the employee must have occurred at least 1 year prior to the effective date of the increase.

At the time that the salary increases at issue in this case were put in effect, the statutory references in the provision read in pertinent part as follows:

> **§ 1-611.05. Compensation system for Career and Excepted Services—Periodic Review.**
>
> * * *
>
> (d) The Mayor ... shall consider, on an annual basis, changes in the compensation system or systems and in the salary and pay schedules under such system or systems, and shall submit adjustments, if any, to the Council pursuant to § 1-611.06. The submission to the Council shall include proposed dates on which the adjustments shall take effect.
>
> * * *
>
> **§ 1-611.06. Compensation system for Career and Excepted Services—Review by the Council of the District of Columbia.**
>
> (a) If the Council by resolution approves, without revision, the new compensation system or systems ... the schedules shall become effective on the dates specified in the schedule submitted by the Mayor as provided in subsection (d) of § 1-611.05.

It is noted that, although the words "Cost-of-living Adjustment" appear in the sub-head as the title of § 1-623.41, those words do not appear in the body of that text, or the bodies of §§ 1-611.05 or 1-611.06.

In April 2005, § 1-623.41 was revised to read as follows:

> On or after April 1, 1990, the Mayor shall award cost-of-living increases in compensation for disability or death whenever a cost-of-living increase is awarded pursuant to §§ 1-611.05 and 1-611.06. The percentage amount and effective date of those increases shall be the same as for any increase granted

under these sections. This section shall not apply to any collective bargaining agreement to the contrary.

This is the first relevant appearance of the words "cost-of-living increases" in § 1-623.41. There was no change in the language of either §§ 1-611.05 or 1-611.06.

Review of the legislative history of the April 2005 Disability Compensation Effective Administration Act of 2004, Law No. 15-290 reveals that the 2005 revisions were in reaction to widespread dissatisfaction among District of Columbia workers receiving disability compensation and others, including the advocacy group the Employment Justice Center and the District of Columbia workers' union, the American Federation of Government Employees, concerning many aspects of the administration of the government workers' disability compensation program, as is evidenced from this passage:

> The Committee on Government Operations, after evaluating the administration of the Disability Compensation Program for a period of two years, has determined that appropriate amendments to the District of Columbia Merit Personnel Act of 1978 are warranted and necessary to protect the interests of the District of Columbia government and its employees that are injured on the job. A comprehensive evaluation of the program has revealed serious administrative deficiencies within the program. The overall administration of the program can be characterized as inefficient and ineffective- at the expense of the injured worker, and the District of Columbia government. The findings substantiate the amendments that are outlined in the proposed legislation, which would address the following areas, which require ongoing and consistent review and analysis by the Council of the District of Columbia and the Executive Office of the Mayor: delayed medical treatment for injured employees; denial of medical treatment that has been deemed necessary by the injured employee primary treating physician (with supporting documents and test results); arbitrary disapproval of medical care providers recommendations for treatment; failure to adhere to current District laws concerning the District's administrative appeals process; and the District of Columbia government's failure to promulgate rules and regulations that would ensure that claimants due process rights are not abridged when determinations are made concerning disabilities and professional fees.(Section 1-623.02(b)(9) of the District of Columbia Official Code.

District of Columbia Council Report on Bill 1-873 (November 4, 2004).

While nothing in any of the Council members' remarks directly addresses benefit increases, review of the testimonial summaries of EJC Director Amy Vruno, AFGE President John Walker, and disability recipient Edna McManus reveals that each made specific complaint about the failure of the Program to implement what they referred to as "COLAs". *See Id.,* p. 4, 5, 6.

It is evident that the legislative changes that resulted from this amendment, including strengthening the evidentiary value of a worker's treating physician's opinion, the lengthening of time for reconsideration requests of denied claims and for the filing of requests for formal

hearings in front of DOES ALJs, and the shortening of time within which the Program was required to act on a benefit claim, all suggest that the general thrust of the amendments was the strengthening of the position of workers filing claims for disability, and nothing in the testimony, council member exchanges or the final amendments suggests any intention to limit or reduce employee rights or benefits.

Because of the absence of the words "cost-of-living" in the Mayor's transmittal letter concerning the salary increases at issue, Employer argues the salary increases do not trigger § 1-623.41. Employer would have us infer from the addition of the words "cost-of-living increase" in § 1-623.41 in 2005 that the Council and the Mayor intended to de-link increases in disability compensation rates from their underlying basis, the in-grade and step pay rate of the worker's pre-injury position.

Not only does such a reading find no support in the legislative history of the larger amendments, a strict reading of the provisions yields, at most, an intent to refer to disability compensation rate increases triggered (for whatever reason) by § 1-611.05 and 1- 611.06 as COLA's in the disability context.

Further, facilitating "the goal of pay parity" is not in conflict with disabled workers receiving "COLAs" whenever a similarly situated government worker gets a salary increase. One might have multiple reasons for submitting a recommendation to the Council to increase government salaries without negating the fact that the statutory scheme contemplates that when salaries go up, so too does disability compensation pay. After all, without the injury and disability status, the injured employee would get the benefit of the raise.

The ALJ premised her decision in part upon Employer's response to a Freedom of Information Act request, which is attached to Employer's Brief and marked "000321" as a page reference.

The request was responded to by the Office of General Counsel of the District of Columbia Department of Human Resources ("DCHR"). The substance of the inquiry from Claimant and DCHR's response are as follows:

> **[Salary Increases]**. You requested: "Please provide me by effective date all cost of living increases (COLA) applied to District of Columbia public sector workers' compensation benefits since 1998."
>
> **RESPONSE**
>
> The DCHR Policy and Compliance Department has compiled a list of salary increases for the time period requested. The information has been reviewed for accuracy by the Classification and Compensation Administration. Please see the list attached.
>
> Attached is a list titled "District Government Salary Schedules 1996 – Present".

CE B, at 321(S)(cited in the ACO at 10).

The list has 18 entries. Each is assigned a date, is described as either "District Salary Schedule Union", "District Salary Schedule Non-Union" or "District Salary Schedule Non-Union & Union"[3], and is accompanied by a statement of the amount of the increase. The entries of relevance here are these:

April 7, 2013	District Salary Schedule Non-Union & Union	3.0 increase
October 5, 2014	District Salary Schedule Non-Union & Union	3.0 increase

There is no entry for October 4, 2015. We shall assume, however, for the purposes of this appeal, and because Employer does not argue otherwise, that it too included a 3 percent increase for D.C. government workers.

Employer argues as follows:

> Moreover, the Program's interpretation of D.C. Official Code § 1-623.41 as amended by D.C. Law 15-290 is reinforced by the most recent change to this provision. Effective December 15, 2015, D.C. Law 15-129 amended D.C. Official Code § 1-623.41 to read:
>
> > The Mayor shall award an across-the-board increase in compensation for disability or death whenever an across-the-board increase is awarded pursuant to [D.C. Code §§ 1-611.05 and 1-611.06] The percentage amount and effective date of those increases shall be the same as for any increases granted under these sections.
>
> By eliminating the "cost-of-living increase" language and replacing it with "across-the-board increase," the D.C. Council appears to have reconsidered its 2005 decision to narrow the existing law. Therefore, the history of D.C. Official Code § 1-623.41 supports Employer's position that after April 5, 2005 (and prior to December 15, 2015) recipients of workers' compensation benefits were only entitled to receive the portion of a general salary increase that the Mayor *reasonably identified as a COLA.*

Employer's Brief at 18 -19 (emphasis in original).

Again, resort to the legislative history tells a different story. A review of the legislative history reveals the following explicit explanation of the Council's intent and the reasons for it, being the refusal of the Program to implement the Council's intent in 2005. The following is from D.C. Council Committee of the Committee of Business, Consumer and Regulatory Affairs, Report on B21-30, the "Injured Worker Fair Pay Amendment Act of 2015":

> I. PURPOSE AND EFFECT

[3] There is a single entry identified as "District Salary Schedule Executive".

B21-30, the "Injured Worker Fair Pay Amendment Act of 2015" was introduced on January 20, 2015by Councilmember Kenyan McDuffie, and co-sponsored by Councilmembers Nadeau, Alexander, Cheh, Silverman, Bonds, Allen, Grosso, and Evans. The bill amends the "District of Columbia Government Comprehensive Merit Personnel Act of 1978" to require that Public Workers' Compensation Program participants receive pay raises anytime District workers receive across-the-board pay raises.

In 1989, the Council amended the "District of Columbia Government Comprehensive Merit Personnel Act of 1978" to add "cost-of-living adjustment of compensation," which tied compensation benefit increases for District government employees to the US Department of Labor's Consumer Price Index. In 2005, the Council again amended the "District of Columbia Government Comprehensive Merit Personnel Act of 1978" to achieve pay equity with noninjured District workers, the language added was a "cost of living increase" to ensure the Council's intent that pay increases were to be paid to all injured workers, whether or not they were members of a collective bargaining agreement at the time of their injury.

Nonetheless, since 2007, the Office of Risk Management ("ORM") has failed to provide cost-of-living increases to injured District government employees under the Public Sector Workers' Compensation Program. ORM chose to interpret the language "cost of living" to deny injured workers pay increases in 2013 and 2014 because the District-wide pay increases didn't use the language "cost of living" and those pay increases were not consistent with the Consumer Price Index. The Committee has received witness testimony and numerous complaints from many claimants seeking to address this issue.

The *Committee believes that ORM's interpretation of the law has not aligned with the intent of the Council.* The Committee sees this bill as *a technical change that makes clear to ORM that the injured workers should receive a raise whenever District employees receive an increase in compensation.*

Not providing cost of living increases to injured District government employees puts an undue hardship on these individuals who served the residents of the District and were injured while working. In addition, it restricts the District government's ability to hire and recruit qualified employees. When the public becomes aware of how the government has treated its employees who were injured on the job it is a disincentive for individuals to work for the District government.

* * *

Id., at 1, 2 (emphasis added).

Not only do we find support in this legislative history for our earlier discussion of the impact of the 2005 amendments, we reject Employer's interpretation of the effect of the Mayoral transmittal letter on the applicability of § 1-623.41, and affirm the ALJ's determination that Claimant was entitled to increases in his disability compensation commensurate with the pay increases in question.

CLAIMANT'S CROSS APPEAL

In addition to opposing Employer's arguments on appeal, Claimant's Opposition to Employer's Application for Review and Cross Appeal contained two assertions of error in the ACO, denominated as sub-parts V and VI. We shall utilize "Cross-Appeal 1" and "Cross-Appeal 2", respectively in referring to the arguments.

Cross-Appeal 1. *The ALJ's Denial of an Augmented Compensation Rate is Not in Accordance with Applicable Law.*

The following is from Claimant's Brief, Cross-Appeal 1:

> The Employee fully briefed the issue of whether he was entitled to an augmented compensation rate because he had a dependent or spouse or, alternatively, because he was a union employee with a dependent spouse at the time his benefit rate was determined. See Employee's Brief on Back Benefits Due and Miscellaneous matters, pp. 2-5 and Exhibit 8 thereto p. 318(G); Employee's Sur Reply Brief filed March 21, 2016, p. 1-2, and Employee's Response to April 7, 2016 Order filed 13, 2016. The Employee incorporates herein by reference those arguments and authorities.

Claimant's Brief at 24.

The appellate provisions of the Act and the implementing regulations contemplate that an aggrieved party file in the CRB papers and filings that contain the substance of their grievances, reference to the appropriate record evidence in support thereof, and argument and citation to such authorities as the party contends support the complaints of error alleged to have occurred. *See* D.C. Code § 1-623.28.

More specifically, with regard to cross-appeals, the regulations governing appeals before the CRB found in Chapter 7 in the District of Columbia Code of Municipal Regulations contain the following:

> 258.11 If the Board receives a timely Application for Review, any other party may initiate a cross-appeal by filing, with the Clerk of the Board, a Notice of Cross-Appeal within seven (7) calendar days of the receipt of the Application for Review, or within the time prescribed by section 258.8, whichever period last expires.

258.12 The notice of Cross-Appeal shall include an original and three copies of an accompanying memorandum of points and authorities in support of the Cross-Appeal and shall be served upon the petitioner.

258.13 The petitioner shall have five (5) calendar days from the date of service to file with the Clerk of the Board, a memorandum of points and authorities in opposition thereto.

258.14 No further pleadings or other submissions with regard to the cross-appeal shall be allowed.

By specifying what pleadings and papers may be filed, and excluding the filing of other papers, the regulations contemplate, and administrative and judicial economy are promoted by, a party making its arguments in the appellate papers, and not by reference to extrinsic filings filed elsewhere or previously before the AHD, OWC, or otherwise. Further, as we have said before in this and other cases, ""Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Enders v. District of Columbia*, 4 A.3d 457, 471 n. 21 (D.C. 2010) quoting *McFarland v. George Washington University*, 935 A.2d 337, 351 (D.C. 2007); *see also Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993) (arguments raised but not argued in briefing are treated as waived)." *Nocket v. Lockheed Martin*, CRB No. 15-171, at 4 n. 1 (April 4, 2016).

Accordingly, our consideration of Claimant's cross-appeals shall be limited to the matters adverted to directly and fully in Claimant's Brief, and will not include consideration of arguments, points or authorities contained in the four extrinsic items referred to above in Claimant's Brief. Similarly, and for the same reasons, we do not address the claims related to Claimant's status as a "DS-7 union member", found at Claimant' Brief, p. 25.

Claimant argues in his brief that because at the time Claimant's disability compensation rate was established he had a spouse, he has been and continues to be entitled to an "augmented" compensation rate of 75% of the employee's normal pay, as opposed to the normal 66 2/3% for workers without a dependent. He argues that D.C. Code § 1-624.10(a)(1) and (b)(1) included a "spouse" within the definition of "dependent" in 1998. While acknowledging that the provision was amended in 1995 by the addition of language making minors who were the "natural issue of the employee or minor legally adopted by the employee prior to the injury" dependents, Claimant argues that the amendments did not exclude spouses from that status.

We will set forth the manner in which the ALJ considered this argument and ultimately found it lacking:

The pertinent provision at the time of Claimant's injury on August 3, 1998, read:

§ 1-624.10. Augmented compensation for dependents.

(a) For the purpose of this section, *and except as provided for in subsection (a-1) of this section,* "dependent" means the following:

(1) A spouse if:

(A) He or she is a member of the same household as the employee;

(B) He or she is receiving regular contributions from the employee for his or her support; or

(C) The employee has been ordered by a court to contribute to his or her support;

(2) An unmarried child, while living with the employee or receiving regular contributions from the employee toward his or her support, and who is:

(A) Under 18 years of age; or

(B) Over 18 years of age and incapable of self-support because of physical or mental disability; and

(3) A parent, while wholly dependent on and supported by the employee.

Notwithstanding paragraph (2) of this subsection, compensation payable for a child that would otherwise end because the child has reached 18 years of age shall continue if he or she is a student as defined by § 1-624.1 at the time he or she reaches 18 years of age for so long as he or she continues to be such a student or until he or she marries.

(a-1) For employees hired after December 31, 1979, who make a claim for compensation after December 29, 1994, the term dependent means the natural issue of the employee or minor legally adopted by the employee prior to the injury who is:

(1) Under 18 years of age and dependent upon the employee for support;

(2) Over 18 years of age and incapable of self-support because of physical or mental disability.

(Emphasis added).

The italicized portion reflects the 1995 amendments to the original provision, which were part of the Omnibus Budget Support Act of 1995. (CE B at 319 (B), Attachment A) [sic] Employer contends that pursuant to D.C. Code § 1-624.10(a)(1981) as amended Claimant's income was not augmented because his spouse was excepted from the dependent provision for employees hired after December 31, 1979. (CE B at 318 (G), 319(B)-(C)) [sic] When interpreting the same amendment, Claimant contends that the amendment was meant to expand the definition of dependent to include adopted children, but was not meant to eliminate a spouse. While Claimant contends that the "and" in the phrase "for the purpose of this section, and except as provided in subsection (a-11)" [sic] signifies that spouses were not excluded, Claimant does not refer to any legislative history for this interpretation.

Applying the *Peoples Drug* [*v. District of Columbia*, 470 A.2d 751 (D.C. 1983)(*en banc*)] analysis because the provision is subject to interpretation, I reviewed the only legislative history of record. *See* Preamble to D.C. Law 11-52, which was attached to the Order dated April 7, 2016. The undersigned takes

> judicial notice of the Preamble, which provides that the purpose was "to Amend the District of Columbia Comprehensive Merit Personnel Act of 1978 to reduce the costs of administering the disability compensation program for employees hired after December 31, 1979..." *Id.* When provided with a chance to clarify the amendment, augmentation for Claimant's spouse was more clearly excluded by the later 2010 amendment, which only provided for augmentation in cases where the spouse was the spouse of an employee hired prior to January 1, 1980. *See* D.C. Code § 1-623.10 (2012). In these circumstances, since the purpose of the amendment was to reduce costs for employees such as Claimant who was hired after December 31, 1979, I find, when reading the provision as a whole and reviewing the legislative history, that D.C. Code § 1-624.10(a-1) did not provide for augmentation under the facts of this case because a spouse such as Claimant's spouse was excluded from the definition of dependent by the 1995 amendment.

ACO at 7 – 8 (emphasis in original).

We note initially that in the sentence "When provided with a chance to clarify the amendment, augmentation for Claimant's spouse was more clearly excluded by the later 2010 amendment, which only provided for augmentation in cases where the spouse was the spouse of an employee hired prior to January 1, 1980. *See* D.C. Code § 1-623.10 (2012)" the ALJ is apparently referring to the limitation on *all* augmentation of disability compensation rates for employees with dependents for any employee hired after January 1, 1980. The limitation is not restricted to spousal dependents.

With that understanding, we agree with the ALJ's analysis and adopt it as our own.

Claimant's argues further that, if the ALJ's ruling is correct, "the Employee has been treated unequally under the law because employees who had filed workers' compensation claims prior to the 1995 amendments, and who had spouses, were entitled to claim an augmented compensation rate of 75%. They also continued to receive them after the 1995 amendments. There is no reason for treating the Employee than protecting the fisc." Claimant's Brief, p. 25.

While we are not entirely clear as to what point Claimant is trying to make, it seems to be that he complains that the law denies him and similarly situated employees equal protection of the law, as opposed to employees who were hired prior to January 1, 1980, a claim of Constitutional import.

If that is indeed his point, until a court of competent jurisdiction so concludes, we have no legal authority to consider such a claim, and thus we decline to do so.

The denial of the claimed augmentation is affirmed.

Cross-Appeal 2. *The Employee Was Prejudiced and Denied Due Process Because ORM/PSWCP Provided the Original Workers' Compensation File to Employer and Allowed the Employer to Control the Employee's Access to the File During AHD Proceedings.*

We will not delineate the allegations concerning Claimant's complaints about access to his claims file or control over access to that file for several reasons.

First, to the extent that access to the claims file is a right unrelated to a claimant's entitlement to benefits (as opposed to litigating such entitlement) the Act bestows no authority over this agency to make rules, enforce procedures or become entangled with the internal operations of the Program. If Claimant has rights to view the contents of his claim file outside the ambit of ongoing litigation, those rights are not subject to our authority or jurisdiction, and Claimant's remedies, if any he has, lie elsewhere.

Second, to the extent that Claimant has rights relating to obtaining information in his claims file in the context of ongoing litigation in this agency concerning a claim over which the agency has jurisdiction, there are rules and regulations pertaining to the conduct of discovery that are the initial province of the ALJ in DOES to oversee. There has been no indication that there has been any unresolved discovery dispute, or that any decision rendered by the ALJ concerned discovery or was wrongly decided to Claimant's detriment.

Third, and related to the second, Claimant asks for no relief for this complaint beyond a declaration by the CRB that Claimant is right and Employer is wrong concerning Claimant's access rights. Again we have no power, authority or inclination to render what is nothing more than an advisory opinion on a point of program administration which is beyond our competence.

CONCLUSIONS AND ORDER

The determination by the ALJ in the Amended Compensation Order that DOES has jurisdiction over disputes concerning modifications of disability compensation awards involving adjustments in the amount of disability compensation payment amounts is in accordance with the law and is **affirmed**.

The determination by the ALJ in the ACO that Claimant is entitled to retroactive payment of benefits since June 1999 is supported by substantial evidence, is in accordance with the law, and is **affirmed**.

The determination by the ALJ that the salary increases effective October 7, 2013, October 5, 2014, and October 5, 2015 triggered an entitlement by Claimant to a statutory increase in disability compensation pay is in accordance with law and is **affirmed**.

The denial of Claimant's claim to entitlement to an augmented disability compensation rate based upon his marital status under the dependency augmentation provisions of the Act are in accordance with the law and are **affirmed**.

The ALJ's determination that DOES lacks jurisdiction to provide relief for the alleged mishandling of and lack of access to Claimant's disability claims file is in accordance with the law, and is **affirmed**.

The determination by the ALJ in the ACO that Claimant is entitled to 4% compound interest on accrued benefits is not in accordance with the law and is **reversed**, and the matter is **remanded** with directions to the ALJ to enter an award using simple interest.

So ordered.