

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**  
**Labor Standards Bureau**

**Office of Hearings and Adjudication**  
**COMPENSATION REVIEW BOARD**



**(202) 671-1394-Voice**  
**(202) 673-6402-Fax**

**CRB No. 06-086**

**JOHN T. CARTER,**

**Claimant–Petitioner,**

**v.**

**DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,**

**Self Insured Employer-Respondent**

Appeal from a Compensation Order of  
Administrative Law Judge Fred D. Carney  
OHA/AHD No. PBL 01-036A, DCP No. LTDMPPSJ004144

John T. Cater, *pro se* Petitioner

Ross Buchholz, Esq., for Employer-Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and LINDA F. JORY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, on behalf of the Review Panel:

**DECISION AND REMAND ORDER**

**JURISDICTION**

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005).<sup>1</sup>

---

<sup>1</sup> Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code § 32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*, including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

## BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Compensation Order (the Compensation Order), which was filed on July 26, 2006, the Administrative Law Judge (ALJ) granted Petitioner's request that his compensation rate be augmented pursuant to D. C. Code § 1-623.10, and denied Petitioner's request for an increase in the compensation rate pursuant to § 1-623.41 and for temporary total disability benefits pursuant to § 1-623.05.

Petitioner's appeal has been effectuated by his filing of a handwritten document entitled "Motion to Appeal Disability Award", which reads in its substantive entirety:

It is my position that the certified mail card with the incorrect date and year is not a binding agreement for a settlement award disability case. There must be a legal document signed by the claimant or past attorney.

Also there have been numerous attempts to contact the D.C. Government about other injury's sustain [sic] during Mr. Carter, John workmans [sic] comp. accident. (Note: The D.C. Government officials refuse to acknowledge all letters and phone calls.)

From this, we discern that Petitioner challenges the denial of his temporary total disability claim because, in his view, the ALJ decided against him because the ALJ determined that Petitioner had entered into a full and final settlement of the claim by obtaining schedule benefits negotiated on his behalf by his prior attorney, while Petitioner never agreed to such a settlement, and challenges the denial of claims related to Crohn's disease, depression and other impairments, which the ALJ determined were not before him because Petitioner has yet to file a claim for these conditions with the District of Columbia Government, on the apparent grounds that he has attempted file such claims but these filings were ignored.

Respondent did not file any response to this appeal.

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation Review Panel, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. *See*, D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28 (a). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In this case, Petitioner sought benefits for temporary total disability from and after the date of injury (November 13, 1996) through the date of the formal hearing (August 23, 2005) and continuing thereafter. He also sought to have his benefits calculated at a rate that includes higher compensation than that for which he has been compensated, for two reasons: first, because he claims to be entitled to ongoing increases tied to increases in the base wages paid to workers in his grade and step pursuant to D.C. Code § 1-623.41 (cost of living adjustments, or “COLA”s) and second because he claims entitlement to an augmented rate, 75% of his base wages rather than 66 2/3%, pursuant to § 1-623.10.

Regarding the § 1-623.10 augmentation, the ALJ awarded the request, and that award has not been appealed. Accordingly, it is affirmed.

Regarding the request for an increase under the COLA provisions, that request was denied. In so ruling, the ALJ cited the notice to Petitioner from ORM in which it denied the request when initially made by Petitioner to it. The reasons given by ORM were that “[Petitioner’s] salary grade was not scheduled to change until you had completed a one year probationary period. Since you did not complete the probationary period as an actual employee, we are unable to make an adjustment to your compensation rate. You are currently receiving a Scheduled Disability Award through November of 2005, which was agreed upon in August of 2003. You did not file a timely Request for Reconsideration or an Appeal at that time.” Quoted in the Compensation Order, page 3 – 4.

The ALJ, in denying the request, stated “Accordingly, claimant had to serve a one year probationary period before becoming a permanent employee; therefore, claimant could not have become a permanent employee eligible for pay increases until he served his probationary period. The record indicates claimant was injured prior to becoming a permanent employee. Therefore, claimant is not eligible for cost of living increases”. Compensation Order, page 4.

The ALJ did not cite any statutory basis for the conclusion that in order to be eligible for COLAs under § 1-623.41, an injured employee must have attained permanent status by the time of the injury. That section provides that “the Mayor shall award cost-of-living increases in compensation for disability ... whenever a cost-of-living increase is awarded pursuant to §§ 1-611.05 and 1-611.06.” The sections in that quotation deal generally with the procedure by which the Mayor and the Council of the District of Columbia determine whether a COLA is to be implemented in the government wide pay system; neither provision specifically references the probationary or permanent status of any employee.

While there is some logical basis for the ALJ’s conclusion, i.e., an employee is not entitled to the benefit of a pay increase if the employee fails to remain employed following a presumably unsuccessful probationary period, by that same logic the employee ought to be denied all benefits, in that benefits represent replacement of wages that would have been earned in the absence of the injury, and if one assumes the employee would not have remained employed beyond probation, there is no wage loss to replace.

Further, we note that the Act contains a provision, § 1-623.13, which provides:

- (a) If an individual: (1) Was a minor or employed in a learner’s capacity at the time of injury; or (2) did not have a physical or mental disability before the injury, the Mayor, on review under § 1-623.28 [the provision for appeal to the Director, and

now, this Board] after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of the assumed monthly pay corresponding to the probable increased wage-earning capacity.

While we do not hold that an individual who is a probationary employee constitutes a person holding a position “in a learner’s capacity”, nonetheless we believe that this section, along with the COLA provisions of the Act, evidence a general intention of the legislature for employees who are injured to obtain compensation rate increases that reflect the upward earnings path that the employee would be expected to obtain in due course, but for the injury. In the absence of a specific exclusion of probationary employees from the COLA provisions, we hold that the denial of the requested COLA increases is not in accordance with the law.

Regarding the last issue, the ALJ denied the request for ongoing temporary total disability because Petitioner had received a schedule award under § 1-623.07. According to the Compensation Order, the injury included: (1) multiple contusions, bruises and lacerations to the face, (2) back bruises, (3) right knee and (4) left knee injuries, (Compensation Order, page 2); and under its terms, Petitioner received a schedule award for injuries to (1) his left ankle, (2) his right knee, and (3) his right shoulder (Compensation Order, page 3).

Petitioner apparently misapprehends the basis of the ALJ’s decision to deny this claim. The ALJ did not base the denial upon a settlement analysis, rather, the ALJ ruled that, having received payments for scheduled injuries under the Act, Petitioner’s entitlement to additional temporary total disability benefits had been extinguished as a matter of law.

However, we note that the two sections of the Compensation Order quoted above are incongruous, leaving unclear precisely what it is that the ALJ found Petitioner to have been awarded under the schedule: we can not discern if the ALJ determined Petitioner was awarded for injuries not sustained in the work injury, or was awarded for some, but not all of the injuries sustained in the work injury.

Further, the ALJ based the denial upon cases decided under the private sector District of Columbia Workers’ Compensation Act, D.C. Code § 32-1501, *et seq.* The cases cited were *Smith v. District of Columbia Dep’t. of Employment Services*, 548 A.2d 95 (1988) and *Cherrydale Heating and Air Conditioning v. District of Columbia Dep’t. of Employment Services*, 722 A.2d 31 (1998), the latter of which the ALJ referred to as “*Choirdale*”. These cases stand for the proposition that, under the private sector act, except for some very limited circumstances as set forth in *Cherrydale* (such as an extremely significant worsening of the condition of a schedule member amounting to something approaching or equaling an additional amputation), once an injured employee obtains a schedule award, the employee is entitled to no additional wage loss benefits attributable solely to the impairment of the scheduled member.

The ALJ’s determination that the claim for temporary total disability benefits should be denied based upon these cases is mistaken for numerous reasons. First, they are cases interpreting the private sector act, not the Act under which this case arises. While the statutory schemes are in many ways similar, the Act contains specific provisions governing the entitlement to wage loss benefits on the one hand, and schedule benefits to be awarded without the need for showing any actual wage loss, on the other.

Second, even under the private sector act, it is not completely accurate to state that upon receipt of a schedule award, a claimant is entitled to no additional total disability benefits arising from the same work related injury. While the subject of much litigation, it has been established that, under the private sector act, where there is an ongoing and separate wage loss being sustained due to an impairment to a part of the body for which there is no schedule award available, such as the neck or back, receipt of a schedule disability award (such as a disability to an arm resulting from an injury to the neck) to a scheduled body part does not bar receipt of wage loss benefits, if the wage loss is attributable to a separate and distinct loss of function from that of the schedule body part. See, *Sullivan v. Boatman & Magnani*, CRB (Dir. Dkt.) No. 03-074, OHA/AHD No. 90-579E, OWC No. 088187 (August 31, 2005).

Further, and most significantly, the language of the Act provides, at § 1-623.05, that “If the disability is total, the District of Columbia government [Respondent in this case] shall pay the employee during the disability monthly monetary compensation ...”. In other words, as long as an injured employee is totally disabled, the employee is entitled to total disability benefits. Regardless of whether the temporary total disability claim might have been extinguished were this a private sector claim, under the Act, at § 1-623.07, the schedule section, it is provided explicitly at subsection (b) that “With respect to any period after payments under subsection (a) have ended, an employee is entitled to compensation as provided by the following: (1) Section 1-623.05, if the disability is total; or (2) Section 1-623.06, if the disability is partial.”

Accordingly, we believe that it is abundantly clear that Petitioner’s claim for temporary total disability benefits under § 1-623.05 was not extinguished by virtue of his having received schedule award payments under § 1-623.07 for disabilities sustained in the course of his employment. Thus, the matter must be remanded to AHD for consideration of Petitioner’s claim for such benefits.

Lastly, regarding the denial of consideration of claims for other conditions, the ALJ declined to consider such claims at this time, in that the ALJ stated that Petitioner “has made no claim for benefits for these other conditions and therefore they will not be adjudicated here”. While it is true that Petitioner did not present any documentary evidence that he has filed a claim or claims for any injuries other than those sustained in the November 13, 1996 assault upon him by inmates, as described in the Compensation Order, three of Petitioner’s exhibits at the hearing (exhibits 13, 15 and 22) appear to be medical records relating to Crohn’s disease, and, review of Petitioner’s testimony indicates that part of his claim before the ALJ was that he had sought benefits for additional conditions by way of “documents accepted by the D.C. government” (line 17 – 18), including carpal tunnel syndrome (HT 92, line 11), and depression (HT 98) yet he had not received a “letter of determination” (HT 92, line 13), and sought medical care for conditions he claims were caused by the November 13, 1996 incident (HT 94 – 95 referring to carpal tunnel treatments sought). In other words, it appears that Petitioner alleged at the formal hearing that these conditions are causally related to his work injury, yet he has been denied benefits, including medical care, despite having documented the claims and conditions to the District of Columbia government.

While we do not rule that Petitioner’s claims concerning the adequacy of his filings or the relationship of these conditions to the work injury are sufficient to warrant granting him benefits for those conditions, the ALJ’s failure to address the claims, by making specific findings of fact based upon record evidence as to whether Petitioner has claimed compensation for these conditions, whether the District of Columbia government has responded to the claim, and/or whether they are causally related to the work injury before the ALJ, is not in accordance with the law. Petitioner is entitled to have his claims addressed.

## CONCLUSION

The augmentation of Petitioner's compensation rate pursuant to § 1-623.10 Compensation Order of July 26, 2006 is not subject to appeal and is affirmed; the denial of the requested COLA increases was not in accordance with the law and is reversed; and the ruling that Petitioner was not entitled to consideration of his claim for temporary total disability benefits is not in accordance with the law and is reversed. Further, the denial of Petitioner's request for a determination as to whether he is entitled to compensation and medical benefits for his claimed carpal tunnel syndrome, depression and Crohn's disease is unsupported by substantial evidence and not in accordance with the law.

ORDER

The Compensation Order of July 26, 2006 is affirmed in part and reversed in part; the award of an augmented compensation rate pursuant to D.C. Code § 1-623.10 is affirmed; the denial of COLA, and the denial of the claim for temporary total disability benefits, are reversed. The matter is remanded to AHD for further consideration of the COLA claim and a determination as to when and in what amounts Petitioner is entitled to such increases, for further consideration of the nature and extent of Petitioner's wage loss, if any, pursuant to D.C. Code §§ 1-623.05 and/or 1-623.06, and for consideration of his claims for compensation and medical benefits for his claimed carpal tunnel syndrome, depression and Crohn's disease. The ALJ is free to conduct further evidentiary proceedings to determine whether these additional claims have in fact been presented to the District of Columbia government's Disability Compensation Program, whether the claims have been subject to a determination thereby, and such further findings as are required to reach a decision upon Petitioner's entitlement to benefits for these conditions under the Act.

FOR THE COMPENSATION REVIEW BOARD:

\_\_\_\_\_  
JEFFREY P. RUSSELL  
Administrative Appeals Judge

\_\_\_\_\_  
February 21, 2007  
DATE