

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 14-158**

**JOSEPHINE REYES,  
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH,  
Employer-Petitioner.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 MAY 13 PM 1 14

Appeal from November 26, 2014 Compensation Order  
by Administrative Law Joan E. Knight  
DCP No. 30110170199-0001, OHA No. PBL13-029

Frank Mc Dougald for the Employer  
Michael J. McAuliffe for the Claimant

Before MELISSA LIN JONES, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND REMAND ORDER**

FACTS OF RECORD AND PROCEDURAL HISTORY

On January 26, 2011, Ms. Josephine Reyes was attacked by a patient while she was working as a psychiatrist at St. Elizabeth’s Hospital. She suffered multiple injuries and filed a workers’ compensation disability claim.

On March 31, 2011, the Public Sector Workers’ Compensation Program (PSWCP) accepted Ms. Reyes’s claim for “headache, cervical and lumbar sprain, rib contusion, and face contusion.” Employer Exhibit 2. Ms. Reyes did not make and PSWCP did not accept a claim for a right knee injury.

At a formal hearing before an administrative law judge (“ALJ”), Ms. Reyes sought “restoration of her disability claim to include payment for right knee treatment and surgeries, as well as, related medicals.” *Reyes v. D.C. Department of Mental Health*, AHD No. PBL13-029, DCP

30110170199-0001 (November 26, 2014), p. 2. The ALJ ruled Ms. Reyes' right knee injury is a work-related aggravation of a prior condition and is compensable.

Ms. Reyes' employer, the D.C. Department of Mental Health ("Employer"), appeals the Compensation Order on two grounds. First, Employer asserts AHD lacked jurisdiction to adjudicate Ms. Reyes' claim for a right knee injury because "Claimant never made a claim for benefits based on her right knee." Memorandum of Points and Authorities in Support of Petitioner's Application for Review, p. 4. Although Dr. Rothschild addressed Ms. Reyes' right knee injury in his Additional Medical Evaluation ("AME") report, Employer asserts

[t]he purpose of the AME was to evaluate Claimant with regard to the "headache, cervical and lumbar sprain, rib contusion, and face contusion" she sustained on January 26, 2011. In the course of the examination, Claimant noted that "the most important problem she is having at this time is with regard to her right knee and her left knee secondarily." EE 5. Dr. Rothschild's report does not provide that Claimant stated she injured her right knee. His report does provide that Claimant stated that "in December of 2011, her right knee started to lock and buckle" but that "[p]rior to that, she had no problem." *Id.* Thus, while Claimant advised Dr. Rothschild of her current knee problems, she never told him that she injured her right knee on January 26, 2011.

Relying on the AME of Dr. Rothschild to terminate Claimant's benefits, an October 5, 2012 [Notice of Determination ("NOD")] was issued which advised Claimant that Dr. Rothschild did not believe that her "current complaints to the knee are related to the accident of January 26, 2011" and that he "believes that you are at [MMI] for all other body parts related to the incident of January 26, 2011." EE 3. The ALJ reviewed the October 5, 2012 NOD and concluded that it advised Claimant "that her claim for her right knee was rejected," but that conclusion is clearly incorrect. Claimant never submitted a claim for her right knee and therefore, the October 5[,] 2012 NOD did not constitute a rejection of such a claim as stated by the ALJ. Hence, because an NOD regarding Claimant's right knee was never issued by the PSWCP, the AHD/ALJ lacked jurisdiction to adjudicate her appeal which sought benefits for her right knee.

*Id.* at pp. 4-5. (Emphasis removed.) Second, if the Compensation Review Board ("CRB") does not vacate the Compensation Order for lack of jurisdiction, Employer asserts the Compensation Order is not supported by substantial evidence because its evidence "clearly shows that Claimant did not injure or aggravate her right knee on January 26, 2011." *Id.* at 6. In that case, Employer requests the CRB reverse the Compensation Order.

In response, Ms. Reyes asserts the Administrative Hearings Division had jurisdiction because PSWCP reached a final decision regarding her knee injury which she claims is causally related to her compensable accident:

PSWCP rejected the reconsideration. That decision. . . specifically found that the right knee problems were related to an osteoarthritic progressive condition and were not causally related to the accident. That is exactly what PSWCP decided, and that is what was appealed.

Based on the PSWCP's decision that they were going to close Dr. Reyes' case because she had no medical conditions causally related to the accident, she filed her appeal. That is what they told her she could do.

The language of the November 30, 2012 "Final Decision on Reconsideration" could hardly be clearer. Dr. Reyes was asking that her claim be kept open because her right knee conditions were causally related to the incident. The PSWCP rejected this assertion, found that the right knee claims were not causally related and issued a final decision. The PSWCP told Dr. Reyes she had the right to appeal this decision, and she did.

Memorandum of Points and Authorities in Support of Claimant/Respondent's Opposition to the Application for Review, pp. 6-7. (Emphasis removed.) Ms. Reyes goes on to assert

it seems that the government is maintaining that the PSWCP should not have decided this issue because the right knee was not included on the claim form. It seeks to rewrite the statute [*sic*] and regulations to say that the issue was not sufficiently before the PSWCP because the Claim form did not include the words "right knee." The responses to this are several. First of all, whether PSWCP should have decided the issue does not matter – it did decide the issue. (It decided that the right knee condition was not causally related to the accident.) Secondly, there is no requirement that a separate claim form be filed when other parts of the body are affected by the same injury. Section 1-623.19 requires that the Claimant give notice of injury, and §1-623.21 requires that a claim be filed. However, there is not [*sic*] statutory requirement that the Claimant identify "right knee" instead of "right ankle." If the PSWCP thought the issue had not been raised properly, it could have said it was not deciding the issue. (7 DCMR §108.4 requires that the claim be in writing, but there is no requirement that Claimant provide an exhaustive list of every body part involved. PSWCP thought that the issue of right knee had been sufficiently raised, and it even obtained a medical report evaluating the right knee (Dr. Rothschild). Undersigned counsel submitted a detailed motion for reconsideration addressing the issue with great specificity. PSWCP decided the issue on November 30, 2012. The Employer now seeks to have this Board pretend that the issue was never decided. (Because some injuries and healing processes can take months or years, they will necessarily involve body parts that were not originally thought to be a part of the claim.)

*Id.* at pp. 7-8. (Emphasis removed.) Ms. Reyes also makes a policy argument that

[a]ccording to the Government's Application for Review, the Respondent/Claimant should have ignored the . . . language of the Notice of Intention to Terminate and the language of the Final Decision on Reconsideration. According to the Government's position, the Respondent/Claimant had no right of appeal because PSWCP should not have issued these decisions. So a Claimant who receives a decision terminating all benefits and advising her of her appeals rights is supposed to forego any appeal and simply argue that the decision-maker should not have decided the matter because "right knee" was not mentioned in the Claim form. Meanwhile the time for any appeal will have passed.

*Id.* at p. 9. Asserting that the ALJ had jurisdiction and appropriately weighed the evidence in the case, Ms. Reyes requests the CRB affirm the Compensation Order.

#### ISSUE ON APPEAL

Did AHD have jurisdiction to rule Ms. Reyes' right knee injury is causally related to her compensable accident such that she is entitled to restoration of her workers' compensation disability claim including medical benefits for that right knee injury?

#### ANALYSIS<sup>1</sup>

On March 31, 2011, PSWCP accepted Ms. Reyes' claim for "headache, cervical and lumbar sprain, rib contusion, and face contusion." Employer Exhibit 2. Ms. Reyes did not claim a right knee injury on the January 26, 2011 First Report of Injury. Employer Exhibit 1. PSWCP did not accept or deny a claim for right knee injury.

On October 5, 2012, PSWCP issued a Notice of Intent to Terminate Public Sector Workers' Compensation Payments explaining:

We intend to close your public sector workers' compensation claim. Benefits will be terminated on November 4, 2012. You no longer meet the requirements for continued claim payments. This conclusion is based on an Additional Medical Evaluation performed by Dr. Stanley Rothschild on July 7, 2012. Dr. Rothschild does not believe that your current complaints to the knee are related to the accident of January 26, 2011. He also believes that you are at maximum medical improvement for all other body parts related to the incident of January 26, 2011 (cervical and lumbar spine, rib contusion, face contusion); that you require no further medical treatment and you can work full duty without restrictions.

Employer Exhibit 3. Ms. Reyes requested reconsideration of the termination, and on November 30, 2012, PSWCP issued a Final Decision on Reconsideration upholding the termination; the Final Decision on Reconsideration addressed Ms. Reyes' cervical spine, lumbar spine, right shoulder, knees, right ankle, and psychological injuries, among others. Employer Exhibit 4.

Pursuant to § 1-624.23(b)(1) of the D.C. Comprehensive Merit Personnel Act of 1978, as amended. D.C. Code § 1-623.01 *et seq.*, ("Act"),

[b]efore review under §1-623.28(a), a claimant for compensation not satisfied with a decision of the Mayor or his or her designee under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of

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<sup>1</sup> The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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* § 1-623.28(a) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

the decision, to a hearing on the claim before a Department of Employment Services Disability Compensation Administrative Law Judge. At the hearing, the claimant and the Corporation Counsel are entitled to present evidence. Within 30 days after the hearing, the Mayor or his or her designee shall notify the claimant, the Corporation Counsel, and the Office of Personnel in writing of his or her decision and any modifications of the award he or she may make and the basis of the decision.

The CRB has interpreted this provision to require issuance of a Final Determination<sup>2</sup> by PSWCP in order to vest jurisdiction in the Administrative Hearings Division:

The plain language of §1-623.24(b)(1) of the Act requires “the issuance of a decision” by DCP before an injured worker may request a formal hearing:

The authority of this Agency to review disputes arising out of the Public Sector Workers’ Compensation Act is wholly governed by the terms of that Act. D.C. Code §1-623.24(b)(1) provides for an appeal or review of a final decision of [PSWCP] Determinations by an ALJ in DOES. As a general principle, the only matters that DOES has authority to review are matters upon which [PSWCP] has rendered a decision, and it is that decision that is reviewed by DOES. In the absence of an operative decision, there is nothing for DOES to review and rule upon. [*Minter v. D.C. Office of the Chief Medical Examiner*, CRB Nos. 11-024 and 11-035, AHD No. PBL073A, DCP No. 761035-0001-2006-0014 (December 15, 2011).]

In other words, the Act is clear that the actual issuance of a Final Determination is a prerequisite to AHD’s adjudication of the request for benefits:

While the courts have broad grants of authority to adjudicate matters, the adjudicatory authority of an administrative agency is limited by an enabling act. Under the Act governing this matter, a claim for benefits for a work-related injury must first be made to the Public Sector Division of the Office of Workers’ Compensation, that is, the OBA. See D.C. Official Code §1-623.24 (a); 7 DCMR §§104, 105, 106, 199. The OBA, now the TPA, is responsible for conducting necessary investigations into an injured worker’s claim and then making an initial determination either to award or deny disability compensation benefits for that claim. It is only if the injured worker is dissatisfied with the determination the worker can request a hearing before the ALJ. See D.C. Official Code §1-623.24(b)(1). Thus, an ALJ is without ancillary authority to adjudicate claims for compensation that have not been first presented to the OBA, or the TPA, for investigation and resolution. [*Burney v. D.C. Public Service Commission*, CRB No.

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<sup>2</sup> The term “Final Determination” is used generically to refer to any final decision rendered by PSWCP including but not limited to a Denial of Award of Compensation Benefits or Notice of Loss of Wage Earning Capacity.

05-220, OHA No. PBL97-016A, DCP No. 345126 (June 1, 2005)  
(Emphasis added.)]

*Sisney v. D.C. Public Schools*, CRB No. 08-200, AHD No. PBL08-066, DCP No. DCP007970 (July 2, 2012). Arguably, PSWCP issued a Final Determination regarding Ms. Reyes' right knee injury; however, the District of Columbia Court of Appeals has reversed the CRB in the past when it espoused a liberal interpretation of the facts and the law in a similar public sector case.

In *Jackson v. D.C. Housing Authority*, CRB 12-104, AHD No. PBL11-022A, DCP No. 30110173190-0001 (October 11, 2012), the claimant filed a First Report of Injury for injuries to her left wrist and neck. A few weeks later, the claimant attempted to amend her claim to include a back injury, but her attempt did not prompt issuance of a notice either accepting or denying her back claim. Instead, PSWCP issued a Notice of Determination accepting only a left wrist injury.

At a formal hearing, "the employer acknowledged that it previously accepted the claim for wrist injury and that it now also was accepting the claim for a neck injury. The employer continued to contest the claim for injury to claimant's back." *Id.*

On appeal to the CRB, the employer asserted

that AHD did not have jurisdiction to hear any matter relating to the claimant's lower back claim because it "neither denied that the lower back injury was a part of the accepted claim nor denied a request for authorization to treat the lower back. In other words, the Claimant had not exhausted her administrative remedies under the Act and regulations." Employer's memorandum at 5-6.

The ALJ, in the CO, addressed this argument as follows:

Employer further argued that there was no final order from the Mayor in this matter from which to appeal. Employer is estopped from alleging there was no final order because it argued earlier that Claimant had 30 days from the date of the March 1, 2011 Acceptance Order which also informed Claimant that she could appeal to an ALJ. Therefore, Employer's motion to dismiss is denied and Claimant may proceed to a formal hearing.

CO at 11.

While we do not agree with the ALJ's analysis that the employer is estopped from asserting this argument, we find that under the specific facts of this case, the employer's failure to specifically deny the claimant's back claim is not a bar to OHA's jurisdiction over that claim.

The employer is correct that as a general rule, OHA does not have jurisdiction to determine a claim for injury to a specific body part unless the employer has issued a determination denying liability for that body part. In several recent decisions, the CRB overruled *Tellish v. D.C. Public Schools*, CRB No. 07-001, AHD No. PBL05-028A, DCP No. DCPS 007013 (February 16, 2007) and held that the plain language of D.C. Code §1-623.24(b)(1) requires that

the employer make a determination with respect to a claim before an injured worker may obtain a formal hearing. *Sisney v. DCPS*, CRB No. 08-200, AHD No. PBL08-066, DCP No. DCP007970 (July 2, 2012), *Brooks v. DCDMH*, CRB No. 10-062, AHD No. PBL96-065B, DCP No. 7610100001199-0016 (August 16, 2012, *Newby v. DCPS*, CRB No 10-162, AHD No. PBL01-064D, DCP No. LT-PARK001712 (September 11, 2012).

In the present case, the claimant asserted three claims: left wrist, neck and back. The Notice of Determination only accepted the claimant's left wrist claim. The Notice was silent as to the neck and back claims. However, the employer did not challenge AHD's jurisdiction over the neck claim. Indeed, at the hearing it advised the ALJ that it was accepting that claim.

The employer, in effect, conceded jurisdiction over the claim for neck injury even though it did not specifically deny that claim. Since the employer did not challenge jurisdiction with respect to one of the claims on which the Notice of Determination was silent, we find it may not act inconsistently and challenge jurisdiction over the other claim on which the Notice of Determination was silent, the back claim.

*Id.* The CRB determined that the ALJ had jurisdiction to adjudicate a back claim; however, the Court reversed the CRB because the claimant had not asserted a back claim to the PSWCP:

Although the CRB states that Jackson asserted claims for her left wrist, neck, and back injuries, it is undisputed that Jackson's claim form identified only her left wrist and neck injuries and nowhere mentioned a back injury.

*D.C. Housing Authority v. DOES*, No. 12-AA1824, Mem. Op. & J. (D.C. March 31, 2014). (*Jackson*) (Emphasis added.)

Although *Jackson* is an unpublished decision which is not to be viewed as having precedential authority, *See* Rule IX D District of Columbia Court of Appeals Operating Procedures; D.C. Ct. App R. 28 (h); *In Re: Pearson*, 628 A.2d 94, n. 8 (DCCA 1993) (unpublished decisions . . . cannot be invoked as precedent); *Scott v. District of Columbia*, 493 A.2d 319,322 n.5 (D.C. 1985), and Joyce J. George, JUDICIAL OPINION WRITING HANDBOOK, 5th Ed., Part III, "Opinions Classified," *Memorandum Opinions*, William S. Hein & Co., 2007, it is informative regarding the Court's position on this legal issue. While an unpublished decision may not have precedential authority, because the CRB was reversed in *Jackson* this panel feels obligated to adopt the Court's reasoning.

#### CONCLUSION AND ORDER

Ms. Reyes did not claim a right knee injury in her First Report of Injury; therefore, even though PSWCP issued a Notice of Intent to Terminate Public Sector Workers' Compensation Payments based upon Dr. Rothschild's additional medical evaluation of Ms. Reyes' right knee injury and even though PSWCP issued a Final Decision on Reconsideration upholding the termination on those same grounds, AHD lacks jurisdiction to adjudicate Ms. Reyes' claim for workers' compensation disability benefits for a right knee injury. The November 26, 2014 Compensation

Order is VACATED, and this matter is remanded for the ALJ to dismiss the Application for Formal Hearing.

FOR THE COMPENSATION REVIEW BOARD:

  
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MELISSA LIN JONES  
*Administrative Appeals Judge*

\_\_\_\_\_ May 13, 2015

DATE