

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-060

**MARIA ROMERO,
Claimant-Respondent,**

v.

**J.W. MARRIOTT HOTEL
and MARRIOTT INTERNATIONAL, LLC,
Employer and Insurer-Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 JUL 29 AM 11 56

Appeal from an Order dated April 14, 2014 of the
Office of Workers' Compensation issued by
Claims Examiner Alice Goldring and Claims Supervisor Lisa Baxter
OWC No. 680258

Julie D. Murray for the Petitioner
Michael J. Kitzman for the Respondent

Before: Before: JEFFREY P. RUSSELL, HENRY W. MCCOY and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board; HENRY W. MCCOY, *concurring.*

DECISION AND ORDER

BACKGROUND

Claimant Maria Romero (Respondent) injured her upper and middle (thoracic) back in a work related injury on April 24, 2011. Employer J.W. Marriott Hotel (Petitioner) accepted the injury, provided causally related medical care and temporary total disability compensation for period of time. Most of that care was provided by Dr. Andrew Dutka at Kaiser Permanente, which is also a medical care provider that provides general health care coverage to Petitioner's employees.

Respondent sought additional medical care and disability compensation related to complaints emanating from her low back (lumbar) and radiating into her left leg at a formal hearing before an Administrative Law Judge (ALJ) held January 31, 2013. Following that hearing, a Compensation Order was issued on February 25, 2013, denying Respondent's claim on the grounds that the low back condition was not medically causally related to the work injury. That

Compensation Order was appealed to the CRB, and was affirmed. *Romero v. J.W. Marriott*, CRB No. 13-036, AHD No. 13-003, OWC No. 680258 (November 13, 2013).

Respondent sought authorization from the Office of Workers' Compensation (OWC) to change her attending physicians to treat what she claims are ongoing thoracic complaints. That request was granted in an Order dated April 14, 2014 from the Office of Workers' Compensation (OWC), in the District of Columbia Department of Employment Services (DOES). In that Order the request for authorization to change attending physicians was granted.

Petitioner appealed the Order to the Compensation Review Board (CRB), arguing that it is arbitrary and capricious inasmuch as it fails to state why a change of attending physician is in Respondent's best interests. Petitioner argues that it is Claimant's burden to demonstrate that such a change is in his or her best interests, and that no such showing has been made. Respondent argues that granting the request was not an abuse of discretion and the Order contains adequate explanation and justification for it to be affirmed. We affirm the Order.

DISCUSSION AND ANALYSIS

In review of an appeal from OWC, the Board must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, § 51.93 (2001).

The Order before us contains the following pertinent language:

Employee made claim that she continues to have problems in the thoracic spine area as a result of the work-related incident of April 24, 2011. Claimant has been receiving medical care from Kaiser Permanente for the work-related injury to the thoracic area of the back. The claimant stated that Kaiser Permanente is not listening to her complaints in connection with her work-related thoracic spine injury. It appears as of April 2014, the claimant no longer has private health insurance (Kaiser Permanente) through the employer (J.W. Marriott Hotel) to address the work-related thoracic spine injury sustained on April 24, 2011.

Employer/Carrier's representative's position on the requested change of treating physician is that the claimant has not had active medical treatment for work-related thoracic spine injury since November 2013.

. . .

The office has determined that a change of physician is in the best interest of claimant as she is still experiencing pain and discomfort from the thoracic spine injury and is not satisfied with the medical treatment received from Kaiser Permanente. The claimant has stated that Kaiser Permanente has not been addressing the complaints for the work-related thoracic spine injury.

It is therefore **ORDERED** that claimant's request for authorization to change physician be **GRANTED**.

In *Lane v. Linens of the Week*, CRB No. 05-207, OWC No. 594244, (May 6, 2005), the CRB wrote that the D.C. Workers' Compensation Act "places the burden upon a claimant to establish entitlement to the specific relief requested" citing *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986). Further, 7 DCMR § 212.13 was noted to be structured so as to maintain that requirement, requiring a "finding" that the requested change is "in the best interests of" Claimant seeking the change. Dissatisfaction with the medical care alone was said to be insufficient; in the absence of a finding that the change is necessary to foster the best interests of Claimant, a denial of the request is allowed.

We fail to see how this Order can be viewed as being deficient. Petitioner does not dispute any of the assertions contained in the Order concerning Respondent's continuing to suffer from the effects of the injury to her thoracic spine, that that injury is work-related, and that Respondent currently has no access to health care to treat that injury.

The CRB recently faced a similar case in *Smith v D.C. Water and Sewer Authority*, CRB No. 14-002, OWC No. 682997 (April 21, 2014). In that decision, quoting from the Order under appeal in that case, the CRB wrote:

In the Final Order, the Claims Examiner wrote:

Counsel for Claimant testified that Claimant was dissatisfied with the quality of treatment being rendered by her treating physician Dr. Danzinger [sic]. Claimant is said to have been unaware of the worker's compensation law, and did not know she had the option to choose her own physician. Claimant states that she has been working in constant pain for the last two years and none of the treatment options suggested by Dr. Danzinger [sic] have been helpful. Claimant claims that she has lost faith in Dr. Danzinger's [sic] ability to remedy her symptoms and or complaints. Claimant previously informed her legal counsel of her displeasure with the treatment she was being rendered and a 2nd opinion doctor was said to have been set up by employer/carrier counsel; however Claimant states that she has not been provided any feedback from that 2nd opinion visit and does not know what diagnosis the other physician reached in terms of her condition and its progression or lack thereof. It is for these reasons that Claimant has come before the Office of Worker's Compensation seeking authorization for a change of physician.

Final Order, page 1.

The Claims Examiner concluded:

It is the opinion of this examiner that a change of physician is in the best interest of Claimant. It is clear that Claimant's condition is not improving and she would feel more comfortable receiving treatment from another physician.

Id.

Employer argues that the claims examiner did not address why the requested change in physicians was in Claimant's best interest and that the reasons for the requested change in physicians outlined by the order are not sufficient to warrant a change in conditions. We reject Employer's arguments.

The claim's examiner noted that Claimant 1) was dissatisfied with Dr. Danziger's treatment; 2) was unaware that she had the option to choose her own physician; 3) had been working in pain for two years; 4) Dr. Danziger's treatment options were not helpful; 5) had "lost faith in Dr. Danzinger's [sic] ability to remedy her symptoms and or complaints; and, 6) the 2nd opinion doctor set up by Employer had not provided any feedback from her visit. Based upon these findings, the claim examiner noted Claimant was not improving and determined Claimant would feel more comfortable receiving treatment from another physician.

Contrary to Employer's argument, the claim examiner listed several reasons why Claimant was seeking a change and not just "dissatisfaction" with Dr. Danziger's treatment. Based upon the lack of improvement and Claimant's testimony she had worked in pain for 2 years without relief, the claim examiner concluded a change of physician would be in the best interest of Claimant and that she would feel more comfortable with another physician. We find no error in this and find the claim examiner adequately addressed the issue pursuant to *Lane, supra*.

Smith, supra.

As in *Smith*, the Hearing Examiner gave legitimate and rational reasons for the change: Respondent's continuing to suffer from the effects of the injury to her thoracic spine, that that injury is work-related, and that Respondent currently has no access to health care to treat that injury.

Petitioner's only substantive objection appears to be that it views Respondent's thoracic injury to have resolved. The Claims Examiner disagrees, and Petitioner points to nothing that was presented at the informal conference (except perhaps a gap in treatment from November until the informal conference) to substantiate that assertion. And, Petitioner does not contest that Kaiser Permanente is no longer willing to provide her with medical care. Further, if it is indeed Petitioner's point of view that Respondent's thoracic spine injury has resolved, it has failed to undertake the mandatory utilization review procedures to establish that Respondent is no longer

in need of medical care for her thoracic spine. *See Acuna v. Clevenger Corporation*, CRB No. 13-087, AHD No. 08-267C, OWC No. 648492 (October 2, 2013).

CONCLUSION AND ORDER

The Order of April 14, 2014 is neither arbitrary nor capricious, is in accordance with the law, and is affirmed.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

July 29, 2014

DATE

HENRY W. MCCOY, *concurring*:

In affirming the Claims Examiner's decision in the instant matter, the majority relied significantly on the CRB's decision in the matter of *Smith v. D.C. Water and Sewer Authority*, *supra*, where I was in stark disagreement. My position taken and the reasons for my dissent in *Smith* have not changed. However, the circumstance in the instant matter where the majority has based its decision, in part, on the fact that Claimant has no access to health care to treat her work-related injury, allows me to distinguish this case from *Smith*. Accordingly, while not in complete agreement, I concur in the decision to allow the change in physician as it is uncontested that Employer's health care provider, Kaiser Permanente, is no longer willing to provide Claimant with medical care.



HENRY W. MCCOY
Administrative Appeals Judge