



PENNY PETRIE, :
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 Claimant :
 :
 v. : Dir. Dkt. No. 91-40
 : H&AS No. 90-723
 CHARLES P. YOUNG COMPANY, : OWC No. 194923
 :
 and :
 :
 GREATER NEW YORK MUTUAL, :
 :
 Employer/Carriers :
 :

ORDER

On October 27, 1992, the Employer/Carrier (hereinafter "Employer") filed with the Office of the Director a Motion for Entry of an Order Finding Jurisdiction or, In the Alternative, Compelling Claimant's Attendance at an Independent Medical Examination in the above captioned matter.

The two procedural issues in the Motion are before the Director as the aforestated Motion was denied at the Hearings And Adjudication level on October 9, 1992. The Hearing Examiner of record, David L. Boddie, reasoned that since said Motion was filed subsequent to Employer's Application for Review, an appeal pending in the Office of the Director, "the relief requested . . . should be directed to that forum." Hearing Examiner Boddie buttressed his ruling by citing Jones v. George Hyman Construction Company, Dir. Dkt. No. 87-17, H&AS No. 86-597, OWC No. 80876 (Decision of the Director, September 18, 1987). In Jones, the Director ruled,

Once a party files a timely application for review of a compensation order with the Director, the Hearings and Adjudication Section has no jurisdiction to proceed on an application for a modification of a compensation order until a pending application for review has been decided. **Compensation Order p. 8.**

The issue which originates from the Order is whether Employer is entitled to its request for an independent medical examination (hereinafter, "IME") subsequent to the issuance of a Compensation Order whose decision is on appeal before the Office of the Director and can said request be properly adjudicated at the Hearings and Adjudication level?

The Director submits that an answer in the affirmative squarely reflects the facts and the procedural history of this case. A capsuled account of the pertinent facts in this case is as follows: On April 1, 1990, a Compensation Order was issued awarding Claimant temporary total disability benefits from March 27, 1990 to the present and continuing and all related medical expenses. On May 1, 1990, Employer filed an Application for Review detailing its objections to the April Compensation Order. On or about June 2, 1992, the Hearings and Adjudication Section received from Employer a Motion to Compel Claimant's Attendance at an Independent Medical Examination, or alternatively, to Suspend Benefits for Unreasonably Failing to Attend the Independent Medical Examination. Claimant filed her opposition to Employer's Motion on June 9, 1992. On June 15, 1992, Employer filed a response to Claimant's opposition. On October 9, 1992, Hearing Examiner Boddie issued an Order denying Employer's Motion citing the Jones case as controlling and containing the applicable law in this instance.

In light of the impact the Hearing Examiner has placed on Jones to the present case, a review of the pertinent facts in Jones is necessary. In Jones, a Compensation Order was issued wherein the claimant was awarded temporary total benefits for a certain time period on March 25, 1987. On April 3, 1987, employer filed a Motion for Reconsideration and Modification of the Compensation Order with the Hearings and Adjudication Section. On April 14, 1987, claimant filed a request with the Hearings and Adjudication Section for a 20% penalty on the awarded benefits. Ten days later, employer filed an application for review appealing the March 25, 1987 Compensation Order in the Office of the Director. The Motions were addressed by the Hearing Examiner through the issuance of a Supplemental Compensation Order wherein select portions of the original Compensation Order were vacated, set aside, and the request for a penalty was granted. On June 18, 1987, employer filed an application for review of the Supplemental Compensation Order.

Employer in the instant case essentially argues that its Motion, notwithstanding pending review of the Compensation Order at the Director's level, can be properly adjudicated at the Hearings

and Adjudications level. To delineate, Employer contends that its pleading to compel an independent medical examination or, alternatively, suspend benefits are issues severable from the issues it raises in its pending appeal before the Director. 1/ Hence, jurisdiction and adjudication of these issues are appropriate at the Hearing and Adjudications level. In making this argument, Employer references the allowance of the severing of the penalty issue in Jones from the other issues addressed in the Jones Supplemental Compensation Order.

The Director responds favorably to Employer's jurisdictional argument. In so doing, the Director will show that there is no discernible difference between the severing and granting of the penalty request in Jones and the severing and granting of a motion to compel or suspend benefits in the instant case. In the former, the Director reasoned that the penalty, by statute and regulation, imposes an obligation on the employer to pay in a timely fashion monies due and owing pursuant to a Compensation Award. See D.C. Code, §36-320. Specifically, the Director explained that:

in the absence of any statute or regulation expressly authorizing the filing of a motion for reconsideration, and in the absence of a specific request for a stay of a compensation order pending resolution of a motion for reconsideration, and in the absence of a showing of irreparable harm, the mere filing of a motion for reconsideration does not stay or otherwise postpone the obligation of an employer to timely pay a compensation award. Compensation Order, p. 8. See also §36-322 (b) (2).

1/ The issues Employer raises in its Application for Review are: a failure by the Hearing Examiner to reopen the record; Hearing Examiner's finding that Claimant is credible is not supported by substantial evidence; and Hearing Examiner's finding that Claimant is temporarily totally disabled is not supported by substantial evidence. These issues are enumerated solely for the purpose to provide the reader some clarity in following Employer's argument.

In the present case, Employer simply wants an IME performed on Claimant. This request, like the penalty issue, is governed by statute. Moreover, the statute includes a sanction for an employee who is found to have unreasonably failed to comply with an Employer's statutorily sanctioned request for an IME. §36-307(d) of the D. C. Code states:

If at any time during such period the employee unreasonably refuses to submit to a medical or surgical treatment or to an examination by a physician selected by the employer, . . . the Mayor shall, by order, suspend the payment of further compensation during such period, unless the circumstances justified the refusal.

Employer further develops its jurisdictional argument by stating that to determine what constitutes an "unreasonable refusal" and the justification for doing so involves a fact finding process whose undertaking is assigned to the Hearings and Adjudication Section. In concurring with this analysis, the Director feels that initial circumstances relating to an IME, be it date and time, location or refusal to take the examination, are concerns appropriately addressed in the Hearings and Adjudication forum and not the Office of the Director.

In considering the statutory relevance that the Motion has in this matter, it is necessary to address the implications it brings to the Jones case. The ruling in Jones deals primarily with a motion to modify an order issued at the Hearings and Adjudication level. At no time, in the instant case did Employer communicate a request for modification of an existing order. By holding the Jones case as the applicable law in this matter, the Hearing Examiner disregarded pertinent statute and broadly construed the basis on which the denial of Employer's IME was founded. To use his words, Hearing Examiner Boddie said:

Although in the instant case the Employer seeks to compel the claimant to submit to an independent medical examination rather than specifically to modify the outstanding compensation order, it is implicit from the discussion in Jones the Hearings and Adjudication Section only has jurisdiction to act in very limited circumstances when a compensation order is on appeal.
Order, p.2

The Director is of the opinion that addressing the issue of an IME as presented in this case, comes within the limited parameters of the Hearing Examiner's adjudicatory function. By adopting Jones as controlling law, the Hearing Examiner in essence precludes decision making on Employer's Motion. Such decision making appears to penalize the Employer for filing an Application for Review with the Director. Specifically, one could readily infer that if no Application for Review had been filed, then some lower level action would have occurred on Employer's request. Even by her own admission through her attorney Claimant indicated that she would have no objection to an IME provided Employer dismissed its appeal before the Director. **See Memorandum to the Director, October 29, 1992.** However, since the application has been filed with the Director, the Hearing Examiner saw fit to eschew the IME request by procedurally equating the Employer's Motion with the modification request made in Jones. The Director views this holding as violative of the judicial economy principle set forth by the Council of the District of Columbia in enacting the Act, namely: to provide effective administration of claims, benefits and services. **See Report of the Committee on Public Services and Consumer Affairs, p. 2,6 (January 16, 1980) and Report of the Committee on Housing and Economic Development, pp. 2-3 (January 29, 1980).**

The IME request is premised on the fact that Claimant has undergone a change in medical condition. Employer contends that Claimant's medical condition has worsened. Furthermore, Employer has offered what appears to be accommodating arrangements for Claimant in obtaining the medical examination. Claimant appeared initially receptive to those arrangements. A collapse of cooperative efforts occurred when Claimant later refused to see an independent medical examiner different from Employer's initial physician of choice. For the record, the Director thinks it important to note that §36-307 (d) permits suspension of benefits to an employee who unreasonably refuses to submit to an examination by "a physician selected by the employer." (emphasis added)

The most salient factor throughout this procedural dilemma is that the Employer took great measures to assure Claimant and Hearing Examiner that it is not seeking nor requesting a modification of the existing Order and continues to pay Claimant benefits per that Order. **Employer's Exhibit B.** This recurring statement which pervades the record evidence was not given proper consideration during the Hearings and Adjudication review.

While the Hearing Examiner did recognize that Employer was not seeking a modification, he nonetheless failed to recognize that his reliance of Jones is inappropriate, if not premature at this time.

Penny Petrie

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The Director must emphasize that since employer is under an ongoing duty to pay benefits pursuant to an award, it is not unusual for employer to obtain an updated medical examination for the purposes of determining Claimant's disability status, See George Butler v. CECO Steel, Inc., Dir. Dkt. No. 89-70, H&AS No. 86-684(A). OWC No. 0077687. (Decision of the Director, March 4, 1993). In summary, Employer's right to ascertain whether Claimant's disability has improved or worsened should in no way impede the administrative proceedings at the Hearings and Adjudication level, or inundate the Office of the Director with a deluge of pleadings to address issues whose proper forum is the level from which said issue(s) originated.

Therefore, as specifically governed by §36-307(d) of the D.C. Code and the record evidence presented, it is hereby **ORDERED** that the employer is entitled to its request for an independent medical examination subsequent to the issuance of a Compensation Order whose decision is on appeal before the Office of the Director. Accordingly, it is further **ORDERED** that the Hearings and Adjudication Section grant Employer's Motion and pursue the necessary fact finding related thereto. As such, the ORDER issued by Hearing Examiner Boddie on October 9, 1992 is **vacated** and set **aside**.



Maria Borrero
Director

Date 3/24/93