

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-043

**PETER KICKEL,
Claimant-Petitioner,**

v.

**MORTENSEN MID-ATLANTIC, LLC and
QUAL-LYNX,
Employer/Third-Party Administrator-Respondent.**

Appeal from a March 3, 2016 Compensation Order
by Administrative Law Judge Douglas A. Seymour
AHD No. 15-515, OWC No. 727139

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 AUG 19 PM 12 46

(Decided August 19, 2016)

Stephen A. Marshall for Employer
Douglas K.W. Landau for Claimant

Before JEFFREY P. RUSSELL, LINDA F. JORY, and GENNET PURCELL, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Although denominated a "Compensation Order", the order before the Compensation Review Board (CRB) for review did not follow a formal hearing. Rather, a documentary record was created by the parties' submission of exhibits and presentation of oral argument conducted January 14, 2016 before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) within the Offices of Hearings and Adjudications (OHA) in the District of Columbia Department of Employment Services (DOES).

That oral argument concerned a Motion to Dismiss filed by Mortensen Mid-Atlantic (Employer), seeking dismissal of the Application for Formal Hearing (AFH) filed by Peter Kickel (Claimant). The motion was premised upon Employer's assertion that Claimant had filed a claim for workers' compensation benefits for the same injury in Virginia, had proceeded to a hearing on

that claim, and been granted and received benefits as a result of an award entered in his favor by the Virginia Workers' Compensation Commission (VWCC). Employer argued in the motion that Claimant's claim for workers' compensation benefits under the District of Columbia Workers' Compensation Act, D.C. Code § 32-1501, *et seq.* (the Act) was therefore barred pursuant to § 32-1503 (a-1), which provides:

No employee shall receive compensation under this chapter and at any time receive compensation under the workers' compensation law of any other state for the same injury or death.

Thereafter, on March 3, 2016, the ALJ issued the "Compensation Order" (the CO) which is now under review. In it, the ALJ granted the Motion to Dismiss the AFH.

Unless otherwise noted by footnote, the following background information is taken from the filings of the parties as described below, largely from the chronology set forth by Employer in Defendants-Respondents' Opposition to Claimant-Petitioner's Application for Review (Employer's Brief) filed April 8, 2016 with the CRB.¹

On October 16, 2014, Peter S. Kickel (Claimant) was employed by Mortensen Mid-Atlantic (Employer) as a "Project Executive", working in Chantilly, Virginia, when he sustained an injury to his right knee.

On November 12, 2014, Employer filed an electronic "First Report of Injury" with the VWCC, as employers are required to do under Virginia law.

On December 5, 2014, Claimant, through counsel (the same counsel representing Claimant in this proceeding) electronically entered his appearance on Claimant's behalf with the VWCC.

On December 18, 2014, Qual-Lynx (the Third-Party Administrator) notified Claimant, through a letter to his counsel, that it was denying the claim because the injury did not arise out of Claimant's employment. The following day, VWCC sent a "Notification of Denial" to Claimant and his counsel.

On February 27, 2015, Claimant, through his counsel, filed a "Claim for Benefits" with the VWCC. Also on February 27, 2015,² Claimant, completed (but did not file) "Employee's Notice

¹ We have reviewed the chronology and the citations to the record supporting this sequence of events, as well as Claimant's letter to the CRB of March 23, 2016 to which was attached Claimant's "Memorandum of Law in Opposition to Insurer and Employer's Motion to Dismiss", which we collectively deem to be Claimant's Application for Review (AFR) and memorandum in support thereof (Claimant's Brief). The accuracy of the chronology as submitted in Employer's Brief is not challenged by Claimant in any filing with the CRB, and the cited documents in Employer's Brief support the chronology.

² February 27, 2014 is the date entered on the "Date of This Report" line of Form 7A, while February 27, 2015 is the date set forth on the "Date of This Report" line of Form 7. Both are date stamped as having been received by OWC on April 6, 2015.

of Accidental Injury” (Form 7) and “Employee’s Claim for Benefits” (Form 7A) promulgated by the Office of Workers’ Compensation (OWC) within DOES.

In a letter bearing a typographically erroneous date of March 27, 2014, but which in all likelihood was actually mailed on or about March 27, 2015,³ Claimant, through counsel, filed the Form 7 and 7A in OWC.

On April 2, 2015, Claimant’s counsel’s office forwarded copies of the Forms 7 and 7A to Employer’s counsel with a letter including the following:

Attached are the documents we have filed with the Office of Workers’ Compensation. We are not pursuing this venue at this time. The filing is for the purpose of notification.

On April 7, 2015, Employer filed a “Notice of Controversion” (Form 11) with OWC.

On June 30, 2015, an evidentiary hearing on Claimant’s Virginia claim was held in front of a Deputy Commissioner of the VWCC. On July 10, 2015, the VWCC issued the Opinion of the Deputy Commissioner awarding benefits under the Virginia Workers’ Compensation Act. Those benefits, including an attorney’s fee to Claimant’s counsel, were paid.

On July 31, 2015, Claimant, through counsel, filed an additional Claim for Benefits with the VWCC, alleging a change in condition, and seeking an expedited hearing. The expedited hearing request was denied by the VWCC by order on September 28, 2015.⁴

On September 21, 2015, Claimant filed an Application for Formal Hearing (AFH) with AHD seeking benefits for the same injury under District of Columbia Workers’ Compensation Act, D.C. Code § 32-1501, *et seq.* (the Act). Following this, on October 6, 2015, the D.C. claim was assigned to the ALJ, who issued a scheduling order setting the matter for a formal hearing to be conducted January 14, 2016.⁵

On November 24, 2015, the parties attended a mediation conference under the auspices of the VWCC.

On December 4, 2015, Employer filed a Motion to Dismiss the AFH in AHD, as described above.

As a result of Employer’s Motion to Dismiss, on December 15, 2015, the ALJ issued an Order to Show Cause (OSC) why the AFH should not be dismissed with prejudice.

³ See Employer’s Brief at 2, nt. 1, and at 3, nt. 2, for details concerning the apparent typographical errors in this letter and in the Form 7A.

⁴ On December 18, 2015, Claimant, through counsel, wrote a letter to the ALJ seeking to add an injury allegedly sustained during a physical therapy session to the pending D.C. claim. CE 9.

⁵ HT 6 at 4 – 9.

Claimant responded by letter dated December 28, 2015, requesting that the then-expired time for discovery be extended to permit the taking of a deposition of the insurer's claims adjuster, who, Claimant avers, had made statements to Claimant which led him to file the claim and accept the benefits under the Virginia workers' compensation law.⁶

On December 31, 2015, Employer filed an opposition to the request to reopen discovery. On that same date, Claimant filed a Memorandum of Law in Opposition to the Motion to Dismiss.

The ALJ convened a telephone conference with counsel on January 4, 2016. At that time the ALJ advised the parties that the formal hearing scheduled for January 14, 2016 would not proceed on that date, but that all discovery was suspended⁷ and the parties should appear at that time for oral argument on the pending Motion to Dismiss.

A Reply to Claimant's Opposition to the Motion to Dismiss was filed by Employer on January 13, 2016.

On January 14, 2015, the parties appeared and submitted documentary materials as described in HT 13 – 18 and in the CO at 2. At that time, the ALJ announced that he would make a decision on the Motion to Dismiss, and if it was denied, a new scheduling order would be issued and discovery would be reopened.⁸ The parties presented their arguments at that time. No testimony was taken.

On March 3, 2016, the ALJ issued the CO granting the Motion to Dismiss with prejudice based upon D.C. Code § 32-1503 (a-1).

On March 25, 2013 Claimant filed a letter and Memorandum of Law in Opposition to Insurer & Employer's Motion to Dismiss, which we deem to be Claimant's AFR and Claimant's Brief.

On April 8, 2016, Employer filed Defendants-Respondents' Opposition to Claimant-Petitioner's Application for Review (Employer's Brief).

Because the dismissal of the AFH is in accordance with the law, we affirm the CO.

ANALYSIS

Claimant's first articulated argument as to why his receipt of benefits under the Virginia Act should not bar his D.C. claims is that such a determination "runs counter to the United States Supreme Court's ruling in *Thomas v. Washington Gas Light*, 448 U.S. 261 (1980)." Claimant's Brief at 3; *see also*, March 23, 2016 Letter of Counsel to the CRB.

⁶ CO at 2, and Letter from Claimant's Counsel March 23, 2016 to the ALJ.

⁷ CO at 2.

⁸ HT 18.

In this context, Claimant faults the ALJ for applying the rule enunciated in *Springer v. DOES*, 743 A.2d 1213 (D.C. 1999), to the effect that receipt of benefits from another state bars a claim under the Act.

Claimant does not argue that the ALJ incorrectly interpreted *Springer*, which unmistakably stands for the proposition for which the ALJ cited it, to wit, that D.C. Code § 36-303 (a-1) (now § 32-1503(a-1)) prohibits a claimant who has obtained benefits in another jurisdiction from obtaining awards for the same injury under the Act.

Rather, Claimant argues that *Thomas* stands for the proposition that the United States Constitution “does not preclude successive workers’ awards”. Claimant’s Brief at unnumbered page 4. Claimant proceeds to argue that, in his view, the Court in *Thomas* exhibited a strong preference in favor of a policy of permitting “successive awards”, citing with apparent favor *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622 (S. Ct. 1947).

Without delving deeply into whether or not *Thomas* and/or *McCartin* can be read to evince a policy preference by the U.S. Supreme Court concerning “successive awards”, we are not bound by Supreme Court “policy preference”; we are bound to follow the law of this jurisdiction unless it can be shown that the Court (or some other court inferior to the Court but superior to us) has determined that the law enacted in this jurisdiction runs afoul of the United States Constitution. As Employer points out, the Court has *not* ruled unconstitutional laws which bar a claimant from pursuing workers’ compensation benefits within its own system if the claimant has also received such benefits under a system in a different jurisdiction. What the Court ruled in *Thomas* and *McCartin* is that State “A” may not prohibit a claimant from obtaining benefits from State “B” by virtue of the claimant having obtained benefits under State “A”’s system. Under our facts, these cases stand for the proposition that the Act cannot preclude Claimant from obtaining benefits under the Virginia law, which no one in this case argues that it can or does. We reject this argument as having no relevance to the case under review.

Claimant also argues that a claimant ought to be entitled to be advised of a right to elect benefits under the system of another state, a requirement that did, at one time, exist under former interpretations of prior iterations of the Act. *See Russell v. WMATA*, Dir. Dkt. 87-51, H&AS No. 84—358, OWC No. 041940 (June 30, 1986).

The argument fails, however, because the District of Columbia Court of Appeals (DCCA) explicitly affirmed the Director’s decision in *Springer* that amendments to the Act in 1991 had the necessary legal effect of overruling the *Russell* rule on notice. *See Springer, supra*, at 1222.

And, Claimant appears to concede the finding that *Springer* and the current provision of the Act prohibit his claim. He merely argues that this is unconstitutional:

Facially, this statutory exclusivity bar seems valid, but the legislative intent of this statutory exclusivity bar clearly indicates that Section 32-1503 (a-1) was enacted for an improper and discriminatory purpose, seeking to intentionally shift the financial burden of payment of valid Workers’ Compensation claims from the

District of Columbia to surrounding states, in an effort to impermissibly protect District of Columbia businesses at the expense of businesses in other jurisdictions.

Claimant's Brief, unnumbered page 5.

Claimant proceeds to discuss at length the legislative history of the 1991 amendments, expressing dismay with the intent to eliminate the notice rule established in *Russell*, and chastising the D.C. Council for what Claimant characterizes "impermissibly impos[ing] a significant financial burden on neighboring states", leading Claimant to ask that we find the Act to be "invalid and contrary to established public policy, and unconstitutional". Claimant's Brief at unnumbered pages 5 – 6.

Claimant misjudges our authority. Even if we agreed (and we do not) with his analytic formulations, the CRB's powers are established and limited by the Act, and nothing therein grants us authority to judge the constitutionality of the Act, at least, nothing of which we are aware or to which we have been directed.

We are also compelled to point out that this supposedly pernicious aspect of the Act, the lack of a notice requirement, doesn't seem particularly compelling in this case. Claimant was represented by counsel (the same counsel) in both the Virginia and District of Columbia claims processes. The detailed procedural history of the filings in D.C. and Virginia set forth above makes abundantly clear that Claimant's choices regarding venue were considered and deliberate.

Further, while Claimant implies in counsel's cover letter to the CRB that this case could have a different result were he allowed to take the deposition of the insurer's claims adjuster, we fail to see validity in this argument.

Among his exhibits, Claimant submitted his own affidavit concerning what he claims that he was told by the insurance company representative:

10. I talked with the workers' compensation insurance representative in November of 2014, and she advised me that everything was covered.

CE A, Affidavit of Peter Kickel, at 2.

This is the only substantive allegation about what the would-be deposition might establish. To the extent that the phrase "it is covered" has any significant meaning, it is a true statement: the claim was determined by the VWCC to be compensable, and the insurer paid what was awarded, presumably because "it was covered". What prejudice this statement may have caused Claimant is not described and is beyond conjecture. He makes no argument in this case that had he been told anything else, or had he not been told something that he was told, he would not have sought and accepted benefits in Virginia. We reject this argument as well.

CONCLUSION AND ORDER

The denial of the claim and the dismissal of the Application for Formal Hearing contained in the Compensation Order is supported by substantial evidence, is in accordance with the law, and is affirmed.

So ordered.