

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 11-151 (R)**

**RAYBURN L. LEVY,  
Claimant-Petitioner and Cross-Respondent,**

**v.**

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,  
Self-Insured Employer-Respondent and Cross-Petitioner.**

Upon Remand by the District of Columbia Court of Appeals,  
No. 12-AA-923 (February 6, 2014), AHD No. 96-064C, OWC No. 236775

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 OCT 8 AM 11 49

Benjamin T. Boscolo for the Petitioner  
Donna J. Henderson for the Respondent

Before JEFFREY P. RUSSELL, MELISSA LIN JONES, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judges*.

JEFFREY P. RUSSELL for the Compensation Review Board; MELISSA LIN JONES, *concurring*.

**DECISION AND REMAND ORDER**

**BACKGROUND**

Rayburn Levy was previously employed by the Washington Metropolitan Area Transit Authority (WMATA) as a station attendant. He sustained an injury to his left knee on June 28, 1992 while working. Subsequently, he developed right knee problems which he alleged were the result of having an altered gait due to the left knee injury.

On April 14, 1998, Mr. Levy and WMATA submitted a Stipulation to the Office of Workers' Compensation (OWC), which provided for payment to Mr. Levy of permanent partial disability to both legs, future causally related medical care, and Mr. Levy's attorney's fee from the proceeds of the schedule payments for the leg disabilities.

The Stipulation also requested that OWC approve the Stipulation and make it an Order. OWC did so on June 8, 1998. WMATA paid the amounts owed per the Order and Stipulation.

Mr. Levy retired from WMATA the following year, 1999.

Thereafter, Mr. Levy's right knee required surgery. Mr. Levy sought additional temporary total disability benefits (TTD) from WMATA for the period that he underwent surgery and recuperated, which WMATA declined to pay. Mr. Levy presented his claim for TTD to Administrative Law Judge (ALJ) David Boddie, in the Department of Employment Services (DOES), for resolution.

On December 24, 2003, ALJ Boddie issued a Compensation Order denying the claim for additional TTD finding that Mr. Levy's receipt of scheduled awards to his legs extinguished entitlement to additional TTD benefits pursuant to *Smith v. DOES*, 548 A.2d 95 (D.C. 1988) and because of his voluntary retirement from WMATA. Claimant appealed that denial to the CRB, which affirmed the denial.

Mr. Levy thereafter sought additional permanent partial disability benefits to his right leg under the schedule, seeking a 37% award from WMATA. WMATA declined to pay, and the matter was presented to ALJ Leslie Meek at a formal hearing. In proceedings preliminary to the formal hearing, WMATA filed a Motion to Dismiss the Application for Formal Hearing, which ALJ Meek denied. At the time of the formal hearing WMATA renewed the motion, which the ALJ again denied.

On November 21, 2011, the ALJ issued a Compensation Order in which she denied the request for additional disability compensation under the schedule, finding that Mr. Levy's request constituted a request for modification of the December 24, 2003 Compensation Order issued by ALJ David Boddie. The ALJ cited D.C. Code § 32-1524, which establishes statute of limitations within which requests for modifications of compensation orders can be brought, and she found that the claim raised in this matter was time-barred because it was not filed within one year of the December 24, 2003 Compensation Order.

She also found that the right knee problems were causally related to the work injury, and ordered provision of the medical care that Mr. Levy had obtained.

Mr. Levy filed a timely appeal of the denial of additional permanent partial disability benefits under the schedule. WMATA filed an opposition to that appeal, and a cross appeal contesting the finding of a causal relationship between the need for right knee surgery and the original work injury.

Mr. Levy argued to the CRB that the ALJ erred in finding the statute of limitations bars the claim because the December 24, 2003 Compensation Order did not involve any claim for a schedule awards to his legs, but rather dealt with a claim for renewed temporary total disability benefits. Citing *Capitol Hill Hospital v. DOES*, 726 A.2d 682 (D.C. 1999), Mr. Levy maintained that a claim for a schedule award which is raised after the issuance of a Compensation Order which resolved disputes involving only a claim for temporary total disability benefits is not a claim for modification of that Compensation Order.

In a Decision and Order issued June 8, 2012, the CRB held that the ALJ erred in finding that the December 24, 2003 Compensation Order operates to establish or commence the limitations provision. That Compensation Order did not adjudicate a claim for this particular class of benefits, so the CRB held that these proceedings were not a modification of that Compensation Order.

However, the CRB also held that “the ALJ appears to have misapprehended WMATA’s argument with respect to the limitations period. WMATA did not argue at the formal hearing that the December 24, 2003 Compensation Order established the time frame for a modification. Rather, WMATA argued that it is the April 14, 1998 Stipulation of the parties, approved and converted to an Order by the Office of Workers’ Compensation (OWC) on June 8, 1998, that established the commencement of the running of the limitations period.”

In the Decision and Order, the CRB agreed with WMATA. The CRB determined:

The District of Columbia Court of Appeals (DCCA) has treated stipulations such as this as [compensation orders], for example, in *Smith v. DOES*, 548 A.2d 95 (D.C. 1988), at 96:

[Smith] returned to work on January 3, 1984, and on June 24, 1984, she and WMATA entered into a stipulation that she had reached maximum medical improvement and was entitled to benefits in the nature of a schedule award, D.C. Code § 36-308 (3), for a 5 percent permanent partial disability of her right upper extremity. *See* D.C. Code § 36-308 (3) (A) (arm loss, 312 weeks' compensation). The agency approved the stipulation on July 5, 1984, and Smith received a schedule award of \$ 4,636.94.

Thus, the DCCA went on to rule that Ms. Smith’s claim for additional temporary total disability benefits was precluded by virtue of her having received an award of compensation under the schedule, despite the award not having been made in a Compensation Order following a contested formal hearing. Indeed, in this very case, in the prior Compensation Order to which the ALJ alluded (erroneously), Mr. Levy’s claim for additional temporary total disability benefits was similarly denied, for the same reason.

Most notably about *Smith*, though, is the following language, found in footnote 20:

Smith’s case is distinguishable from cases involving a previously stabilized and compensated permanent partial condition which *deteriorates* thereafter and results in further wage loss. The hearing examiner concluded, on the basis of Smith’s testimony, that her absence from work [...] was due to a “flare up” of her condition. As the hearing examiner noted, nothing in this decision prevents her from seeking a modification of a schedule award based on changed circumstances. If her condition deteriorates to a point where she can demonstrate a permanent partial disability in excess [of that which she obtained under the approved stipulation] she would be statutorily entitled to an additional schedule award under [the schedule disability portion of the Act]. D.C. Code §36-324; *see Snipes v. District of Columbia Dep’t of Employment*

*Servs.*, 542 A.2d 832, 835 (D.C. 1988); see also 3 LARSON §§ 81.30-33 (1983).

*Id.* at 96 (emphasis in original). It is clear that the court viewed OWC approved stipulated awards under the schedule to be governed by the modification provisions of the Act, which are now found not at D.C. Code §36-324, but are found in identical form at §32-1524. While this language is *dicta*, it nonetheless follows from the logic of the court's holding, and it represents precisely the circumstance we are presented with in this case.

Decision and Order, June 18, 2012.

The Decision and Order of the CRB was appealed to the District of Columbia Court of Appeals (DCCA), which vacated our decision, and the matter was remanded to the CRB because the Decision and Order did not comport with the court's earlier approval of the Director's decision in *Sodexo Marriott Corporation v. DOES*, 858 A.2d 452 (D.C. 2004) (*Sodexo*).

#### STANDARD OF REVIEW

The scope of review by the CRB is generally 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. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d) (2) (A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

#### DISCUSSION AND ANALYSIS

What the CRB failed to consider in the prior Decision and Order in this case is that there is nothing in *Smith* which indicated whether the approved settlement in that case was a "full and final disposition of the case". This was a problem because in *Sodexo*, the DCCA upheld a decision of the Director to the effect that the only OWC orders that can be considered "Compensation Orders" are full and final settlements approved pursuant to D.C. Code §32-1524. That oversight renders problematic what was then taken by the CRB as a strong implication from the court that it viewed OWC approved settlements in schedule award cases to be "compensation orders" for the purposes, D.C. Code §32-1524, the relevant portion of which reads:

§32-1524. Modification of awards.

(a) At any time prior to 1 year after the date of last payment of compensation or at any time prior to 1 year after rejection of a claim [...] the Mayor may, upon his own initiative or upon application of a party in interest, order a review of a compensation case pursuant to the procedures provided in §32-1520 where there

is reason to believe that a change of conditions has occurred which raises issues concerning:

(1) The fact or the degree of disability or the amount of compensation payable pursuant thereto [...].

Since it was undisputed in this case that the Order from OWC approving the Stipulation was approved and became effective June 8, 1998 (EE 2), the CRB found that whether it was paid within the ten days of that date in full, or was paid out over the course of the 27.36 weeks that followed the approval, more than a year had passed since the last date of the compensation ordered to be paid. Accordingly, the CRB held that the request for modification of the Stipulation and Order from OWC was time barred, and

While the basis of the ALJ's determination that Mr. Levy's modification request was time barred was erroneous, on these undisputed facts of record concerning the approved Stipulation and Order, there is but one outcome possible, and that is that the modification request is time barred. The error of the ALJ is thus deemed harmless.

However, in *Sodexo*, decided 15 years after *Smith*, the Director of DOES (in whom review authority in workers' compensation cases then vested) interpreted the Act such that a "stipulation" issued by OWC covering two distinct, closed-ended periods of temporary total disability did not constitute a Compensation Order or a Full and Final Settlement under D.C. Code § 32-1508 (8), and thus did not bar a later request for future benefits even when the later request was made more than one year after the payment of the benefits agreed to in the stipulation. The court upheld this interpretation as reasonable, writing:

Here, the employer's obligation to pay benefits arose not from a compensation order, but from the presumption established by the Act that "compensation . . . shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer." D.C. Code § 32-1515 (a) (2001). These so-called "voluntary payments" are subject to monitoring by the Office of Workers' Compensation "to ensure that the amount paid is proper." 7 DCMR § 209.9. Approval by the Office of voluntary payments is consistent with that responsibility, and does not convert every such payment into a compensation order, unless it is a complete and final settlement and in other respects meets the requirements of D.C. Code § 32-1508 (8). See *supra* note 2.

The court in the present remand viewed our determination as being inconsistent with *Sodexo*, and remanded the matter because we did not provide any explanation for departing from the *Sodexo* rule.

In order to further consider the issue, then, we start with, D.C. Code §32-1508 (8), which reads as follows:

The Mayor may approve lump-sum settlements agreed to in writing by the interested parties, discharging the liability of the employer for compensation, notwithstanding §§ 32-1516 and 32-1517, in any case where the Mayor determines that it is in the best interest of an injured employee entitled to compensation or individuals entitled to benefits pursuant to § 32-1509. The Mayor shall approve the settlement, where both parties are represented by legal counsel who are eligible to receive attorney fees pursuant to § 32-1530. These settlements shall be the complete and final dispositions of a case and shall be a final binding compensation order.

Under the Director's decision and the DCCA's ruling in *Sodexo* for an approved settlement from OWC to constitute a "Compensation Order", rather than a mere written agreement to pay a disputed amount of compensation benefits, the settlement must be "agreed to in writing" and must "discharge [...] the liability of the employer for compensation", such that the settlement becomes "the complete and final disposition [...] of the case".

We also must consider D.C. Code §32-1516 (b), which states that "No agreement by an employee to waive his right to compensation under this chapter shall be valid", the only exception being that contained in §32-1508 (8) cited above. Thus, our decision must be consistent with the fact that any agreement which prohibits a claimant from seeking future benefits is invalid, unless it is an approved full and final settlement of the whole case. The Act renders anything other than a full and final settlement which purports to waive a claimant's right to compensation invalid. This is consistent with *Sodexo*.

In addition to directing that we consider this matter in light of *Sodexo*, the DCCA instructed us to consider *Fluellyn v. DOES*, 54 A.3<sup>rd</sup> 1156 (D.C. 2012). *Fluellyn* concerned the distinction between voluntary payments of compensation, and payments made pursuant to an "award". The court wrote:

Similarly, here, petitioner's proposed interpretation of "award" for purposes of entitlement to attorney's fees under § 32-1530 (b) would eliminate any distinction between compensation that is voluntarily tendered by the employer<sup>8</sup> and compensation that is disbursed only after compulsion, thereby subsuming the terms "pay" and "tender" within the phrase "compensation thereafter awarded." Cf. *Carey*, 457 A.2d at 1108 ("To define the term 'award' too broadly, so as to construe compensation 'under an award in a compensation order' to include virtually all payments, would be inconsistent with other sections of the LHWCA."). Rather, the plain statutory language requires an "award" of compensation that is compelled in some official form by an administrative agency's order or decree. This interpretation is supported by the language of § 32-1530 (b), other uses of "award" in the Workers' Compensation Act, Supreme Court precedent, and our own case law interpreting the "virtually identical" LHWCA statutory scheme. Therefore, we hold that the phrase "compensation

thereafter awarded," as used in § 32-1530 (b), means compensation payable by an employer to a claimant pursuant to an official adjudication and determination by the Mayor or his designee.

There is nothing in the Act or regulations that render written voluntary agreements "Compensation Orders" or "awards", except for the full and final settlement provision found in D.C. Code §32-1508 (8). Thus, *Fluellyn* requires an "adjudication" in order for a payment to be considered an "award".

Therefore, upon further consideration of the matter presented, and taking into account the fact that the stipulation approved by OWC in the "Order" (i) did not purport on its face to foreclose entitlement to future wage loss benefits, and (ii) kept open the possibility of entitlement to future medical care, we conclude that the OWC-approved stipulation was not a "Compensation Order" or an "award" within the meaning the Act, and therefore the passage of a time from the date of last payment pursuant thereto does not affect Mr. Levy's entitlement to seek additional wage loss benefits.

Accordingly, we conclude that the claim for temporary total disability benefits is not time barred, in that it does not seek modification of a compensation order.

Finally on this issue, we add that this decision should not be taken as altering the rule in *Smith*, as modified by *Sodexo*. to the effect that a claimant who obtains an award under the schedule pursuant to a Compensation Order is not entitled to additional wage loss benefits, either schedule or otherwise, for that same injury, except where a modification for a worsening of condition is brought under D.C. Code §32-1524.

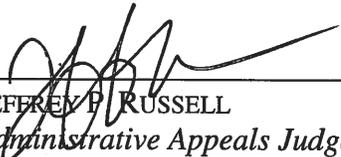
We note that there were other issues raised in the appeal. The court's mandate did not address these remaining issues: whether the ALJ's findings of a causal relationship between the right knee condition and the work injury, and the award of medical benefits, are supported by substantial evidence and are in accordance with the law. Nothing in this Decision and Remand Order should be construed to change these rulings, which we hereby incorporate by reference.

CONCLUSION AND ORDER

The determination that the request for an additional award was time barred is erroneous. The ALJ had jurisdiction to consider the claim for provision of medical care. The ALJ was under no obligation to explain why she did not credit Dr. Nasseri's opinion as to causal relationship because no such opinion was rendered by Dr. Nasseri in this record.

The denial of the request for an award to the right leg under the schedule is vacated, and the matter remanded to AHD for further consideration of the claim.

FOR THE COMPENSATION REVIEW BOARD:

  
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JEFFREY P. RUSSELL  
*Administrative Appeals Judge*

\_\_\_\_\_  
October 8, 2014  
DATE

MELISSA LIN JONES, *concurring*:

In April 1998, the parties entered into a written Stipulation agreeing that Mr. Levy was entitled to a 2.5% permanent partial disability of his right leg and a 7% permanent partial disability of his left leg. The Office of Workers' Compensation incorporated the Stipulation into an Order on June 8, 1998.

Following arthroscopic surgery in January 2001, Mr. Levy asserted his right knee condition had worsened. He sought an award of temporary total disability benefits from January 2, 2001 to September 4, 2001. In a Compensation Order dated December 24, 2003, an ALJ denied Mr. Levy's claim for relief because his receipt of schedule awards to his legs had extinguished his entitlement to additional temporary total disability benefits and because he had voluntarily retired.<sup>1</sup> That Compensation Order was affirmed by the CRB.<sup>2</sup>

More than five years later, Mr. Levy underwent a total knee replacement, and almost a year after that, he underwent a second arthroscopic surgery to remove scar tissue from his right knee. Mr. Levy then asserted a worsening of condition and requested an increase of his permanent partial disability to 37% of his right leg.

<sup>1</sup> *Levy v. Washington Metropolitan Area Transit Authority*, OHA No. 98-064B, OWC No. 236775 (December 24, 2003).

<sup>2</sup> *Levy v. Washington Metropolitan Area Transit Authority*, CRB No. 04-008, OHA No. 98-064B, OWC No. 236775 (August 8, 2006).

In a Compensation Order dated November 21, 2011, another ALJ determined Mr. Levy was attempting to modify the 2003 Compensation Order. Because that Compensation Order had issued more than seven years prior, the ALJ ruled Mr. Levy's request for modification of his wage loss benefits was time barred; however, the ALJ awarded Mr. Levy medical benefits because his knee condition was causally-related to his compensable injury.<sup>3</sup>

On appeal, because Mr. Levy was requesting a different class of benefits than he had received in the 2003 Compensation Order, the CRB held that his request for permanent partial disability was not a modification of that Compensation Order and was not time-barred in this way. The CRB went on to rule that the Order memorializing the Stipulation was an award with the effect of a Compensation Order, and as such, Mr. Levy's request still was time-barred:

It is undisputed in this case that the Order from OWC approving the Stipulation was approved and became effective June 8, 1998. EE 2. Whether it was paid within the ten days of that date in full, or was paid out over the course of the 27.36 weeks that followed the approval, more than a year has passed since the last date of the compensation ordered to be paid therein. Accordingly, the request for modification of the Stipulation and Order from OWC was time barred.

While the basis of the ALJ's determination that Mr. Levy's modification request was time barred was erroneous, on these undisputed facts of record concerning the approved Stipulation and Order, there is but one outcome possible, and that is that the modification request is time barred. The error of the ALJ is thus deemed harmless.<sup>[4]</sup>

The CRB affirmed the denial of Mr. Levy's request for additional schedule member permanent partial disability benefits.

The District of Columbia Court of Appeals vacated the CRB's Decision and Order and remanded for further proceedings to allow the CRB to "more fully explain the basis for its decision."<sup>5</sup> The Court specifically noted that pursuant to *Sodexo*,<sup>6</sup> unless a Stipulation is a full and final settlement, the Office of Workers' Compensation's memorializing that Stipulation in an Order does not create a Compensation Order triggering the time limit in §32-1524(a) of the Act.

On remand, the majority, consistent with *Sodexo*, determines Mr. Levy's current request for additional permanent partial disability benefits is not time barred because neither the Stipulation nor the 2003 Compensation Order suffices to trigger the time limits in §32-1524(a) of the Act.

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<sup>3</sup> *Levy v. Washington Metropolitan Area Transit Authority*, OHA No. 98-064C, OWC No. 236775 (November 21, 2011).

<sup>4</sup> *Levy v. Washington Metropolitan Area Transit Authority*, CRB No. 11-151, OHA No. 98-064C, OWC No. 236775 (June 8, 2012), p. 7.

<sup>5</sup> *Levy v. DOES*, 84 A.3d 518, 519 (D.C. 2013).

<sup>6</sup> *Sodexo Marriott Corporation v. DOES*, 858 A.2d 452 (D.C. 2004).

I cannot dispute that the majority relies on existing law to reach its conclusion that the Stipulation is not a Compensation Order or that §32-1524 of the Act only applies if there is an existing Compensation Order to modify, but there is an existing Compensation Order to modify. The problem lies in the erroneous premise that because the 2003 Compensation Order did not award or deny permanent partial disability benefits, it did not need to be modified in order for Mr. Levy to get schedule member permanent partial disability benefits in a subsequent Compensation Order.

In order to prove entitlement to temporary total disability benefits, a claimant must prove a work-related injury prevents the claimant from working in the claimant's regular employment for a limited time,<sup>7</sup> and in order to prove entitlement to schedule member permanent partial disability benefits, a claimant must prove maximum medical improvement<sup>8</sup> and a disability to a body part listed in §32-1508(3) of the Act. The progression from the healing process necessary to get temporary total disability benefits to maximum medical improvement necessary to get permanent partial disability benefits is a change of condition; it is a modification. Failing to recognize that a claim for permanent partial disability benefits following an award of temporary total disability benefits requires a modification not only ignores the medical change, it ignores an economic one. For example, if a claimant is awarded ongoing temporary total disability benefits as a result of a leg injury and later in a subsequent Compensation Order is awarded schedule member permanent partial disability benefits for that leg, the employer remains liable for ongoing temporary total disability benefits and permanent partial disability benefits at the same time because the second Compensation Order is not a modification of the first one which remains in full force and effect.<sup>9</sup> Ultimately, "[§32-1524] is designed for the review of a specific compensation award covering an issue 'previously decided' by that order, and is not addressed to new issues that were not decided in the prior compensation award."<sup>10</sup> There are important distinctions between an "award" and an "issue," and the change in medical condition and the change in economic condition are both issues covered in the prior Compensation Order thereby necessitating a modification.

Although I agree with the majority's application of the law to this case, I must write separately to point out this underlying error in the law.

*/s/ Melissa Lin Jones* \_\_\_\_\_

MELISSA LIN JONES

*Administrative Appeals Judge*

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<sup>7</sup> See *Savoy v. Evered Bardon*, Dir. Dkt. No. 96-059, H&AS No. 93-377, OWC No. unknown (April 24, 1997).

<sup>8</sup> *Williams v. Steel Contractors*, Dir. Dkt. No. 95-068, H&AS No. 91-965, OWC No. 177546 (May 29, 1998).

<sup>9</sup> See *Al-Nori v. Four Points Sheraton Hotel*, CRB No. 11-008, OWC No. 604611 (August 10, 2011).

<sup>10</sup> *Capitol Hill Hospital v. DOES*, 726 A.2d 682, 685 (D.C. 1999).