

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-090

BERNARD FLETCHER,

Claimant–Petitioner,

v.

SAFEWAY, INC.,

Self-Insured Employer–Respondent.

Appeal from a Compensation Order on Remand of
Administrative Law Judge Belva D. Newsome
AHD No. 04-217C, OWC Nos. 623841 and 584291

Michael J. Kitzman, Esquire, for the Petitioner

William H. Schladt, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ LAWRENCE D. TARR, AND MELISSA LIN JONES, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

Petitioner asserts in this appeal that this case involves two separate dates of injury. The first is October 12, 2002, which occurred when a customer struck Petitioner, and he fell to the floor, injuring his right shoulder. That injury resulted in Petitioner undergoing surgical intervention involving the insertion of screws in the shoulder. That surgery occurred August 19, 2003. Ultimately, Petitioner sought a schedule award to the right arm resulting from the shoulder impairment, and in a Compensation Order issued June 8, 2004, Petitioner was awarded 8% permanent partial disability to the right arm.

¹ Judge Russell is appointed by the Director of DOES as a Board Member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

The second date of alleged injury is September 1, 2005, on which date Petitioner asserts he reinjured his right shoulder when, he alleges, a case of string beans fell and struck his right shoulder. Petitioner asserts that this incident reinjured the surgically repaired right shoulder.

On September 16, 2005, the screws were surgically removed. Thereafter, Petitioner sought an additional 40% permanent partial disability to the right arm, or a total award of 48% "subject to a credit for 8% already paid by the Employer as a result of the Compensation Order from 2004." (Michael Kitzman, Petitioner's Counsel, at HT 10). Petitioner's request was denied as representing an untimely request for modification of the 2004 Compensation Order. Petitioner appealed the denial.

In its opposition to the appeal, Respondent argued that there was but one matter before the ALJ at the time of the formal hearing, and that was consideration of the nature and extent of disability suffered as a result of the October 12, 2002 injury, and that consideration of the request for worsening of that injury was barred as being untimely pursuant to the one year time period for modifications of awards established by D.C. Code § 32-1524 (a). Respondent argued, *inter alia*, that the parties and the ALJ were bound by the issues and matters identified and stipulated to in the Joint Pre-hearing Statement (JPHS), in which there was but a single date of injury identified.

In a Decision and Remand Order (DRO) issued January 31, 2012, the CRB agreed with this argument, and wrote:

It is the Joint Pre-Hearing Statement that advises the parties of the contested issues to be addressed at the formal hearing [footnote omitted] and the Joint Pre-hearing Statement filed by Mr. Fletcher and Safeway, Inc. references only one date of injury- October 12, 2002 [footnote omitted]. The Stipulation Form attached to the Joint Pre-Hearing Statement also only references one date of injury- October 12, 2002. Prior to the 2011 formal hearing, there were no stipulations reached or issues raised regarding a September 2005 accidental injury arising out of and in the course of employment. Thus, only benefits awarded for Mr. Fletcher's October 12, 2002 accident should have been under consideration for modification at the 2011 formal hearing.

DRO, page 4 – 5.

However, because there was no finding concerning the date of the last payment of the benefits awarded in the Compensation Order of June 8, 2004, the CRB was unable to determine whether the request for modification was timely. The CRB also rejected Petitioner's argument that the worsening in this case that led to the September 16, 2005 surgical removal of the screws was so severe that an additional award of permanent partial disability is appropriate, analogizing this case to *Cherrydale Heating and Air Conditioning v. DOES*, 722 A.2d 31 (D.C. 1998). The CRB determined that the reference to *Cherrydale* was inapposite, given the *Cherrydale* dealt with requests for additional temporary total disability benefits following an award under the schedule, a situation not presented by the facts of this case. See, DRO, page 5.

On remand, the ALJ issued a show cause order seeking to establish that date, to which Respondent filed a response, indicating that the last payment was made August 13, 2007. The ALJ issued a Compensation Order on remand (entitled "Compensation Order") on May 11, 2012, denying the request for modification as untimely. This appeal followed.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, 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. Official Code § 32-1501, *et seq.*, at § 32-1521.01 (d)(2)(A), (the Act), 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

Respondent contends in its Memorandum that this appeal ought to be dismissed as untimely. There is no dispute that the Compensation Order was issued on May 11, 2012. Although the phraseology employed in the notice of appeal rights attached thereto references a requirement that an AFR must be filed "within 30 days" of the issuance of the Compensation Order, the CRB has always interpreted that language to mean that an AFR, in order to be timely, must be filed on or before the 30th day following issuance of a Compensation Order, and that if the 30th day is a Saturday, Sunday or holiday, the AFR can be filed the next regular business day thereafter, consistent with the practice and procedure established in the District of Columbia Superior Court Rules of Civil Procedure, Rule 6, which rules this agency has long used as guidance in procedural matters not explicitly governed by the Act or our own regulations. *See, McManus v. District of Columbia Department of Corrections*, CRB No. 09-003 (May 23, 2006). In this case, the 30th day was a Sunday, and the Application for Review was filed the following Monday. Thus, we deem the filing of the AFR to be timely.

The DRO returned the case to the ALJ for a single purpose: to determine the date of last payment of permanent partial disability benefits under the schedule pursuant to the 8% permanent partial disability award made in the Compensation Order of June 18, 2004. That determination was necessary in order to determine whether Mr. Fletcher had made a timely request for modification of the June 18, 2004 Compensation Order, on the one hand, or had failed to do so on the other, in light of the one year time period within which modification requests must be brought, under D.C. Code § 32-1524.

On remand, the ALJ did as directed. She issued a show cause order seeking to establish that date, to which Respondent filed a response, not contested before the ALJ or in this appeal, indicating that the last payment was made August 13, 2007. Thus, the request for modification must have been brought to the agency on or before August 13, 2008, in order to have been timely. The ALJ

accordingly issued a Compensation Order on Remand on May 11, 2012, denying the request for modification as untimely.

Although neither the Compensation Order or Compensation Order on remand contains reference to the date the Application for Formal Hearing was filed, review of the agency administrative file for the formal hearing proceedings reveals that date to be February 8, 2011, rendering the ALJ's determination in the Compensation Order on Remand that the modification request is untimely in accordance with the law.

Petitioner re-argues in this appeal the same additional points that were argued in the prior appeal to the effect that the question of whether there was a new injury on September 1, 2005 was before the ALJ, and that the worsening in this case warrants an additional award under *Cherrydale*, even without a new injury occurring on that date. As these matters were (1) not the subject of the DRO's instructions to the ALJ on remand, and (2) were not addressed in the Compensation Order on Remand, they are not presently before us.

Lastly we note that nothing in this decision, the prior CRB decision, or either of the Compensation Orders that have been issue precluded Petitioner from bringing a claim for a new injury occurring on September 1, 2005. All that has been determined at this stage is that no such claim has been brought to the agency for a hearing yet.

CONCLUSION

The determination that the request for modification of the June 18, 2004 Compensation Order is untimely is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order of May 11, 2012 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

August 6, 2012
DATE