

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-067

GARY GRUENWALD,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA HOUSING AUTHORITY
Self-Insured Employer-Petitioner.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JUL 21 PM 2 15

Appeal from a March 27, 2015 Compensation Order
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 13-039, DCP No. 761001-001-1999-0003

(Decided July 21, 2015)

Bruce M. Bender for Claimant
Andrea G. Comentale for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, AND MELISSA LIN JONES, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board:

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Employer as an Administrative Assistant. On October 1, 1998, Claimant sustained an injury to his left shoulder and arm when he slipped and fell against the side of a door. The District of Columbia Office of Risk Management (ORM) accepted the claim for the left shoulder in a Notice of Determination dated October 25, 1998.

Claimant underwent repair of a torn labrum. On March 18th, 2002, Dr. William Launder determined Claimant had a 35% permanent partial disability (PPD) to his left arm due to the 1998 work injury. On March 29, 2004, the DC Disability Compensation Program (DCP) issued Compensation Determination which awarded Claimant 22.5% PPD (permanent partial disability) of the left arm. Claimant did not request reconsideration of the PPD award and received PPD scheduled award payments from November 2, 2003 to February 7, 2005. Thereafter, Claimant continued to receive temporary total disability (TTD) until October 28, 2006.

In a letter dated February 19, 2013, Claimant sought to increase his prior PPD award by 10% for a total of 32.5%. On March 20, 2013, the Office of Risk Management Public Sector Workers Compensation Program (PSWCP) issued a Notice of Determination Regarding Permanent Partial Disability denying additional PPD benefits, relying on the Compensation Review Board (CRB) decision in *Washington v. District of Columbia Public Schools*, CRB No. 08-091, AHD No. PBL 06-037, DCP No. 760002-0001-2000-20702B (March 20, 2008).

Claimant filed a request for a formal hearing before the Administrative Hearings Division (AHD). Employer subsequently filed a Motion to Dismiss Claimant's request asserting that Claimant is legally barred from receiving an additional PPD award based on a previously accepted injury. Claimant responded to Employer's Motion asserting that case law makes it clear that a Claimant can re-open his claim to seek additional PPD benefits for a worsening of condition, citing *Smith v. DOES*, 548 A.2d 95 (D.C. 1998) a decision involving the private sector workers' compensation act.

Employer's Motion was not ruled upon and the parties proceeded to a formal hearing to address the issues of:

Whether [AHD] has jurisdiction over a claim for a schedule award of additional permanent partial disability benefits?

Whether Claimant is entitled to an increase in permanent partial disability benefits based on a work-related aggravation or recurrence of Claimant's left shoulder?

Gruenwald v. District of Columbia Housing Authority, AHD No. PBL 13-0393, DCP NO. 71001-001-1999-003 (March 27, 2015) (CO) wherein the administrative law judge (ALJ) determined:

... AHD has jurisdiction to review over [sic] a claim of an aggravation, even in a case where years earlier a claimant has received a prior schedule award for permanent partial disability benefits pursuant to D.C. Code §1-623.07. In this case, the last payment of the PPD award was issued on February 7, 2005, and the notice of the instant claim was filed on February 19, 2013, which was years later. As a result, the statute of limitations pursuant to D.C. §1-623.22(e) began to run on February 7, 2005 and expired on February 7, 2006, and any subsequent claim of increased disability must be adjudicated as a new claim of aggravation.

In addition to concluding AHD has jurisdiction to decide Claimant's claim for additional benefits, the ALJ concluded Claimant did prove by a preponderance of the evidence that Claimant was entitled to an additional 20% permanent partial disability benefits and that his increased pain was caused by a work related event.

Employer filed a timely appeal and Claimant filed an Opposition.

ISSUES ON APPEAL

1. Whether [AHD] has jurisdiction over a claim for a schedule award of additional permanent partial disability benefits?
2. Whether Claimant is entitled to an increase in permanent partial disability benefits based on a work-related aggravation or recurrence of Claimant's left shoulder?

ANALYSIS¹

In support of its argument that the ALJ's award of additional PPD compensation under the schedule for a previously accepted injury is contrary to law, Employer asserts:

The ALJ's determination that he could evaluate Claimant's claim as a new claim of aggravation has no legal basis.

* * *

Initially, the ALJ interpreted *Washington*, [*v. District of Columbia Public Schools*, CRB No. 08-091, AHD No. PBL 06-037, DCP No. 760002-0001-2000-207-2 (March 20, 2008)] *supra*, as holding that a claim of aggravation may be made and adjudicated at any time without respect for the limitations period set forth in D.C. Code §1-623.229(e). This is a complete misinterpretation of *Washington*. First, there was no issue of a limitation period in the *Washington* case. Second, D.C. Official Code §1-623.22(e) did not exist when *Washington* was decided in 2008. That section of the statute was added effective September 24, 2010. Accordingly, the CRB did not conclude "that a claim for aggravation may be made after the modification period ends" and *Washington* provided no support for the consideration of Claimant's claim as a new claim for aggravation.

Employer's Brief at 8, 9.

Claimant has responded asserting:

It is nearly an axiom in the District of Columbia that the aggravation of an underlying condition is a compensable injury of purposes of the (sic) workers' compensation *Clark v. DOES*, 772 A.2d 198 (D.C.2001); DC Code § 32-1508 (6)(A). It is equally clear where there is 'an independent work-related incident,

¹ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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 § 1-623.28(a) of the D.C. Comprehensive Merit Personnel Act of 1978, as amended. D.C. Code § 1-623.01 *et seq.*, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

an exacerbation or aggravation of a pre-existing condition is considered a new injury. *Crawley v. S.A. Halac Iron Works, Inc.*, OHA No. 04-100, OWC No. 557716 (September 28, 2014); *see also Harris v. DOES*, 746A.2d 297, 302 (D.C. 2000); *Brown v. DOES*, 700 A.2d 787 (D.C. 1997).

Claimant's Brief at 6.

Claimant argues that Employer's reliance on *Washington* to support its position is flawed because "in *Washington*, the Claimant's condition was in no way a result of the second work-place event, whereas here there is evidence that the second work-place event resulted, at least in part in the Claimant's worsening condition." Claimant's Brief at 7.

Employer asserts in its brief, Counsel for Claimant's February 19, 2013 letter to DCP provided:

As you know, Mr. Guenwald last received a 22.50% permanent partial disability award on March 29, 2004. I am writing to request that you agree to a 10% increase or a 32.50% [PPD] award for his left shoulder and arm which would amount to 31.2 weeks of additional benefits at the rate of \$401.39 for a total of \$12,523.37.

Employer's Brief at 6.

Employer added:

Under section B.2. of the joint pre-hearing order filed by the parties on July 10, 2013, the relief sought by the Claimant was specified as: Claimant previously was awarded 22.5% permanent partial disability to his left shoulder/ arm. Claimant seeks a 20% increase in this award.

Additionally in the CO, the claim for relief was listed as "Claimant seeks an award of additional 20% permanent partial disability pursuant to the schedule. Claimant made no claim for wage loss benefits related to the 1998 work-related injury or an aggravation of the 1998 work-related injury nor did he make any claim for a new injury resulting in wage loss.

Id. at 7.

We agree.

We further note the ALJ acknowledged that the statute of limitations for modification of any award is one year from the date of the last payment or the final order. Citing the CRB's decision in *Washington*, the ALJ determined that AHD has jurisdiction over a claim for an aggravation after the modification period ends, stating:

Because the ALJ's determination that Petitioner's current complaints are causally related to the work injury for which Petitioner has obtained a prior PPD schedule

is supported by substantial evidence, the denial of additional PPD schedule benefits is in accordance with the law . . . While it is true that an aggravation of a prior work related injury can constitute a new injury, we have seen nothing in the record of a medical nature that was before the ALJ that suggests that this condition is such a work related aggravation.

CO at 6, citing *Washington, supra*.

We agree with Employer's interpretation of *Washington*.

Notwithstanding that the ALJ refers to case law, the ALJ utilized a three-part test that is not supported by either the Act or any case law. The ALJ stated:

In order to prove aggravation, Claimant must prove by a preponderance of the evidence (1) a post-award increase of disability, which is related to the prior accepted claim; (2) that the injury is related to a post-award work-related event and (3) sufficient medical rationale to explain how the work incident caused an aggravated injury.

CO at 7.

The CRB agrees that an aggravation of a pre-existing condition may be considered a new injury, if Claimant has suffered an aggravation of a pre-existing condition, which would be considered a new injury. We are also mindful that, as in the case presently before the CRB, certain private sector case law may be applied to public sector cases, where the public sector is silent on the issue.

Our decision in *Love v. WMATA*, CRB No. 14-116, AHD No. 05-288A, OWC No. 550539 (February 23, 2015) (*Love*) provides guidance with regard the instant matter. The CRB described the facts in *Love* as:

On August 20, 2014, Mr. Love again presented his claim for permanent partial disability of his left leg as a result of his October 2, 1999 work-related back injury. Mr. Love attempts to fashion his claim for relief as a new claim because the one-year statute of limitations on requests for modification of an existing Compensation Order does not apply to timely filed new claims, even if benefits previously have been awarded for a different injury arising out of the same work-related accident, *Washington Metropolitan Area Transit Authority v. DOES*, 981 A.2d 1216 (D.C. 2009); however, Mr. Love's claim is a classic case of worsening of condition purportedly supported by more recent testimony and a more recent medical opinion. Nonetheless, calling the claim a new claim does not make it so, particularly when it is identical in all respects to the original claim (albeit supported by new evidence). Thus, the ALJ correctly stated:

Having reviewed the Compensation Order in its entirety, the undersigned finds there is no question that the nature and extent of claimant[']s permanent partial disability was the issue addressed at the prior formal hearing and the Compensation Order addressed entirely whether claimant's back injury resulted in a permanent partial impairment to claimant's left leg. Thus the undersigned must agree with employer that the instant claim is not a new claim but the same claim and the only thing that is increased is Dr. Franchetti's rating. HT at 49.

Accordingly, as reiterated by the CRB in *Fletcher [v. Safeway, Inc.]*, CRB No. 11-090, AHD No. 04-217C (January 31, 2013)], and pursuant to §32-1524, in order for AHD to retain jurisdiction over the instant claimant's current claim, his request for modification must have been filed[] at any time prior to 1 year after the date of the rejection of his claim which both parties agree, claimant did not do.

Id., at 3.

We conclude Claimant, as in *Love*, is seeking an increase in PPD based upon a different medical opinion. The Act does not provide for additional PPD once an award has been paid. Therefore, the ALJ lacked authority to award the additional 20% PPD.

CONCLUSION AND ORDER

The March 27, 2015 Compensation Order is not in accordance with the applicable law. It is REVERSED and the award VACATED.

So Ordered