

# GOVERNMENT OF THE DISTRICT OF COLUMBIA

## Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA MARÍA MALLORY  
DIRECTOR

### COMPENSATION REVIEW BOARD

**CRB No. 10-004**

**LEROY GIBSON,  
Claimant–Petitioner,**

**v.**

**DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS  
Employer-Respondent.**

Appeal from a September 14, 2009 Order of  
Administrative Law Judge Fred D. Carney, Jr.  
AHD No. PBL09-041A, DCP No. 761020-0005-20007-0080

Benjamin T. Boscolo, Esquire, for the Claimant-Petitioner  
Lionel Sims, Esquire, for the Employer-Respondent

Before MELISSA LIN JONES and HEATHER C. LESLIE, *Administrative Appeals Judges* and  
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

### **DECISION AND ORDER**

#### FACTS OF RECORD AND PROCEDURAL POSTURE

In 2008, Mr. Leroy Gibson requested permanent partial disability compensation benefits as a result of a work-related injury. When the Disability Compensation Program (“DCP”)<sup>1</sup> failed to respond to his request, Mr. Gibson filed an Application for Formal Hearing with the Office of Hearings and Adjudications, Administrative Hearing Division (“AHD”).<sup>2</sup>

Because Mr. Gibson had not included a Final Determination<sup>3</sup> with his Application for Formal Hearing, an administrative law judge (“ALJ”) issued an Order to Show Cause directing Mr.

---

<sup>1</sup> Effective October 1, 2010, the DCP’s name was changed to the Public Sector Workers’ Compensation Program.

<sup>2</sup> As of February 2011, AHD’s name changed to Hearings and Adjudication.

<sup>3</sup> The term “Final Determination” is used generically to refer to any final decision rendered by DCP including but not limited to a Denial of Award of Compensation Benefits or Notice of Loss of Wage Earning Capacity.

Gibson show why his Application for Formal Hearing should not be dismissed. The D.C. Department of Public Works (“Employer”) responded to the Order to Show Cause indicating DCP had not issued a Final Determination regarding Mr. Gibson’s request for permanent partial disability compensation benefits; Mr. Gibson failed to respond to the Order to Show Cause; and an ALJ dismissed Mr. Gibson’s Application for Formal Hearing.

Mr. Gibson filed another Application for Formal Hearing. In response, Employer filed a Motion to Dismiss because the DCP still had not issued a Final Determination, and another Order to Show Cause issued. Following receipt of Mr. Gibson’s response to this Order to Show Cause, in an Order dated September 14, 2009, an ALJ ruled that in the absence of a Final Determination, AHD lacked jurisdiction over Mr. Gibson’s claim.

On appeal, Mr. Gibson argues that DCP’s failure to make a timely determination on his claim deprives him of due process and of a remedy to secure benefits pursuant to the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code §1-623.1 *et seq.* (“Act”) and that DCP’s failure establishes a constructive denial of his claim. Mr. Gibson also argues Employer should be estopped from asserting that DCP’s inaction does not constitute a constructive determination because Employer has taken a contrary position in a different case in a different court. Consequently, Mr. Gibson requests the September 14, 2009 Order be vacated and this matter be remanded for a formal hearing.

Employer has not filed a response to this appeal.

#### ISSUE ON APPEAL

1. Does AHD have jurisdiction over a claim if DCP has not issued a Final Determination?

#### ANALYSIS<sup>4</sup>

Mr. Gibson asserts §1-623.24 of the Act vests jurisdiction in AHD to adjudicate his request for permanent partial disability compensation benefits. We disagree. Sections 1-623.24(a), (a-1), (a-2), and (a-3) of the Act do not apply to Mr. Gibson’s request for disability compensation benefits. In *Nixon v. DOES*,<sup>5</sup> the D.C. Court of Appeals held §1-623.24(a-3)(1) of the Act applies only to initial claims to initiate payment of disability compensation benefits, “claims documented by a ‘report furnished by the employee’s immediate supervisor.’”

---

<sup>4</sup> Because the Order on review is not one based on an evidentiary record produced at a formal hearing, the applicable standard of review is whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 7 DCMR §266.3; *see* 6 Stein, Mitchell & Mezines, *Administrative Law*, § 51.03 (2001).

<sup>5</sup> 954 A.2d 1016, 1021(D.C. 2008).

Moreover, in *White v. D.C. Department of Housing and Community Development*,<sup>6</sup> the Director of the Department of Employment Services ruled that the plain meaning of Section 2324(a) of the Act (currently codified at §1-623.24) entitled “Time for making claim; findings of fact; awards; right to hearing; conduct at hearing” is applicable when an initial claim is made, a claim made by filing a claim and a supervisor’s report. No supervisor’s report is contemplated when requesting permanent partial disability compensation benefits years after the initial, work-related injury has reached maximum medical improvement. As such, this Panel respectfully rejects Mr. Gibson’s argument that §1-623.24(a) of the Act applies to the case under review.

In addition, Mr. Gibson asserts that pursuant to *Tellish v. D.C. Public Schools*,<sup>7</sup> §1-623.24(b)(1)<sup>8</sup> of the Act confers jurisdiction on AHD to adjudicate his request for permanent partial disability compensation benefits. In *Tellish*, the claimant filed an Application for Formal Hearing seeking permanent partial disability compensation benefits before AHD; that Application for Formal Hearing was dismissed by the presiding ALJ for lack of jurisdiction. The ALJ reasoned DCP had not issued a Final Determination, and in the absence of a Final Determination, there was no jurisdiction authorizing AHD to conduct a formal hearing.

This tribunal remanded the case back to AHD holding that despite the lack of a Final Determination, AHD had jurisdiction to proceed to a formal hearing because a “constructive determination” had been effectuated “as a matter of law, due to the lapse of the statutorily prescribed 30-day period [set forth in §1-623.24(b)(1) of the Act].”<sup>9</sup> On remand, the ALJ refused to proceed to a formal hearing.

Another appeal ensued, and the Compensation Review Board (“CRB”) reiterated that the phrase “deemed accepted” creates an exception to the requirement of an actual written Final Determination because “the Act instructs, commands and requires that a failure to issue that decision or a notice of extenuating circumstances within the 30 day period be treated ‘as if’ a written determination has been issued.”<sup>10</sup>

---

<sup>6</sup> ECAB No. 98-20, H&AS No. PBL92-06, ODC No. 325142 (July 15, 1999).

<sup>7</sup> CRB No. 07-001, AHD No. PBL05-028A, DCP No. DCPS 007013 (February 16, 2007).

<sup>8</sup> Section 1-623.24(b)(1) of the Act states:

Before review under §1-623.28(a), a claimant for compensation not satisfied with a decision of the Mayor or his or her designee under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on the claim before a Department of Employment Services Disability Compensation Administrative Law Judge. At the hearing, the claimant and the Attorney General are entitled to present evidence. Within 30 days after the hearing, the Mayor or his or her designee shall notify the claimant, the Attorney General, and the Office of Personnel in writing of his or her decision and any modifications of the award he or she may make and the basis of the decision.

<sup>9</sup> *Id.*

<sup>10</sup> *Tellish v. D.C. Public Schools*, CRB No. 07-001, OHA No. PBL05-028A, DCP No. DCPS 007013 (June 28, 2007).

Upon careful consideration, we have found *Tellish* is inconsistent with the plain language of the statute and has been overruled.<sup>11</sup> Regardless of Employer's position in this case or any other, the plain language of §1-623.24(b)(1) of the Act requires "the issuance of a decision" by DCP before an injured worker may request a formal hearing:

The authority of this Agency to review disputes arising out of the Public Sector Workers' Compensation Act is wholly governed by the terms of that Act. D.C. Code §1-623.24(b)(1) provides for an appeal or review of a final decision of [DCP] Determinations by an ALJ in [the Department of Employment Services ("DOES")]. As a general principle, the only matters that DOES has authority to review are matters upon which [DCP] has rendered a decision, and it is that decision that is reviewed by DOES. In the absence of an operative decision, there is nothing for DOES to review and rule upon.<sup>[12]</sup>

In other words, the Act is clear that the actual issuance of a Final Determination, as opposed to a constructive denial, is a prerequisite to AHD's adjudication of the request for benefits:

While the courts have broad grants of authority to adjudicate matters, the adjudicatory authority of an administrative agency is limited by an enabling act. Under the Act governing this matter, a claim for benefits for a work-related injury must first be made to the Public Sector Division of the Office of Workers' Compensation, that is, the OBA. See D.C. Official Code §1-623.24(a); 7 DCMR §§104, 105, 106, 199. The OBA, now the TPA, is responsible for conducting necessary investigations into an injured worker's claim and then making an initial determination either to award or deny disability compensation benefits for that claim. It is only if the injured worker is dissatisfied with the determination the worker can request a hearing before the ALJ. See D.C. Official Code §1-623.24(b)(1). Thus, an ALJ is without ancillary authority to adjudicate claims for compensation that have not been first presented to the OBA, or the TPA, for investigation and resolution."<sup>[13]</sup>

---

<sup>11</sup> *Sisney v. D. C. Public Schools*, CRB No. 08-200, AHD No. PBL08-066, DCP No. DCP007970 (July 2, 2012).

Mr. Gibson's attorney has requested the Compensation Review Board ("CRB") convene an *en banc* panel pursuant to 7 DCMR §255.8. In accordance with that regulation, *en banc* review is discretionary and may be granted where two or more panels disagree concerning resolution of an issue; however, since *Sisney, supra*, the CRB consistently has required a Final Determination in order for AHD to have jurisdiction over a public sector workers' compensation case, and all members of the CRB have participated in decisions reaching that conclusion. Thus, granting the *en banc* request is unnecessary and would needlessly delay this decision.

<sup>12</sup> *Minter v. D.C. Office of the Chief Medical Examiner*, CRB Nos. 11-024 and 11-035, AHD No. PBL073A, DCP No. 761035-0001-2006-0014 (December 15, 2011).

<sup>13</sup> *Burney v. D.C. Public Service Commission*, CRB No. 05-220, OHA No. PBL97-016A, DCP No. 345126 (June 1, 2005) (Emphasis added.)

Such a reading does not “render the provisions of subsections (a-3)(1) and (a-4)(2)”<sup>14</sup> meaningless and without recourse.”<sup>15</sup> Section 1-623.24(a-3)(1) of the Act does not apply to a request like the one made by Mr. Gibson, a request for permanent partial disability compensation benefits. Pursuant to §1-623.24(a-4)(2), if DCP fails to provide a written decision after a reconsideration has been requested, “the claim shall be deemed accepted, and payment of compensation to the claimant shall commence on the 31<sup>st</sup> day following the date the request was filed.”<sup>16</sup> Contrary to the meaning previously ascribed to “deemed accepted” in *Tellish, supra*, DCP’s failure to render a final decision on reconsideration entitles a claimant to payment of compensation, a far more effective recourse under those circumstances than providing for a formal hearing.

Consistent with the language enacted by the City Council in §1-623.24(b)(1), DCP’s issuance of a Final Determination is a condition precedent to AHD obtaining jurisdiction. DCP’s failure to issue a Final Determination, therefore, prevents AHD from obtaining the authority to conduct a formal hearing to adjudicate Mr. Gibson’s claim for benefits.<sup>17</sup>

The case on appeal is analogous to *Washington v. D.C. Public Schools*.<sup>18</sup> In *Washington*, the claimant sustained a work-related injury and received temporary total disability compensation benefits for a closed period of time. Thereafter, she requested a formal hearing before AHD to determine her eligibility for permanent partial disability compensation benefits, and her Application for Formal Hearing was dismissed because she had not received a Final Determination from DCP. This tribunal, post-*Tellish*, affirmed the dismissal on the basis that the

request for schedule permanent partial disability benefits is not an initial claim. Rather, her request is a request for a different type of disability benefits than she initially received for her work injury. The thirty (30) day timeframe of the D.C. Official Code § 1-623.24(a-3) does not apply and her request for a schedule award is not “deemed accepted” giving AHD jurisdiction over this matter.<sup>19]</sup>

For the foregoing reasons, AHD does not have jurisdiction over this claim because DCP has not issued a Final Determination.<sup>20</sup>

---

<sup>14</sup> §1-623.24(a-4) of the Act was repealed in 2010.

<sup>15</sup> *Tellish, supra*.

<sup>16</sup> Section 1-623.24(a-4)(2) of the Act. This section of the Act has been repealed.

<sup>17</sup> See *Dorsey v. D.C.*, 917 A.2d 639, 641 (D.C. 2007).

<sup>18</sup> CRB No. 08-160, AHD No. PBL05-18B, DCP No. LTDMOPS0006086 (November 13, 2008).

<sup>19</sup> *Id.*

<sup>20</sup> The CRB has not overlooked the fact that there is no statute or regulation establishing a time period within which the DCP must respond to Mr. Gibson’s request for benefits; however, this is an issue the legislature must resolve.

ORDER

The September 14, 2009 Dismissal Order is not arbitrary or capricious and is in accordance with the law. The September 14, 2009 Dismissal Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

---

MELISSA LIN JONES

*Administrative Appeals Judge*

---

June 6, 2013

DATE