

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
INTERIM DIRECTOR

CRB No. 13-128

**ZINA HUNTER,
Claimant–Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES,
Employer–Petitioner.**

Appeal from a Compensation Order of September 23, 2013 issued by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 10-092, DCP No. 30100852406-0001

Harold Levi, for the Petitioner
Frank McDougald, for the Respondent

Before JEFFREY P. RUSSELL, HEATHER C. LESLIE, and HENRY W. MCCOY, *Administrative
Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board:

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of Zina Hunter (Claimant) for review of a September 23, 2013 Compensation Order issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudications section of the District of Columbia Department of Employment Services (DOES). Prior to the issuance of the Compensation Order, a Formal Hearing was held for the purpose of determining Claimant's entitlement to benefits under the D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (the Public Sector Workers' Compensation Act, or PSWCA). In that Order, the ALJ determined that Claimant's right foot injury is included within the injury that has been accepted as compensable by the Public Sector Workers' Compensation Program (PSWCP), and granted her claim for medical care for both feet, and resumed temporary total disability benefits, which

had been terminated based upon the results of an Additional Medical Evaluation (AME) performed on February 1, 2012 that concluded that Claimant's right foot injury was unrelated to the table dropping incident or the "subsequent treatment" therefor (EE 5), and that Claimant had recovered sufficiently to permit her to return to her pre-injury job.

The District of Columbia Department of Youth Services (Employer) appealed that award to the Compensation Review Board (CRB), arguing that DOES did not have jurisdiction to consider claims related to the right foot because the PSWCP has yet to issue a Notice of Determination in connection with the right foot, having only accepted the claim for injuries to Claimant's left foot.¹

Claimant opposes this appeal, arguing that under the facts of this case, the left foot injury is to be considered as part of the accepted injury under the "quasi course of employment" theory, inasmuch as Claimant asserts that the left foot injury resulted from a fall that she sustained while leaving her doctor's office wearing a "CAM Boot" on her left foot and using crutches.

We vacate and reverse the award because the PSWCP has yet to issue a notice of determination (NOD) concerning whether the right foot injury is compensable under the Act, thereby denying DOES jurisdiction to hear the claim at this time, and the Compensation Order does not make clear whether the award of ongoing temporary disability benefits is premised upon incapacity related to the right foot. We remand for further consideration and explanation.

BACKGROUND FACTS OF RECORD AND ANALYSIS

Claimant worked for Employer as a Recreational Specialist at the Oak Hill Juvenile Services facility. Part of her duties included setting up recreational equipment. On July 24, 2010, Claimant and an Oak Hill resident were carrying a table. The resident dropped his end of the table, causing Claimant to drop her end onto her left foot.

Claimant filed a claim under the Act for a left foot injury, which was accepted by the PSWCP on August 26, 2010 (EE 3). She was treated by several physicians for a contusion and three fractured toes. That treatment included wearing a "CAM Boot", which is a type of removable, hard cast-like support, and using crutches.

On August 23, 2010, Claimant alleges that while leaving the office of her treating physicians, she stumbled and fell down four steps outside the doctors' office, injuring her right foot and ankle. Nonetheless, Claimant was authorized to return to light duty work on October 14, 2010 by one of her physicians, and Claimant attempted to do so. For reasons not discussed in the Compensation Order, Claimant's employment was terminated "shortly" after her return on October 25, 2010, and her temporary total disability benefits were resumed. Claimant testified that she advised her

¹ The scope of review by the CRB, as established by the PSWCA and as contained in the governing regulations, is generally limited to making a determination as to whether the factual findings of a 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*), at § 1-623.28 (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 are constrained to 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

claims examiner, Selma Taylor, of the right foot injury, but no additional claim form was filed, and no separate written notice of acceptance or denial has been issued regarding the right foot and ankle.

Although Employer contested Claimant's assertion at the time of the formal hearing that the right foot injury claim had been "deemed accepted" (HT 11), and "is not a matter that is before" the ALJ (HT 24), the Compensation Order does not identify jurisdiction over the claim as a contested issue. Further, although the Compensation Order identifies "nature and extent of Claimant's remaining disability" as an issue, it contains no discussion distinguishing whether the finding of a current inability to return to the pre-injury job is premised in whole or in part upon ongoing incapacity due to the injury that has been accepted. Although the ALJ discussed the AME's findings, he did not make clear whether he was accepting or rejecting them *vis a vis* the ability to return to work. Rather, the ALJ wrote:

The IME of Dr. Weiner indicates that based upon a review of her medical records, diagnostic reports and examination Claimant's *work related injury* has resolved and her *remaining disability* is not sustained in the performance of her duties.

Compensation Order, page 5 (emphasis added). Following this recitation of his interpretation of the AME report, the ALJ undertook an analysis that included consideration of whether, despite a lack of medical causation, the right ankle injury is nonetheless compensable as a matter of legal causation, and determined that it was. Based upon this determination, the claim was granted.

We do not now consider whether the ALJ's analysis and determination that the alleged right foot and ankle injuries are ultimately compensable under the theory expounded upon in the Compensation Order. It is undisputed that no separate written claim has been made for the right foot and ankle condition, that the condition is related to a fall at a later date, place and time, and is to a different body part, than the claim that has been accepted. Further, it is undisputed that there has been no NOD issued with regard to the compensability of that injury.

Quoting from *Jaiyeola v. D.C. Public Service Commission*, CRB No. 13-022, OHA No. PBL 00-058B, DCP No. LT-DPE000340 (July 26, 2013):

It is now settled that a Final Determination by DCP [now known as the PSWCP] is a prerequisite to AHD's adjudication of a request for benefits. That is to say, AHD does not have jurisdiction to determine a claim unless the employer has issued a determination denying liability for that claim.

In 2012, the CRB overruled *Tellish v. D.C. Public Schools*, CRB No. 07-001, OHA No. PBL 05-028A, DCP No. DCPS 007013 (February 16, 2007) and held that the plain language of D.C. Code §1-623.24 (b) (1) requires that the employer make a determination with respect to a claim before an injured worker may obtain a formal hearing. *Sisney v. DCPS*, CRB No. 08-200, OHA No. PBL08-066, DCP No. DCP007970 (July 2, 2012). Since *Sisney*, the CRB consistently has held that a notice of determination is a prerequisite for AHD to have authority to hold a formal hearing: *Downing v D.C Public Schools*, CRB No. 12-081, AHD No. PBL 11-015, DCP No. 30090824958-0001(August 3, 2012), *Brooks v. DCDMH*, CRB No. 10-062, OHA No. PBL 96-065B, DCP No. 7610100001199-0016 (August

16, 2012), *Newby v. DCPS*, CRB No 10-162, OHA No. PBL 01-064D, DCP No. LT-PARK001712 (September 11, 2012), *Freeman-Cunningham v. D.C. Dept. of Transportation*, CRB 12-104, AHD PBL No. 11-022A, OWC No. 30110173190-0001 (September 19, 2012), *Jackson v. D.C. Housing Authority*, CRB 12-104, AHD PBL No. 11-022A, OWC No. 30110173190-0001 (November 11, 2012), *Bonds. v. D.C. Dep't of Corrections*, CRB No. 12-038, AHD No. PBL08-061D, DCP No. 300903255759-001 (December 6, 2012) and *Buitrago v. D.C. Health HIV/AIDS Administration*, CRB No. 12-076, AHD No. PBL10-032C, DCP No. 761010-006-0001 (March 20, 2013).

Here, the claimant does not dispute that the PSWCP has not made a determination with respect to one of the issues presented, i.e., whether the right foot and ankle injury is compensable. It is further clear from the record that the issue was presented to the ALJ but was not discussed or analyzed from the jurisdictional perspective.

It may be that on this record, the ALJ could determine whether Claimant's is unable to return to work due to her left foot condition alone, without regard to the condition of the right foot and ankle, or it could be that the ALJ concluded that it is now the right foot and ankle problems that prevent her from doing so. Because the ALJ does not specify, we have no way of knowing.

Accordingly, we have no recourse other than to vacate the award for lack of clarity, and remand for further consideration of the claim for temporary total disability in a manner consistent with the foregoing, and to vacate the award of medical care to the right foot and ankle until such time as DOES obtains jurisdiction over that claim.

CONCLUSION AND ORDER

The award of benefits related to the right ankle was rendered without DOES having proper jurisdiction, and is vacated. The award of temporary total disability benefits is vacated as being inadequately explained given the multiple claims of the cause of the underlying incapacity, and the matter is remanded for further consideration of the temporary total disability claims considering the effect of the accepted injury only.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Law Judge

January 28, 2014
DATE