

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

**Labor Standards Bureau**

**Office of Hearings and Adjudication  
COMPENSATION REVIEW BOARD**



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**CRB No. 07-10**

**JANELL T. PERRY,**

**Claimant – Petitioner,**

**v.**

**D. C. DEPARTMENT OF CHILD AND FAMILY SERVICES**

**Employer,**

**Employer- Respondent.**

Appeal from a Compensation Order of  
Administrative Law Judge Anand K. Verma  
AHD PBL No. 06-038, DCP No. 761010-8-2003-3

Kirk D. Williams, Esquire for the Petitioner

Pamela L. Smith, Esquire, for the Respondent

Before LINDA F. JORY, JEFFREY P. RUSSELL and FLOYD LEWIS, *Administrative Appeals Judges* .

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

**DECISION AND ORDER ON REMAND**

**JURISDICTION**

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §1-623.28, §32-1521.01, 7 DCMR § 118, Department of Employment Services (DOES) Director's Directive, Administrative Policy Issuance 05-01(February 5, 2005).<sup>1</sup>

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<sup>1</sup> Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation

## BACKGROUND

This appeal follows the issuance of a Compensation Order (CO) by the Administrative Hearings Division (AHD) in District of Columbia Department of Employment Services (DOES). In that Order, which was filed on October 31, 2006, the Administrative Law Judge (ALJ), upheld the Disability Compensation Program's (DCOP) termination of Petitioner's wage loss benefits.

Claimant-Petitioner through the assistance of counsel filed an Application for Review (AFR) of the October 31, 2006 Compensation Order requesting that the denial be reversed and Petitioner's claim for relief granted.

Employer – Respondent filed its response to the AFR on November 24, 2006, asserting the Compensation Order is supported by substantial evidence and should, therefore, be affirmed.

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (the Panel) as established by the Act and as contained in the governing regulations is 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.01, *et seq.*, at §1-623.28 (a). “Substantial evidence”, as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int’l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and the Panel are bound to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, Petitioner asserts that after concluding she could return to work with her back symptoms, the ALJ failed to require Respondent to show that the “alluded to employment was in fact available.” Petitioner relies on a decision rendered by the Court of Appeals in a private sector case *Washington Post v. District of Columbia Department of Employment Services (Mukhtar)*, 675 A.2d 37 (D.C. 1996).

The Panel finds it necessary at this juncture to remind all parties involved that not all case law that has developed in adjudicating the D.C. Workers’ Compensation Act of 1979, as amended, D.C. Official Code §§ 32-1501 to 32-1545 (private sector) is applicable to cases arising under the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005) (public sector). This Panel is certainly mindful that the Court of Appeals has agreed that “the treating physician’s preference should be utilized in both Acts,

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Administrative Reform and Anti-Fraud Amendment Act of 2004.

however the language (or omission of certain language) of the Act may preclude certain theories of recovery or defense, such as the case law associated with the presumption of compensability afforded under the private sector act. D.C. Code §32-1521. *See Kralick v. District of Columbia Dept. of Employment Services*, 842 A.2d 705 (DC 2004) (The Court found no reason why a claimant employed by the District should be treated any differently than a claimant employed in the private sector when it comes to assessing the credibility of that claimant's treating physician's testimony). *See generally, Larry Barron v. DOES*, CRB No. 06-054, AHD No. PBL 05-010 (September 6, 2006).

Just as the steps required in determining whether an injury arises out of and in the course of employment differ between the two Acts, the threshold test in establishing the nature and extent of disability differ. The Panel notes that neither party on appeal, nor the ALJ, refer to the well settled evidentiary burden the public sector places on the employer when disability benefits have been commenced by employer and then terminated<sup>2</sup>

The Employees Compensation Appeals Board, (ECAB) has stated that once a claimant's claim has been accepted as compensable, DCP must demonstrate that the claimant is no longer disabled before benefits can be terminated. *See Vernell Chase v. D.C. Department Human Services*, ECAB No. 92-9 (July 1992)(*Chase*).<sup>3</sup> Consistent with the ruling in *Chase*, the Board has held that once the Third Party Administrator (TPA) pays disability benefits due to a work-related injury, the TPA must present substantial and recent medical evidence to support a modification or termination of benefits. *See Toomer v. D.C. Dep't. of Corrs.*, CRB No. 05-202, OHA No. PBL 98-048A, DCP No. LT5-DOCOO1603 (May 2, 2005); *Jones v. D.C. Dep't. of Corrs.*, Dir. Dkt. No. 07-99, OHA No. PBL No. 97-14, ODC NO. 312082 (December 19, 2000; *Robinson v. D.C. Gen. Hosp.*, ECAB No. 95-8, ODCVC No. 302585 (July 8, 1997).

Thus, while the ALJ's ultimate determination may be supported by the evidence of record, the Panel finds it necessary to remand the matter to AHD to ensure that the proper evidentiary burden is placed on the employer to support its decision to terminate Petitioner's benefits in accordance with the prevailing public sector Act and case law and its Act.

## CONCLUSION

The ALJ's conclusion that Petitioner has not met her burden of proving that she has suffered a continued wage loss from March 1, 2006, the date Respondent terminated benefits, is not in accordance with the law.

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<sup>2</sup> The ALJ cited to only one public sector Court of Appeals case in the Compensation Order and indicated in the Statement of the Case that the claim was filed pursuant to D.C. Code §32-1501, the private sector Act.

<sup>3</sup> Although the Employees Compensation Appeals Board was abolished by legislation in 1998, ECAB's rulings in the past disability compensation cases remain persuasive in deciding disability. *See Amaechi v. District of Columbia Department of Corrections*, Dir. Dkt. 12-00, PBL NO. 99-49, ODC No. 001926 (Opinion and Order of the Director, January 9, 2002).

## **ORDER**

The Compensation Order of October 31, 2006 is hereby REVERSED and REMANDED to the ALJ with instructions to determine if Respondent has met its burden of proof applying the prevailing public sector case law and make further findings of fact and conclusions of law he deems appropriate consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY  
Acting Administrative Appeals Judge

December 13, 2006  
Date