

**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. 07-74**

**JANELL T. PERRY,**

**Claimant – Respondent**

**v.**

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

**Employer/Carrier – Petitioner.**

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

Pamela L. Smith, Esq., for the Petitioner

Kirk D. Williams, Esq., for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

**DECISION AND REMAND ORDER**

**JURISDICTION**

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services 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 District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the

## BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order on Remand, which was filed on February 28, 2007, the Administrative Law Judge (ALJ) granted the request of the Claimant-Respondent (Respondent) for temporary total disability benefits continuing from March 1, 2006. The Employer-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the decision below is not supported by substantial evidence and is not in accordance with the law. The Respondent filed an Opposition.

## ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review 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. D.C. Official Code §1-623.28(a) and § 32-1521.01 (d)(2)(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 standard of review, the CRB and this Review Panel are constrained 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, the Petitioner alleges that the ALJ’s decision is erroneously based upon a determination that it had accepted the Respondent’s claim for a back injury and, accordingly, had the initial burden to show that the Respondent’s back disability had resolved. The Petitioner argues that it accepted a claim for a crush injury to the Respondent’s foot and cites to the Pre-Hearing Conference Order filed in this case, its Notice of Determination and Final Decision on Reconsideration as support for its argument. The Petitioner maintains that it at no time accepted a claim for an injury to the Respondent’s back and, therefore, the initial burden rested not with it, but with the Respondent. In addition, the Petitioner asserts that the

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Director’s Policy Issuance, 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. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 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 Administrative Reform and Anti-Fraud Amendment Act of 2004.

ALJ's decision in the October 31, 2006 Compensation Order to accept the medical opinion of Dr. Robert Collins, the independent medical examiner, as more persuasive than that of Dr. Hampton Jackson, the treating physician, must stand given that the record evidence did not change since the issuance of the October 31, 2006 Compensation Order.

D.C. Official Code § 1-623.24 states:

(a) *The Mayor or his or her designee shall determine and make a finding of facts and an award for or against payment of compensation under this subchapter within 30 days after the claim was filed based on the following guidelines:*

(1) The claim presented by the beneficiary and the report furnished by the employee's immediate superior; and

(2) Any investigation as the Mayor or his or her designee considers necessary, provided that the investigation shall not extend beyond 30 days from the date that the Mayor received the report of the injury.

(emphasis added).<sup>2</sup>

The responsibilities of the Mayor under the Act governing this matter have been delegated to the Office of Risk Management (ORM), Disability Compensation Program (DCP). Thus, under the Act, a claim for benefits for a work-related injury must first be made to the Disability Compensation Program of the ORM which 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. *See* D.C. Official Code § 1-623.24 (a); 7 DCMR §§ 104, 105, 106, and 199. *See also* *Burney v. D.C. Public Service Commission*, CRB No. 05-220, OHA No. PBL 97-016A, DCP No. 354126 (June 1, 2005).

It is well-settled in this jurisdiction that once the DCP accepts an injured worker's claim as compensable, the DCP bears the initial burden to demonstrate a change in the injured worker's medical condition such that disability benefits need to be modified or are no longer warranted and must be terminated. *See Chase v. D.C. Department of Human Services*, ECAB No. 92-9 (July 29, 1982). The evidence used to modify or terminate benefits must be current and fresh in addition to being probative and persuasive of a change in medical status. *See Robinson v. D. C. General Hospital*, ECAB No. 90-15 (September 16, 1992). The DCP's burden is one of production and requires an evaluation of the DCP's evidence standing alone without resort to evaluating or weighing the injured worker's evidence in conjunction thereto for if the DCP fails to sustain its burden, the injured worker prevails outright. *See generally Byrd v. D.C.*

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<sup>2</sup> D.C. Official Code § 1-623.24 was amended effective April 5, 2005 to read as above indicated. Prior thereto, the section read as follows:

(a) The Mayor shall determine and make a finding of facts and make an award for or against payment of compensation under this subchapter after the following:

(1) Considering the claim presented by the beneficiary and the report furnished by the employee's immediate superior; and

(2) Completing such investigation as the Mayor considers necessary.

*Department of Human Services*, OHA No. PBL 03-015A, DCP No. LT4-DHS000775 (June 16, 2004)(As the DCP failed to sustain its initial burden, there was “no need to discuss claimant testimony and evidence.”). However, if the DCP meets its burden, then the burden shifts to the injured worker to show through reliable, relevant, and substantial medical evidence that her physical condition has not changed and that benefits should continue. If the injured worker meets her burden, the medical evidence is weighed to determine the nature and extent of disability, if any.

In the instance where the DCP does not accept a claim, the injured worker bears the initial burden of proving with reliable, probative and substantial evidence that she is disabled and unable to work as a result of a work-related injury. See *Blackmon v. D. C. Department of Human Services*, ECAB No. 82-63 (September 20, 1983); *Wills-Rice v. DOES*, ECAB No. 88-37 (May 31, 1991); *Beaty v. D.C. Department of Corrections*, H&AS No. PBL-96-05, ODC No. 350846 (December 9, 1997). Since the initial burdens on the question of nature and extent vary under the Act, thereby affecting the legal obligations of the parties, whether the DCP accepted a claim and for which injury (ies) are threshold factual determinations that must be made, along with the factual determinations on the issues presented for resolution in a given case.

In the instant case, it is undisputed that the Petitioner accepted the Respondent’s claim for a crush foot injury arising from a May 20, 2003 work incident. The pivotal issue at this juncture is whether the Petitioner also accepted a claim for a back injury allegedly arising from the same work incident. As stated earlier herein, if DCP accepted the claim, it bears the initial burden. If it did not accept the claim, the Respondent bears the initial burden. A review of the Compensation Order on Remand fails to reveal any findings or other determinations with respect to this issue. Without such a threshold factual determination, the Panel is unable to determine whether the Compensation Order on Remand is supported by substantial evidence and is in accordance with the law. This matter must be remanded.<sup>3</sup>

Of note, the Panel rejects the Petitioner’s argument that the ALJ’s decision in the October 31, 2006 Compensation Order to accept the medical opinion of Dr. Robert Collins as more persuasive than that of Dr. Hampton Jackson must stand. The ALJ was not bound by determinations made in that decision as that decision was reversed with instructions to “make further findings of fact and conclusions of law . . . deemed appropriate.” See Decision and Remand Order at p. 4. Accordingly, the ALJ was free to re-evaluate the record evidence and reach the same or different conclusions.

## CONCLUSION

The Compensation Order on Remand of February 28, 2007 is not supported by substantial evidence in the record and is not in accordance with the law.

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<sup>3</sup> The Panel is aware that in the earlier Decision and Remand Order issued on December 13, 2006, the ALJ was instructed to revisit this matter, bearing in mind the proper evidentiary burden to be allocated to the Petitioner. This decision merely expands the prior instruction to encompass the analysis of the proper evidentiary burdens to be allocated to both parties on the question of nature and extent under the Act.

**ORDER**

The Compensation Order on Remand of February 28, 2007 is REVERSED AND REMANDED for findings of fact and conclusions of law on whether the Petitioner accepted a claim for a back injury arising from the May 20, 2003 work incident and on the nature and extent of the Respondent's disability, if any.

FOR THE COMPENSATION REVIEW BOARD:

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SHARMAN J. MONROE  
Administrative Appeals Judge

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May 29, 2007  
DATE