

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER  
MAYOR

ODIE DONALD II  
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-120

JULIO JOVEL,  
Claimant-Petitioner,

v.

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

Appeal from an August 17, 2016 Compensation Order  
by Administrative Law Judge Gwenlynn D'Souza  
AHD No. PBL 16-009, DCP No. 0468-WC-15-0000307

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2017 FEB 1 PM 11 01

(Decided February 1, 2017)

Michael Kitzman for Claimant  
Milena Mikalova for Employer<sup>1</sup>

Before LINDA F. JORY, GENNET PURCELL and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Julio Jovel ("Claimant") worked as a road sweeper operator for the Department of Public Works ("Employer"). During the fall and winter months, Claimant was responsible for collecting leaves and placing them in a van. Claimant suffered several prior back injuries, including a work-related back injury on June 26, 2014.

On December 15, 2014, Claimant stepped out of his work van for a lunch break. As Claimant tried to stand, he yelled out "my back". He reported to his supervisor, James Barksdale, that he injured his back when he fell. Claimant went by ambulance to George Washington University Hospital ("GWUH"), however the records from GWUH were not made part of the record.

<sup>1</sup> The Compensation Order incorrectly indicates Janea J. Raines represented Employer at the formal hearing.

On January 12, 2015, Claimant informed Dr. Mondino that he injured his neck and back when using a machine to clean the street on December 15, 2014. On January 20, 2015, Employer issued a Notice of Determination (“NOD”) which stated “Your public sector compensation claim is hereby CONTROVERTED for the reasons indicated below: We are still investigating your claim”.

On January 20, 2016 the Office of Risk Management (“ORM”) issued a denial of Claimant’s claim, stating that the injury did not arise out of and in the course of his employment, and that he had refused to provide information to ORM as part of the claims investigation. Claimant requested a formal hearing with respect to the June 26, 2014 back injury and the alleged December 15, 2014 back injury. On April 14, 2016, ORM issued a NOD accepting the June 26, 2014 back injury claim.

Thereafter, an Administrative Law Judge (“ALJ”) with the Administrative Hearings Division (“AHD”) scheduled a formal hearing on the remaining injury that purportedly occurred on December 15, 2014. At the hearing Counsel for Employer indicated that it would not stipulate to anything that happened on December 15, 2014. Claimant asserted that the only issue before the ALJ was whether the NOD was properly issued and whether or not Claimant’s injury arose out of and in the course of his employment with the Employer. Claimant further asserted that the only claim for relief was the acceptance of the claim. However, subsequent events as discussed below made it apparent that Claimant also was claiming causally related medical expenses if the ALJ decided Claimant did in fact sustain a work-related injury.

Specifically the ALJ asked Claimant:

Judge D’Souza: Is claimant seeking temporary total disability benefits for any particular time period?

Mr. Kitzman: No, your honor.

Judge D’Souza: Is claimant seeking medical, properly related medical expenses?

Mr. Kitzman: Not that I believe are properly before the agency at this time, based on the manner in which this claim was denied, Your Honor.

Judge D’Souza: Can you explain that to me?

Mr. Kitzman: Yes, Your Honor. The agencies denial of the claim in the notice of determination we’re dealing with didn’t deny any particular treatment per se. They simply denied that they had any responsibility for the events or the injury whatsoever. They claim that it does not fall under the Act and that, therefore, they’re not responsible for anything and that the accident is not at issue for them. And so it’s the claimant’s understanding that that’s the issue in the notice of determination, that it does not expressly deny any other type of benefit or any particular treatment that the claimant would be requesting at this time, would have requested. That that’s the only issue that can be addressed is the one that’s in that

notice of determination. Not whether or not he's entitled to medical treatment or anything beyond that, other than simply whether the claim could or should be accepted.

Judge D'Souza: Based on my understanding of the pre-hearing order it appears the issue is besides whether or not the notice of determination was properly issued was whether or not the claim for the low back arose out of and in the course of employment on December 15, 2014; is that correct?

Mr. Kitzman: Yes, Your Honor.

HT at 8, 9.

The ALJ identified the following issues in the CO:

Whether Employer timely controverted the claim related to the alleged December 15, 2014 injury?

Whether Claimant's back injury to the back arose out of and in the course of employment?

Whether Claimants back condition is medically causally related to the alleged December 15, 2014 work injury?

CO at 2.

After the hearing adjourned, the ALJ issued an Order to Show Cause ("OSC") to the parties on June 23, 2016 requesting that the parties show cause whether Claimant's claim for causally related medical expenses could be addressed by AHD, citing to *Carrington v. District of Columbia Public Schools*, CRB No. 13-093 (August 29, 2013)(*Carrington*).

On July 12, 2016, Claimant filed Claimant's Response ("Claimant's Response") to the OSC stating:

In this matter, the question raised is whether or not the payment of causally related medical expenses can be addressed based on the Program's contention that Mr. Jovel's claim does not arise out of and in the course of his employment. The short answer, under *Carrington*, is yes. Since the Notice of Determination in this matter denied all benefits, the award of payment of causally related medical expenses remains the fundamental issue to be decided by the ALJ.

As in *Carrington*, while the technical language of the Notice of Determination may address only the specific legal basis for the denial of general benefits, the ALJ has the authority to reach a conclusion on the payment of related medical expenses incurred as a result of the work injury.

The Claimant would therefore request that payment of causally related medical expenses to the low back be included as an issue to be addressed by the ALJ through this Formal Hearing.

Claimant's Response at 1, 2.

On July 19, 2016, Employer filed Employer's Response ("Employer's Response") to the OSC, stating:

If the tribunal finds that Claimant suffered a compensable injury on December 15, 2014 and cooperated with the Program's investigation, then it has jurisdiction to award him causally related medical expenses.

Employer's Response at 2.

A Compensation Order ("CO") issued on August 17, 2016. The CO concluded:

Based upon a review of the record evidence as a whole, I conclude, by a preponderance of the evidence, that although Claimant has proven he sustained an injury which arose out of and in the course of his work on December 15, 2014 when he stepped from the van, Claimant has not proven that his back condition is a result of that injury. Therefore, Claimant's injury is not compensable under the CMPA<sup>2</sup>.

CO at 6.

On September 16, 2016 Claimant filed a timely Application for Review ("Claimant's Brief") of the August 17, 2016 Order and Employer filed an Opposition to Application for Review of Order ("Employer's Brief") on October 17, 2016.

#### ANALYSIS

Claimant asserts that the defense of medical causal relationship was not raised by the Employer. Claimant asserts:

Here, the issue of medical causal relationship was not raised by the Employer and was not at issue before, during or after the hearing.

Based on these beliefs, the claimant presented the record evidence, and not additional, or other medical records. Since the basis for the Employer's decision was not an issue in dispute between the parties and was not raised by either party, neither prior to, nor during the hearing or closing argument, the issue of medical causal relationship was decided in error. This error led to prejudice on the part of

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<sup>2</sup> Although not included in the Conclusion and Order, the ALJ also concluded Employer timely issued a Notice of Controversion dated January 20, 2015.

the claimant as Mr. Jovel was unable to present evidence to address this defense, as it was not raised by the Employer.

Since the matter was raised *sua sponte* in the Compensation Order and not by either party it was raised in error. As such, the denial of the claim for relief on the sole basis of medical causal relationship is not in accordance with the law or substantial evidence in this matter.

Claimant's Brief at 6

Employer responds:

. . . Then before the parties submitted their written Closing Arguments, the ALJ asked them to address whether AHD could rule on “[Claimant’s] claim for causally related medical expenses.” In response, Claimant unequivocally stated that the ALJ had authority to decide the issue of related medical expenses. Claimant also specifically requested that the payment of causally related medical expenses “be included as an issue to be addressed by the ALJ.”

In order to reach a conclusion on causally related medical expenses, it is clear that the ALJ first had to rule on the issue of medical causation. Thus, Claimant’s contention that medical causation was “raised *sua sponte*” in the CO is inaccurate. Because Claimant conceded that the ALJ had jurisdiction to consider his claim for causally related medical expenses, it is improper for him to now contend that the issue of medical causation was decided by the ALJ in error. In light of the parties’ responses to the Show Cause Order, the ALJ considered the relevant evidence in the record and made a finding regarding medical causation. As such, Claimant’s argument that the ALJ erroneously denied his claim for relief on the basis of medical causation is without merit.

Employer’s Brief at 5, 6.

This Panel found it crucial to the disposition of Claimant’s appeal that we review the parties’ responses to AHD’s OSC as well as the order itself as we have not found any evidence in the hearing transcript to support Employer’s assertion that the ALJ asked the parties to address whether AHD could rule on “[Claimant’s] claim for causally related medical expenses. The OSC as well as the parties’ responses were obtained from the administrative file and have been chronicled above.

It is unclear from the review of the Order to Show Cause whether the ALJ was *sua sponte* raising the issue of whether Claimant’s back condition is medically causally related to the incident that occurred on December 15, 2015. However any uncertainty is mooted by the parties’ unequivocal responses quoted herein.

While a review of the hearing transcript and pre-hearing order confirms Claimant's assertion that medical causal relationship was not an issue initially, the ALJ was within her discretion to issue the Order to Show Cause which she properly did before addressing the causal relationship issue.

#### CONCLUSION AND ORDER

The Conclusion of Law that Claimant's injury is not compensable under the CMPA is in accordance with the law. We further conclude the remainder of the order is not contested and is in accordance with the law and is affirmed.

*So ordered.*