

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**

**VINCENT C. GRAY**  
**MAYOR**



**LISA M. MALLORY**  
**DIRECTOR**

**COMPENSATION REVIEW BOARD**

**CRB No. 11-151**

**RAYBURN L. LEVY,**

**Claimant–Petitioner and Cross-Respondent,**

**v.**

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,**

**Self-Insured Employer-Respondent and Cross-Petitioner.**

Appeal from a Compensation Order of  
Administrative Law Judge Leslie Meek  
AHD No. 98-064C, OWC No. 236775

Benjamin T. Boscolo, Esquire, for the Petitioner and Cross-Respondent

Donna J. Henderson, Esquire, for the Respondent and Cross-Petitioner

Before JEFFREY P. RUSSELL,<sup>1</sup> MELISSA LIN JONES, AND HENRY W. MCCOY, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board.

**DECISION AND ORDER**

**BACKGROUND**

Rayburn Levy was previously employed by the Washington Metropolitan Area Transit Authority (WMATA) as a station attendant. He sustained an injury to his left knee on June 28, 1992 while working. Subsequently, he developed right knee problems which he alleged were the result of having an altered gait due to the left knee injury. On April 14, 1998, Mr. Levy and WMATA submitted a Stipulation to the Office of Workers' Compensation (OWC), which provided for payment to Mr. Levy of permanent partial disability to both legs, provision of future causally related medical care, and payment of Mr. Levy's attorney's fee from the proceeds of the schedule payments for the leg disabilities. The Stipulation also requested that OWC approve the Stipulation

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<sup>1</sup> Judge Russell was appointed by the Director of DOES as a Board Member pursuant to DOES Administrative Policy Issuance No. 11-03 (October 5, 2011).

and make it an Order. OWC did so on June 8, 1998. WMATA paid the amounts owed per the Order and Stipulation.

Mr. Levy retired from WMATA the following year, 1999.

Thereafter, Mr. Levy's right knee required surgery. Mr. Levy sought additional temporary total disability benefits (ttd) from WMATA for the period that he underwent surgery and recuperated therefrom, which WMATA declined to pay. Mr. Levy presented his claim for ttd to Administrative Law Judge (ALJ) David Boddie, in the Department of Employment Services (DOES), for resolution.

On December 24, 2003, ALJ Boddie issued a Compensation Order denying the claim for additional ttd on the grounds that Mr. Levy's receipt of scheduled awards to his legs extinguished entitlement to additional ttd benefits pursuant to *Smith v. DOES*, 548 A.2d 95 (D.C. 1988) and because of his voluntary retirement from WMATA. He appealed that denial to the CRB, which affirmed the denial.

Mr. Levy thereafter sought additional permanent partial disability benefits to the right leg under the schedule, seeking a 37% award from WMATA. WMATA declined to pay additional disability compensation, and the matter was presented ALJ Leslie Meek (hereafter, the ALJ) at a formal hearing. In proceedings preliminary to the formal hearing, WMATA filed a Motion to Dismiss the Application for Formal Hearing, which the ALJ denied. At the time of the formal hearing WMATA renewed the motion, which the ALJ again denied.

On November 21, 2011, the ALJ issued a Compensation Order in which she denied the request for additional disability compensation under the schedule, finding that Mr. Levy's request constituted a request for modification of the December 24, 2003 Compensation Order which was untimely pursuant to the one year provision contained in D.C. Code §32-1524 (a). She also found that the right knee problems were causally related to the work injury, and ordered provision of the medical care that Mr. Levy had obtained.

Mr. Levy filed a timely appeal of the denial of additional permanent partial disability benefits under the schedule. WMATA filed an opposition to that appeal, and a cross appeal contesting the finding of a causal relationship between the need for right knee surgery and the original work injury.

#### STANDARD OF REVIEW

The scope of review by the CRB is generally 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. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(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 must 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.

## DISCUSSION AND ANALYSIS

The ALJ denied Mr. Levy's claim for a schedule award to his leg, finding that the request came more than one year after the Compensation Order issued by ALJ David Boddie on December 24, 2003. In that Compensation Order, ALJ Boddie denied Mr. Levy's claim for additional temporary total disability benefits covering the time when he underwent surgery to his knee and recuperated therefrom. The ALJ in the instant matter cited D.C. Code §32-1524, which establishes a one year statute of limitations within which requests for modifications of compensation orders can be brought, and she found that the claim raised in this matter was time-barred because it was not filed within one year of the December 24, 2003 Compensation Order.

Mr. Levy argues in this appeal that the ALJ erred in finding that the statute of limitations bars the claim, because the December 24, 2003 Compensation Order did not involve any claim for a schedule awards to his legs, but rather dealt with a claim for renewed temporary total disability benefits. Citing *Capitol Hill Hospital v. DOES*, 726 A.2d 682 (D.C. 1999), Mr. Levy maintains that a claim for a schedule award which is raised after the issuance of a Compensation Order which resolved disputes involving only a claim for temporary total disability benefits is not a claim for modification of that Compensation Order.

Mr. Levy is correct in that assertion, and the ALJ's finding that the December 24, 2003 Compensation Order operates to establish or commence the limitations provision is erroneous. That Compensation Order did not adjudicate a claim for this particular class of benefits, so these proceedings can not be said to seek a modification of that Compensation Order.<sup>2</sup>

However, the ALJ appears to have misapprehended WMATA's argument with respect to the limitations period. WMATA did not argue at the formal hearing that the December 24, 2003 Compensation Order established the time frame for a modification. Rather, WMATA argued before the ALJ and argues in this appeal that it is the April 14, 1998 Stipulation of the parties, approved and converted to an Order by the Office of Workers' Compensation (OWC) on June 8, 1998, that established the commencement of the running of the limitations period.

WMATA made this express argument on the record at the time of the formal hearing, noting at that time that it had also filed a prehearing Motion to Dismiss or for Summary Judgment in which the argument was fully set forth, which was denied by the ALJ prior to the formal hearing. WMATA renewed the motion at the time of the formal hearing, and the ALJ again denied it, without explanation on the record.

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<sup>2</sup> We note with some puzzlement a reference in footnote 2 of the Compensation Order to a request for payments concerning surgery and other treatment for abdominal pain. We have seen nothing in the record relating to abdominal pain or surgery. We also note that, on page 4 of the Compensation Order, the ALJ wrote "Employer has failed to clear the first threshold of the 'reason to believe' standard", which is apparently a reference to *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988), in which the District of Columbia Court of Appeals held that a party is not entitled to a formal hearing seeking modification of a Compensation Order unless the party seeking the modification can adduce "some evidence" of a change in circumstances effecting the fact or degree of disability, or of the amount of compensation to which a claimant is entitled. In this case, since it is Mr. Levy who seeks the additional benefits, it is upon him, and not the employer WMATA, the *Snipes* burden would lie, if modification were appropriate.

At the formal hearing, the following colloquies occurred:

JUDGE MEEK: All right. Well, again, employer has noted that—the parties have noted that employer has voluntarily paid Claimant temporary total disability from a date to be determined, later provided, up until February 24<sup>th</sup>, 1996.

Employer also paid Claimant's scheduled loss of 7 percent to the lower left extremity and 2.5 percent to the right lower extremity.

Is that correct, Mr. Boscolo?

MR. BOSCOLO [Mr. Levy's Counsel]: It is, your Honor.

JUDGE MEEK: Ms. Henderson?

MS. HENDERSON [WMATA's Counsel]: It is. It was not a voluntary payment. There's really no place for this [on the Prehearing Joint Stipulation Form]. It was an order, pursuant to an order dated 4-14-1998, and that was the last payment of permanent partial disability, Your Honor.

JUDGE MEEK: It was pursuant to what order?

MS. HENDERSON: The one attached to Exhibit 2 of Claimant's—of WMATA's exhibits, Your Honor.

JUDGE MEEK: I'm sorry?

MS. HENDERSON: The one that is attached to Exhibit 2.

JUDGE MEEK: And who issued the order?

MS. HENDERSON: That was Cheryl B. Jordan, senior claims examiner at the Office of Workers' Compensation.

JUDGE MEEK: Okay. Am I permitted to consider what is—

MS. HENDERSON: Well, it was—had to be paid within ten days, and the parties specifically requested that it be reduced to an order, and so we were ordered to pay. If we did not pay, I'm sure counsel would have made sure that we were subject to penalties.

JUDGE MEEK: Okay. All right. I'm going to keep it moving. All right. Thank you.

[The identification of all exhibits by each party, including EE 2 referenced above, their admission into evidence without objection by either party, and incorporation of the Joint Prehearing Statement and Stipulation Form omitted]

JUDGE MEEK: Any previous evidence or procedure before the Office of Workers' Compensation is not before me and will not be considered, unless it is submitted into evidence.

If there are no further preliminary matters, counsel for the parties may make a brief opening statement, and we will begin. Is there a preliminary matter, Ms. Henderson?

MS. HENDERSON: Yes, Your Honor. At this time, WMATA would renew its motion to dismiss, or in the alternative, for a motion for summary judgment, based upon the prior Order, which was a stipulation that was approved and reduced to an Order by the Office of Workers' Compensation.

It's WMATA's argument that that does constitute an Order—

JUDGE MEEK: But before you make the argument, are you going to make any argument that's new, or different from the argument you made in the written motion that was previously denied?

MS. HENDERSON: No new argument.

JUDGE MEEK: Okay. All right.

MS. HENDERSON: I can proceed, or—

JUDGE MEEK: No. I think if there are no new arguments, my prior ruling will stand. Your motion is denied.

MS. HENDERSON: I am making it my record, Your Honor.

JUDGE MEEK: Thank you.

MS. HENDERSON: We are renewing our motion and we continue to object to this proceeding, Your Honor.

JUDGE MEEK: Duly noted. Thank you very much.

HT 10 – 18. Then in closing argument, WMATA again raised the issue:

MS. HENDERSON: [...] And finally, because I must raise it to make the record, it's WMATA's contention, and he admitted he signed it, he had counsel when he signed it, and he knew what the impact of the, of signing that stipulation to be converted to an Order was at the time that he signed it.

That all the parties knew that it was to be converted to an Order, and in fact it was converted to an Order, that WMATA had ten days to pay, not fourteen days to pay as would be an approved stipulation. Where it's ordered you have ten days to pay. You'll notice, the language is ten days to pay, not fourteen, as would be an approval of a stipulation.

This was a very, very common way in which many attorneys and many here, at OWC, and even—

JUDGE MEEK: So if I accept your argument, what? What happens if I accept your argument that you've just made?

MS. HENDERSON: Well, I'm renewing my motion, really, Your Honor, and the motion is based on—

JUDGE MEEK: I'm not going to hear argument regarding the motion right now. You—

MS. HENDERSON: I'm protecting the record, Your Honor, and I move again—

JUDGE MEEK: And it's been protected.

MS. HENDERSON: --to dismiss, or for summary judgment, that the statute of limitations applies in this case and that the order was final in 1998.

JUDGE MEEK: Thank you. All right. Thank you.

HT 86 – 88.

We agree with WMATA that the Order and Stipulation in question was an award with the effect of a Compensation Order. The District of Columbia Court of Appeals (DCCA) has treated stipulations such as this as such, for example, in *Smith v. DOES*, 548 A.2d 95 (D.C. 1988), at 96:

[Smith] returned to work on January 3, 1984, and on June 24, 1984, she and WMATA entered into a stipulation that she had reached maximum medical improvement and was entitled to benefits in the nature of a schedule award, D.C. Code § 36-308 (3), for a 5 percent permanent partial disability of her right upper extremity. *See* D.C. Code § 36-308 (3) (A) (arm loss, 312 weeks' compensation). The agency approved the stipulation on July 5, 1984, and Smith received a schedule award of \$ 4,636.94.

Thus, the DCCA went on to rule that Ms. Smith's claim for additional temporary total disability benefits was precluded by virtue of her having received an award of compensation under the schedule, despite the award not having been made in a Compensation Order following a contested formal hearing. Indeed, in this very case, in the prior Compensation Order to which the ALJ alluded (erroneously), Mr. Levy's claim for additional temporary total disability benefits was similarly denied, for the same reason.

Most notably about *Smith*, though, is the following language, found in footnote 20:

Smith's case is distinguishable from cases involving a previously stabilized and compensated permanent partial condition which *deteriorates* thereafter and results in

further wage loss. The hearing examiner concluded, on the basis of Smith's testimony, that her absence from work [...] was due to a "flare up" of her condition. As the hearing examiner noted, nothing in this decision prevents her from seeking a modification of a schedule award based on changed circumstances. If her condition deteriorates to a point where she can demonstrate a permanent partial disability in excess [of that which she obtained under the approved stipulation] she would be statutorily entitled to an additional schedule award under [the schedule disability portion of the Act]. D.C. Code §36-324; *see Snipes v. District of Columbia Dep't of Employment Servs.*, 542 A.2d 832, 835 (D.C. 1988); *see also* 3 LARSON §§ 81.30-33 (1983).

*Id.* at 96 (emphasis in original). It is clear that the court viewed OWC approved stipulated awards under the schedule to be governed by the modification provisions of the Act, which are now found not at D.C. Code §36-324, but are found in identical form at §32-1524. While this language is *dicta*, it nonetheless follows from the logic of the court's holding, and it represents precisely the circumstance we are presented with in this case.

The relevant portion of the provision reads as follows:

§32-1524. Modification of awards.

(a) At any time prior to 1 year after the date of last payment of compensation or at any time prior to 1 year after rejection of a claim [...] the Mayor may, upon his own initiative or upon application of a party in interest, order a review of a compensation case pursuant to the procedures provided in §32-1520 where there is reason to believe that a change of conditions has occurred which raises issues concerning:

(1) The fact or the degree of disability or the amount of compensation payable pursuant thereto[...].

It is undisputed in this case that the Order from OWC approving the Stipulation was approved and became effective June 8, 1998. EE 2. Whether it was paid within the ten days of that date in full, or was paid out over the course of the 27.36 weeks that followed the approval, more than a year has passed since the last date of the compensation ordered to be paid therein. Accordingly, the request for modification of the Stipulation and Order from OWC was time barred.

While the basis of the ALJ's determination that Mr. Levy's modification request was time barred was erroneous, on these undisputed facts of record concerning the approved Stipulation and Order, there is but one outcome possible, and that is that the modification request is time barred. The error of the ALJ is thus deemed harmless.

We turn to the remaining issues on appeal, those being whether the ALJ's finding of a causal relationship between the right knee condition and the work injury, and the award of medical benefits, are supported by substantial evidence and are otherwise in accordance with the law.

WMATA asserts in this appeal that "AHD has no jurisdiction over the medical expense issue because WMATA had voluntarily paid all medical expenses and these were not in dispute." We

agree that it has long been Agency policy that formal hearings and Compensation Orders are inappropriate where there is no specific claim for relief for identifiable benefits that is in dispute. See, *Powell v. Wrecking Corp. of America*, H&AS No. 84-540, OWC No. 051161 (Decision of the Director March 4, 1987), which was reviewed by the DCCA and found to be reasonable, rational, and consistent with the Act in *Thomas v. DOES*, 547 A.2d 1034 (D.C. 1988).

However, WMATA points to nothing in the record to support its contention that it was WMATA that provided the care to Mr. Levy's right knee, and the assertion in this appeal that it was in fact WMATA that did so is a curious position to take, when WMATA contested medical causal relationship at the formal hearing. It is more curious still in light of the discussion between the ALJ and WMATA's counsel in closing argument where it was suggested that Dr. Nasserri provided treatment (including the surgery) outside the workers' compensation system. Indeed, it was the implication that that surgery was not provided as part of the acknowledged workers' compensation case that WMATA argued suggested that it was not causally related. See HT 74 – 78.

In this case, WMATA contested medical causal relationship, presenting an independent medical evaluation (IME) report from Dr. David Johnson supporting its position, and arguing that position in closing arguments. It did not raise the objection to consideration of an award of the medical care on these grounds to the ALJ, and it points to nothing in the record to support its claim in this appeal that it has voluntarily provided the care. When the claim for relief was recited, WMATA did not object that the claim for medical care was inappropriate or beyond the jurisdiction of the forum. Consideration of the award of medical care is within the jurisdiction of the hearings division of DOES.

Regarding medical causal relationship, WMATA does not contest that the ALJ's finding that Mr. Levy's evidence was sufficient to invoke the presumption that the right knee problems for which he obtained medical care were causally related to the work injury. And, obviously, they do not contest the ALJ's determination that WMATA's IME successfully rebutted the presumption, requiring that the ALJ then re-weigh the evidence anew, with the burden of proof resting with Mr. Levy.

WMATA's sole merits argument on appeal appears to be that, in its view, the ALJ was obligated to treat a notation on a letter returned to Mr. Levy's attorney from Dr. Nasserri's office containing the words "This patient was not seen in this office of [sic] a work related injury" as a medical opinion that the surgery that Dr. Nasserri performed was not causally related to the work injury. If it were considered such an opinion, WMATA asserts, it is a treating physician's opinion entitled to deference and requiring an explanation for its rejection.

We disagree with the premise that this statement represents a medical opinion. It is not contained in a medical report; it does not address the issue of causal relationship in a legal or medical sense; it contains no rationale or discussion suggesting that it is a considered expression of the doctor's medical judgment. The treating physicians upon whom the ALJ relied in this case were the ones who the ALJ quoted in the Compensation Order at page 5 and 6, and whose opinions are contained in their medical reports clearly in the form of expressions of belief that the conditions they were treating were caused by the work injury. These were Dr. Phillips and Dr. Azer.

CONCLUSION

The error committed by the ALJ in determining that the modification request was time barred due to its not being brought within a year of the issuance of the Compensation Order of December 24, 2003 is harmless, in light of the fact that the modification request was otherwise time barred as discussed in the body of this Decision and Order. The ALJ had jurisdiction to consider the claim for provision of medical care. The ALJ was under no obligation to explain why she did not credit Dr. Nasser's opinion as to causal relationship because no such opinion was rendered by Dr. Nasser in this record.

**ORDER**

The denial of the request for an additional award to the right leg under the schedule is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
Administrative Appeals Judge

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June 8, 2012  
DATE