

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-063

RAYBURN L. LEVY,
Claimant-Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and XCHANGING,
Self-Insured Employer/Insurer-Petitioner.

Appeal from a March 24, 2015 Compensation Order By
Administrative Law Judge Douglas A. Seymour
AHD No. 98-064C, OWC No. 236775

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 SEP 25 PM 9 34

(Decided September 25, 2015)

Sarah O. Rollman for Employer
Benjamin T. Boscolo for Claimant

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge* with LINDA F. JORY, and
JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

LAWRENCE D. TARR for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD, PROCEDURAL HISTORY, AND ANALYSIS¹

On June 28, 1992, Mr. Rayburn L. Levy injured his left knee while working as a station attendant for the Washington Metropolitan Area Transit Authority (“WMATA”). Thereafter, he developed problems with his right knee from altering his gait to compensate for his left knee injury.

¹ The scope of review by the Compensation Review Board (“CRB”) is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers’ Compensation Act, as amended, D.C. Code §32-1501 to 32-1545 (“Act”). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

On April 14, 1998, the parties entered into a stipulation regarding permanent partial disability to both of Mr. Levy's legs. The parties agreed Mr. Levy had sustained a 7% disability to his left leg and a 2.5% disability to his right leg. The Office of Workers' Compensation approved the stipulation on June 8, 1998.

Mr. Levy returned to full duty with WMATA and worked until he retired in July 1999. In January 2001, he underwent arthroscopic surgery on his right knee and sought additional temporary total disability benefits.

In a Compensation Order dated December 24, 2003, administrative law judge ("ALJ") David L. Boddie denied Mr. Levy's request for temporary total disability benefits, finding that Mr. Levy's wage loss was not attributable to his work-related injury. *Levy v. Washington Metropolitan Area Transit Authority*, OHA No. 98-064B, OWC No. 236775 (December 24, 2003).

The CRB affirmed ALJ Boddie's compensation order, finding that Mr. Levy's wage loss was attributable to his voluntary retirement, not his injury. The CRB further held that Mr. Levy's disability after receiving permanent partial disability benefits did not rise to the level of an unusual or extraordinary condition as required by *Cherrydale Heating & Air Conditioning v. DOES*, 722 A.2d 31 (D.C. 1998). *Levy v. Washington Metropolitan Area Transit Authority*, CRB No. 04-08, OHA No. 98-064B, OWC No. 236775 (August 8, 2006).

Almost five years later, the parties proceeded to a formal hearing before another ALJ, Leslie A. Meek, to resolve Mr. Levy's claim for a 37% permanent partial disability to his right leg and causally related medical expenses. ALJ Meek denied Mr. Levy's claim because his request for modification was not timely:

In the instant case, Claimant's prior claim for wage replacement benefits was rejected pursuant to a Compensation Order that was issued on December 24, 2003, over seven years ago. The Claimant's current request for modification is outside of the time-line set forth by the Act. Employer has failed to clear the first threshold for the "reason to believe standard." As Claimant's current claim for an increased permanency rating is untimely, this Tribunal has no jurisdiction to consider said claim.

Levy v. Washington Metropolitan Area Transit Authority, OHA No. 98-064C, OWC No. 236775 (November 21, 2011). Regarding Mr. Levy's request for medical expenses, ALJ Meek ordered reimbursement for total right knee replacement surgery and related treatment. *Id.*

On appeal, the CRB determined the December 24, 2003 Compensation Order had not adjudicated a claim for permanent partial disability benefits; therefore, the proceeding before ALJ Meek did not seek a modification of that compensation order. Nonetheless, reasoning that the Office of Workers' Compensation's order approving the stipulation had the effect of a compensation order, the CRB determined Mr. Levy's request still was time barred. The CRB also affirmed the award of medical expenses. *Levy v. Washington Metropolitan Area Transit Authority*, CRB No. 11-151, OHA No. 98-064B, OWC No. 236775 (June 8, 2012).

Mr. Levy filed an appeal with the District of Columbia Court of Appeals ("DCCA"). The DCCA remanded the matter for the CRB to analyze whether the Office of Workers' Compensation's

order approving the parties' stipulation was a compensation order and therefore subject to the modification time limitation. *Rayburn v. DOES*, 84 A.3d 518 (D.C. 2014).

In response, the CRB ruled Mr. Levy's request for additional permanent partial disability benefits is not time barred because the Office of Workers' Compensation's order is not a compensation order:

Since it was undisputed in this case that the Order from OWC approving the Stipulation was approved and became effective June 8, 1998 (EE 2), the CRB found that 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 had passed since the last date of the compensation ordered to be paid. Accordingly, the CRB held that the request for modification of the Stipulation and Order from OWC was time barred, and

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.

However, in *Sodexo*, decided 15 years after *Smith*, the Director of DOES (in whom review authority in workers' compensation cases then vested) interpreted the Act such that a "stipulation" issued by OWC covering two distinct, closed-ended periods of temporary total disability did not constitute a Compensation Order or a Full and Final Settlement under *D.C. Code § 32-1508 (8)*, and thus did not bar a later request for future benefits even when the later request was made more than one year after the payment of the benefits agreed to in the stipulation. The court upheld this interpretation as reasonable, writing:

Here, the employer's obligation to pay benefits arose not from a compensation order, but from the presumption established by the Act that "compensation . . . shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer." *D.C. Code § 32-1515 (a)* (2001). These so-called "voluntary payments" are subject to monitoring by the Office of Workers' Compensation "to ensure that the amount paid is proper." 7 *DCMR § 209.9*. Approval by the Office of voluntary payments is consistent with that responsibility, and does not convert every such payment into a compensation order, unless it is a complete and final settlement and in other respects meets the requirements of *D.C. Code § 32-1508 (8)*. See *supra* note 2.

The court in the present remand viewed our determination as being inconsistent with *Sodexo*, and remanded the matter because we did not provide any explanation for departing from the *Sodexo* rule.

In order to further consider the issue, then, we start with, *D.C. Code § 32-1508 (8)*, which reads as follows:

The Mayor may approve lump-sum settlements agreed to in writing by the interested parties, discharging the liability of the employer for compensation, notwithstanding §§ 32-1516 and 32-1517, in any case where the Mayor determines that it is in the best interest of an injured employee entitled to compensation or individuals entitled to benefits pursuant to § 32-1509. The Mayor shall approve the settlement, where both parties are represented by legal counsel who are eligible to receive attorney fees pursuant to § 32-1530. These settlements shall be the complete and final dispositions of a case and shall be a final binding compensation order.

Under the Director's decision and the DCCA's ruling in *Sodexho* for an approved settlement from OWC to constitute a "Compensation Order", rather than a mere written agreement to pay a disputed amount of compensation benefits, the settlement must be "agreed to in writing" and must "discharge [...] the liability of the employer for compensation", such that the settlement becomes "the complete and final disposition [] of the case".

We also must consider *D.C. Code § 32-1516 (b)*, which states that "No agreement by an employee to waive his right to compensation under this chapter shall be valid", the only exception being that contained in § 32-1508 (8) cited above. Thus, our decision must be consistent with the fact that any agreement which prohibits a claimant from seeking future benefits is invalid, unless it is an approved full and final settlement of the whole case. The Act renders anything other than a full and final settlement which purports to waive a claimant's right to compensation invalid. This is consistent with *Sodexho*.

In addition to directing that we consider this matter in light of *Sodexho*, the DCCA instructed us to consider *Fluellyn v. DOES, 54 A.3rd 1156 (D.C. 2012)*. *Fluellyn* concerned the distinction between voluntary payments of compensation, and payments made pursuant to an "award". The court wrote:

Similarly, here, petitioner's proposed interpretation of "award" for purposes of entitlement to attorney's fees under § 32-1530 (b) would eliminate any distinction between compensation that is voluntarily tendered by the employer and compensation that is disbursed only after compulsion, thereby subsuming the terms "pay" and "tender" within the phrase "compensation thereafter awarded." Cf. *Carey, 457 A.2d at 1108* ("To define the term 'award' too broadly, so as to construe compensation 'under an award in a compensation order' to include virtually all payments, would be inconsistent with other sections of the LHWCA."). Rather, the plain statutory language requires an "award" of compensation that is compelled in some official form by an

administrative agency's order or decree. This interpretation is supported by the language of § 32-1530 (b), other uses of "award" in the Workers' Compensation Act, Supreme Court precedent, and our own case law interpreting the "virtually identical" LHWCA statutory scheme. Therefore, we hold that the phrase "compensation thereafter awarded," as used in § 32-1530 (b), means compensation payable by an employer to a claimant pursuant to an official adjudication and determination by the Mayor or his designee.

There is nothing in the Act or regulations that render written voluntary agreements "Compensation Orders" or "awards", except for the full and final settlement provision found in *D.C. Code § 32-1508 (8)*. Thus, *Fluellyn* requires an "adjudication" in order for a payment to be considered an "award".

Therefore, upon further consideration of the matter presented, and taking into account the fact that the stipulation approved by OWC in the "Order" (i) did not purport on its face to foreclose entitlement to future wage loss benefits, and (ii) kept open the possibility of entitlement to future medical care, we conclude that the OWC-approved stipulation was not a "Compensation Order" or an "award" within the meaning the Act, and therefore the passage of a time from the date of last payment pursuant thereto does not affect Mr. Levy's entitlement to seek additional wage loss benefits.

Accordingly, we conclude that the claim for temporary total disability benefits is not time barred, in that it does not seek modification of a compensation order.

Finally on this issue, we add that this decision should not be taken as altering the rule in *Smith*, as modified by *Sodexo*. to the effect that a claimant who obtains an award under the schedule pursuant to a Compensation Order is not entitled to additional wage loss benefits, either schedule or otherwise, for that same injury, except where a modification for a worsening of condition is brought under *D.C. Code § 32-1524*.

We note that there were other issues raised in the appeal. The court's mandate did not address these remaining issues: whether the ALJ's findings 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 in accordance with the law. Nothing in this Decision and Remand Order should be construed to change these rulings, which we hereby incorporate by reference.

Levy v. Washington Metropolitan Area Transit Authority, CRB No. 11-151(R), AHD No. 98-064C, OWC No. 236775 (October 8, 2014). The CRB remanded the case for further consideration of Mr. Levy's claim for relief.

WMATA attempted to appeal the CRB's October 8, 2014 Decision and Remand Order to the DCCA. The Court dismissed that appeal on the grounds that there was no final order for the

court to review. *See Levy v. Washington Metropolitan Area Transit Authority*, AHD No. 98-064C, OWC No. 236775 (March 24, 2015),

ALJ Douglas A. Seymour decided the CRB's October 8, 2014 decision remanding this case. The ALJ did not address issues of timeliness or modification. ALJ Seymour awarded Mr. Levy 37% permanent partial disability to his right leg. *Id.*

On appeal, WMATA contends Mr. Levy's request for additional permanent partial disability benefits is not a timely request for modification; therefore, the award of those benefits is not in accordance with the law and must be vacated. In support of its position WMATA argues the CRB's October 8, 2014 Decision and Remand Order is not consistent with *Sodexo v. DOES*, 858 A.2d 452 (D.C. 2004).

In opposition, Mr. Levy asserts "Employer has not provided any grounds why the Compensation Order of March 24, 2015 is not in accordance with the law or facts, and has not provided any grounds to overrule the October 8, 2014 Decision and Remand Order." Claimant's Opposition to the Application for Review, unnumbered p. 1. Claimant argues:

Employer does not challenge the factual conclusions of the Compensation Order on Remand. The Employer only challenges the legal reasoning behind the CRB's October 8, 2014 Decision and Remand Order, and asks that this tribunal overrule both that Order and the decision of the Director that underlies the *Sodexo* case. The CRB's October 8, 2014 Decision and Remand Order is the law of the case, however, and the Employer is not entitled to a second attempt to have the issues determined by the CRB.

Id. at unnumbered p. 5.

The CRB acknowledges, as noted above, that the March 24, 2015 Compensation Order on Remand did not address issues of timeliness or modification. However, underlying the award in the Compensation Order on Remand is ALJ Seymour's acceptance of the CRB's ruling that Mr. Levy's request is timely.

It should also be noted that WMATA does not appeal the substance of the award of 37% permanent partial disability to Mr. Levy's right leg, it appeals the underlying legal issue resolved in the October 8, 2014 Decision and Remand Order.

In view of the fact that WMATA's prior appeal of the October 8, 2014 Decision and Remand Order was dismissed by the DCCA, it appears WMATA has filed this appeal to preserve its argument that Mr. Levy's request is not timely.

WMATA did not file a request for reconsideration of the October 8, 2014 Decision and Remand Order, and the CRB will not review its October 8, 2014 Decision and Remand Order in this appeal. Our review is restricted to the contents of the March 24, 2015 Compensation Order on Remand which substantively are not in dispute and which are appropriately based upon the CRB's rulings in the October 8, 2014 Decision and Remand Order.

CONCLUSION AND ORDER

The March 24, 2015 Compensation Order on Remand is supported by substantial evidence, is in accordance with the law, is in accordance with the CRB's October 8, 2014 Decision and Remand Order, and is AFFIRMED.

So ordered.