

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-143

SHERYL M. SWINSON,
Claimant–Respondent/Cross-Petitioner,

v.

GAL TEX HOTEL CORPORATION and LIBERTY MUTUAL INSURANCE COMPANY,
Employer/Carrier-Petitioner/Cross-Respondent.

Appeal from a Compensation Order by
The Honorable Belva D. Newsome
AHD No. 07-091D, OWC No. 628287

Gregory V. Chestnut, Esquire for Petitioner/Cross-Respondent
James E. Turner, Esquire for Respondent/Cross-Petitioner

Before MELISSA LIN JONES, JEFFREY P. RUSSELL,¹ and LAWRENCE D. TARR, *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.²

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On May 25, 2006, Ms. Sheryl M. Swinson injured her back at work. Gal Tex Hotel Corporation (“Gal Tex”) voluntarily paid workers’ compensation benefits until August 6, 2006.

Asserting ongoing entitlement to temporary total disability benefits and payment of causally related medical bills, Ms. Swinson requested a formal hearing. Following that proceeding, Ms. Swinson was awarded temporary total disability benefits from August 6, 2006 to the date of the formal hearing and continuing as well as payment of causally related medical bills.³

¹ Judge Russell has been appointed a temporary Compensation Review Board (“CRB”) member pursuant to the Department of Employment Services’ Director’s Administrative Policy Issuance No. 12-01 (June 20, 2012).

² Jurisdiction is conferred upon the CRB pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, (“Act”), 7 DCMR §250, *et seq.*, and the Department of Employment Services’ Director’s Administrative Policy Issuance 05-01 (February 5, 2005).

³ *Swinson v. Gal Tex Hotel Corporation*, AHD No. 07-091A, OWC No 628287 (November 30, 2007).

Despite the November 30, 2007 Compensation Order which was final, Gal Tex stopped paying Ms. Swinson's medical expenses, and in July 2009, a second formal hearing was held. An administrative law judge ("ALJ") found that Ms. Swinson's disabling condition had not changed nor had her need for medical treatment. In addressing whether "the medical treatment sought by Claimant [is] reasonable, necessary and causally related to the course of her recovery from the work injury," Ms. Swinson was awarded "continuing causally related medical benefits, including outstanding and future medical bills for care provided and medication prescribed by her treating physicians."⁴

The September 25, 2009 Compensation Order was affirmed by the CRB because "[t]he ALJ did not exceed her authority in awarding 'continuing causally related medical benefits, including outstanding and future medical bills for care provided and medication prescribed by [Ms. Swinson's] treating physicians.'"⁵ Nonetheless, the CRB found nothing in the

September 25, 2009 Compensation Order that restricts Gal Tex from requesting a *Snipes* hearing and a formal hearing on the issue of causal relationship or a utilization review at an appropriate time in the future. Similarly, there is nothing restricting Ms. Swinson from requesting an order of default; a hearing on the issue of bad faith penalties; or an order of protection from an unreasonable, burdensome, or harassing independent medical examination at an appropriate time in the future.^[6]

Again despite a valid Compensation Order, Gal Tex stopped paying Ms. Swinson's medical expenses, and on September 28, 2011, this matter proceeded before a third ALJ. Without conducting a full evidentiary hearing, that ALJ issued a Compensation Order granting Ms. Swinson's request for payment of causally related medical bills including prescription drugs from May 15, 2008 to the present but denied her continuing medical care after August 31, 2011.⁷ Both parties have appealed the September 28, 2011 Compensation Order.

On appeal, Gal Tex argues that given the procedural posture of this case, the September 28, 2011 Compensation Order must be reversed insofar as it awards payment for treatment rendered after the issuance of the utilization review report. Gal Tex does not seek review of the Compensation Order's award of medical treatment rendered prior to the issuance of the utilization review report.

Ms. Swinson cross-appeals asserting she was denied a fair hearing because the ALJ did not conduct a full, evidentiary hearing before issuing the September 28, 2011 Compensation Order. In the alternative, Ms. Swinson asserts that given the procedural posture of this case, the September 28, 2011 Compensation Order is supported by substantial evidence.

⁴ *Swinson v. Gal Tex Hotel Corporation*, AHD No. 07-091B, OWC No 628287 (September 25, 2009), pp. 3, 6.

⁵ *Swinson v. Gal Tex Hotel Corporation*, CRB No. 10-010, AHD No. 07-091B, OWC No 628287 (March 10, 2011), p. 3.

⁶ *Id.*

⁷ *Swinson v. Gal Tex Hotel Corporation*, AHD No. 07-091D, OWC No 628287 (November 14, 2011).

ISSUE ON APPEAL

1. Was Ms. Swinson denied due process?

ANALYSIS

Preliminarily, it must be acknowledged that the ALJ's disposition of the issues by granting Ms. Swinson's request for payment of causally-related medical bills including prescription drugs from May 15, 2008 to the present while denying Ms. Swinson's continuing medical care after August 31, 2011 is inconsistent. If Ms. Swinson's medical care after August 31, 2011 is not reasonable and necessary, the claim for those expenses should not have been granted.

Turning to the issues raised by the parties, the resolution of Ms. Swinson's cross-appeal is dispositive. The remaining issues raised at this time, therefore, are moot.

Ms. Swinson was pursuing an enforcement action for outstanding medical expenses. Gal Tex was pursuing denial of medical expenses on the grounds that Ms. Swinson's treatment is not reasonable and necessary. At the September 28, 2011 proceeding, Ms. Swinson's counsel stated

I will have the Claimant here to offer some testimony, okay, about the therapeutic benefits of what Dr. Jackson has prescribed for her but, frankly, I think this case can be decided as a legal matter on the issue of race [*sic*] *judicata* and on the issue of no satisfactory proof under *Snipes* to reopen this record at all.

If the court decides that there is some basis to reconsider the medical care and, on a factual basis, what Dr. Jackson is recommending in the treatment and what the Claimant will testify about, we think submits - - is our submission on the reasonableness and necessity of that treatment.^[8]

In response, Counsel for Gal Tex argued in part that Ms. Swinson's condition had stabilized.⁹

After listening to opening statements by both attorneys, the ALJ stated

I'm reading the March 10th, 2011, decision of the Compensation Review Board written by Judge Jones. And the conclusion and order, it says, "The ALJ does not exceed her authority in awarding continuing causally related medical benefits, including outstanding and future medical bills for care provided and medication prescribed by her treating physicians. The finding of that [*sic*] and conclusions of law in the September 25th, 2009, compensation order are supported by substantial evidence in the record and are affirmed."

⁸ Hearing Transcript p. 23.

⁹ Hearing Transcript p. 25.

The finding in the September 25th, 2009, decision of Judge Govan reads, “Dr. Ennis’ opinion is not persuasive and is rejected.”

I think the parties should have read this and we would not have had to have a formal hearing. I’m going to give the parties 15 days to submit legal arguments in accord to their two positions and the outstanding case law. I don’t see the need for testimony because this will be decided on the law and the medical evidence that has been submitted by the parties and the utilization review and the definitions.^[10]

Ms. Swinson’s counsel immediately requested an opportunity to be heard regarding his request for a full evidentiary hearing. Instead, the ALJ attended to scheduling matters regarding the written submissions.¹¹

Eventually, Ms. Swinson’s counsel brought up the issue again, and the ALJ asserted an evidentiary hearing was not necessary:

[B]ecause the Employer has only submitted the 2010 utilization review, August 25th, 2011, medical report of Hampton Jackson. You submitted all of your medical reports. So under the 2009 decision, the medicals are continuing.

* * *

So you don’t have any bills after August 25th, 2011. If I find that your evidence is more compelling based on race [*sic*] *judicata* and *Snipes*, then they’ll still be under a continuing requirement to pay based on Judge Govan’s decision.^[12]

Ms. Swinson’s counsel persisted -- if Gal Tex demonstrated a reason to believe a change of condition had occurred, he was entitled to put on evidence.¹³ The ALJ responded that he could argue that position in his brief,¹⁴ and in Claimant’s Formal Hearing Brief, Ms. Swinson’s Counsel repeated Ms. Swinson’s request to present testimony:

In the event, that the ALJ views the employer’s evidence as meeting the *Snipes* threshold, then in that event, claimant requests the scheduling of a full evidentiary hearing that did not occur on September 28, 2011.^[15]

¹⁰ Hearing Transcript pp. 27-28.

¹¹ Hearing Transcript pp. 28-19.

¹² Hearing Transcript pp. 30-31.

¹³ Hearing Transcript p. 31.

¹⁴ Hearing Transcript p. 32.

¹⁵ Claimant’s Formal Hearing Brief, p. 8.

We are aware that it is a party's responsibility to make sure the decision-maker accurately understands the issues, defenses, and claim for relief¹⁶ and that "[i]n making an investigation or inquiry or conducting a hearing the Mayor shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties."¹⁷ Even so, the fundamental problem made apparent from a thorough review of the record in this matter is that at the time of the proceeding, the ALJ had determined that the issue for resolution already had been addressed by prior Compensation Orders, and as a result, Ms. Swinson's attempts to present live testimony were thwarted.

Without conducting a formal hearing, the ALJ determined "Gal Tex and Liberty Mutual have not paid Swinson's medical bills or reimbursed Swinson for prescription medications in contradiction to the Compensation Orders and the Decision and Order issued by the Office of Hearings and Adjudication (hereinafter, "OHA") and the CRB."¹⁸ Thus, based upon the law of the case, the ALJ summarily stated that a decision had not issued relieving Gal Tex from ongoing payment of medical expenses and that Ms. Swinson is entitled to payment of medical bills from May 15, 2008 to present, yet the ALJ still ruled Ms. Swinson's medical care after August 31, 2011 is not reasonable and necessary.

It is true that the procedural posture of this matter raises questions regarding *res judicata*. In particular, based upon prior Compensation Orders, Ms. Swinson is entitled to receive continuing medical care that is causally related to her compensable injuries; inherent in such a determination is that Gal Tex remains responsible to pay for that care if that care also is reasonable and necessary. These conditions implicate *res judicata* and modification of a prior Compensation Order.

"After a valid final adjudication on the merits, the doctrine of *res judicata* bars relitigation of the same claim between the same parties."¹⁹ At the July 23, 2009 formal hearing, Gal Tex had every opportunity to raise the defense of reasonableness and necessity of medical treatment rendered up to that point. It did not do so; therefore, it is barred from raising that defense (as well as the defense of causal relationship) in regard to medical treatment received up to that point.

Unlike in tort litigation, in workers' compensation cases, *res judicata* is "not encrusted with the rigid finality that characterizes the precept in judicial proceedings."²⁰ In other words, following the July 23, 2009 formal hearing, Gal Tex was free to raise the defenses of causal relationship and reasonableness and necessity as they apply to medical treatment rendered after that point. Doing so, however, is only a request for a modification of a prior Compensation Order in regard to the causal relationship defense, not the reasonableness and necessity defense; Ms. Swinson's injuries had been

¹⁶ See *Hensley v. Cheechi & Company*, CRB No. 04-97, OHA No. 92-359G, OWC No. 115568 (April 26, 2007).

¹⁷ Section 32-1525(a) of the Act.

¹⁸ *Swinson v. Gal Tex Hotel Corporation*, AHD No. 07-091D, OWC No 628287 (November 14, 2011), p. 5.

¹⁹ *Oubre v. DOES*, 630 A.2d 699, 703 (D.C. 1993).

²⁰ *Id.* (Internal citation omitted.)

adjudicated to be causally related to her on-the-job accident, but there was no adjudication as to the reasonableness and necessity of medical treatment that had not been proposed or received up to that time.

Importantly, Gal Tex did not raise the defense of causal relationship at the most recent proceeding:

Basically, at this point, the issue is that the treatment up until August 15th, 2008, was reasonable. After August 15th, 2008, it's not medically reasonable and necessary and no further medical treatment is necessary from this point forward.^[21]

Nonetheless, Ms. Swinson's counsel clearly was given the impression that before Gal Tex would be permitted to demonstrate a change of condition, a *Snipes* hearing was being held.²² No *Snipes* hearing was needed; an evidentiary hearing to address the reasonableness and necessity of treatment rendered since the prior formal hearing and the enforcement of the prior Compensation Orders was needed.

CONCLUSION AND ORDER

Given the misperceptions that tainted the prior proceeding, the law requires we VACATE the November 14, 2011 Compensation Order and REMAND this matter for further proceedings consistent with this Decision and Remand Order, including a full, evidentiary hearing.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

December 10, 2012
DATE

²¹ Hearing Transcript, pp. 7-8.

²² Hearing Transcript, p. 21.