**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | |
| | OEA Matter No.: 1601-0032-14R18 |
| SAMUEL MURRAY, Employee | |
| | Date of Issuance: October 31, 2018 |
| v. | |
| DEPARTMENT OF YOUTH REHABILITATION SERVICES, Agency | Arien P. Cannon, Esq. Administrative Judge |

Johnnie Louis Johnson, III, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

## SECOND INITIAL DECISION ON REMAND

### INTRODUCTION AND PROCEDURAL BACKGROUND

An Initial Decision was issued by the undersigned on September 18, 2015, reversing the Department of Youth Rehabilitation Services' ("Agency" or "DYRS") decision to remove Employee from his position for incompetence and inability to perform the essential functions of the job.[1] Agency filed a Petition for Review with the Office of Employee Appeal's ("OEA") Board on October 23, 2015, asserting that the Initial Decision was based on an erroneous interpretation of statute. The OEA Board issued an Opinion and Order ("O & O") on Petition for Review on March 7, 2017, remanding this matter to the undersigned to make further determinations.

On October 25, 2017, after consideration of the parties' arguments, which addressed the issues raised by the OEA Board's Opinion and Order, I issued an Initial Decision on Remand. That Initial Decision on Remand reversed Agency's decision to terminate Employee. The reversal in the Initial Decision on Remand was based on the finding that evidence existed to establish that Employee was medically cleared or deemed to have overcome his disability. The

[1] Agency's Answer, Tab 8 (February 14, 2014).

reversal was also based on the finding that necessary medical treatments were performed to lessen Employee's disability. The OEA Board's March 7, 2017 O & O specifically remanded the matter for these two queries to be addressed—whether evidence existed to establish that Employee was medically cleared or deemed to have overcome his disability and whether necessary medical treatments were performed to lessen Employee's disability.

On November 29, 2017, Agency filed a Petition for Review of the Initial Decision on Remand. The OEA Board issued an Opinion and Order on Remand on April 24, 2018. The Board's Opinion and Order on Remand upheld the undersigned's finding that Employee was medically cleared to return to work without restriction on November 5, 2012.[2] The Board also upheld the finding that Employee received medical treatments to lessen his disability after being injured on July 30, 2010.[3] After addressing the issues raised in its initial O & O, the Board's O & O on Remand held that "it is unclear whether the AJ applied D.C. Code § 1-623.45(b)(1) or 7 DCMR § 139 in determining the date on which the two-year period began to run."

Accordingly, I held a Status Conference on June 26, 2018, to address the Board's O & O on Remand regarding the appropriate date the two-year period began to run under D.C. Code § 1-623.45(b). A briefing schedule was issued for the parties to "address the conflicting provisions in [D.C. Code] § 1-623.45(b)(1) and 7 DCMR § 139." The parties were further ordered to address "whether the 'commencement of payment of compensation' date under D.C. Code § 1-623.45(b)(1) is the same date as the 'first date the employee received compensation or medical treatment' under 7 DCMR § 139 [(July 27, 2012)]." Both parties have submitted their respective briefs.

## JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

## ISSUE

1. What date did the two-year time period begin to run for Employee's right to resume his position with Agency under D.C. Code § 1-623.45(b)(1).

## FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

A brief recitation of the facts is as follows:

1. Employee began working with Agency on February 25, 2002, as a Motor Vehicle Driver.

2. Throughout the course of his employment, Employee filed two separate workers' compensation claims as a result of two separate incidents.

[2] *Samuel Murray v. DYRS*, OEA No. 1601-0032-14, Opinion and Order on Remand, p. 10 (April 24, 2018).
[3] *Id.*

3. On July 30, 2010, Employee sustained an on-the-job injury, and filed a workers' compensation claim, which is the relevant claim in the instant matter.

4. After the injury in the instant matter, Employee was out from work until he returned for a brief period of time from November 5, 2012, through December 17, 2012.

5. Two separate checks workers' compensation checks were issued to Employee for his temporary total disability, as a result of the workers' compensation claim relating to the instant matter.

6. The first check was dated November 18, 2010, in the amount of $355.66, which covered the time period of October 30, 2010, through November 2, 2010.[4]

7. The second check was dated July 18, 2013, in the amount of $5,766.89, which covered the time period of August 26, 2010, through November 2, 2010.[5]

8. On September 23, 2013, Agency issued an Advance Written Notice of Proposed Removal, for what Agency asserted was the inability to perform the essential functions of the job.

9. On November 15, 2013, after an administrative review, Agency issued its Notice of Final Decision on Proposed Removal for Employee, with an effective termination date of November 29, 2013.

Agency argues that the decision to terminate Employee is supported by D.C. Code § 1-623.45(b)(1), a provision that gives an injured employee the right to return to his or her former, or equivalent position, if the employee overcomes the injury or disability within two years. Employee argues that his termination was unlawful because he returned to work within two years of recovering from his work-related injury, albeit for a brief period of time.

The two provisions at issue in this matter are D.C. Code § 1-623.45(b)(1) and 7 DCMR § 139.2.[6] Agency maintains that D.C. Code § 1-623.45(b)(1) and 7 DCMR § 1392 refer to two different return-to-work circumstances. Agency contends that under the statutory provisions of

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[4] Agency Brief on Remand, Attachment 5 (August 3, 2017). (It is noted that there are two "Attachment 5" with Agency's Brief on Remand, presumably in error.)

[5] It is unclear from the record why the July 18, 2013 check was issued nearly three years after the time period in which it was supposed to cover Employee's Temporary Total Disability (TTD) benefits. It is noted that Employee's continuation of pay after filing his workers' compensation claim ended on August 25, 2010, thus the worker's compensation check covered the time period beginning on August 26, 2010. (See Agency's Answer, Tab 2 (February 14, 2014)). Although Employee received continuation of pay after filing his workers' compensation claim pursuant to D.C. Code § 1-623.18(d), continuation of pay is not considered compensation for purposes of determining when the two-year grace period begins. As such, the undersigned must look at when Employee received his first compensation payment, as defined in D.C. Code § 1-623.01(12), in determining when the two year period under D.C. Code § 1-623.45 starts to run.

[5] *See* Employee's Brief, Exhibit A (June 17, 2015)

[6] The Board did not make a determination whether an analysis under DCMR 7 § 139.2 or D.C. Code § 1-623.45(b)(1) should be applied in this matter. However, as explained below, this decision performs an analysis under D.C. Code § 1-623.45(b)(1).

the Code, an employee can only return to work if the employee has overcome an injury, and must return without restrictions and be able to perform the full range of duties and responsibilities of the employee's pre-injury position.[7] Additionally, Agency asserts that under the DCMR regulatory provision, an employee may return to work, although with medically imposed restrictions, commonly referred to as "limited duty status."[8] Based on these assertions, Agency contends that D.C. Code § 1-623.45(b)(1) is the applicable provision to analyze since Employee was returned to work without restrictions.[9] The undersigned will accept Agency's contention and perform an analysis under D.C. Code § 1-623.45(b)(1).[10]

The issue presented on remand in this matter appears to be one of first impression before this Office. The outcome of this matter also seems to hinge largely on a statutory interpretation of D.C. Code § 1-623.45(b)(1). Specifically, D.C. Code § 1-623.45(b)(1) provides, in pertinent part, that "the department or agency which was the last employer shall:"

> (1) Immediately and unconditionally accord the employee the right to resume his or her former, or an equivalent position…provided that the injury or disability has been overcome within two years after the date of commencement of compensation…(Emphasis added).

The OEA Board held in its April 24, 2018 O & O on Remand that "[t]he document [Disability Certificate], on its face, reflects that Employee was cleared to return to work without limitation. Therefore, this Board finds that the Disability Certificate, coupled with Agency's act of permitting Employee to return to work, **constitutes substantial evidence that Employee overcame his disability** as of November 5, 2012."[11] The Board's holding that Employee overcame his disability satisfies one of two critical requirements under D.C. Code § 1-623.45(b)(1). The next critical requirement is whether Employee overcame his disability within two years after the date of "commencement of compensation."

The Board stated in its April 24, 2018 O & O on Remand that the undersigned "failed to provide a legal basis for concluding that November 18, 2010 was the date that should be utilized for calculating the two-year period [under D.C. Code § 1-623.45(b)(1)], and not the date on which Employee became entitled to Workers' Compensation benefits." In addressing the Board's concern that a legal basis was not provided in concluding that November 18, 2010, was the date that should be utilized for calculating the two-year period under D.C. Code § 1-

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[7] *See* Agency's Brief on Remand, at 6 (August 3, 2018); *See also* Agency's Petition for Review, at 8 (November 29, 2017).
[8] *Id*.
[9] Agency contends that D.C. Code § 1-623.45(b)(1) is applicable in the instant case presumably because the Board upheld the finding that the "return-to-work circumstances" in the instant matter provides that Employee overcame his disability and returned to work without restrictions.
[10] In the Board's O & O on Remand, issued April 24, 2018, the Board also found that "the AJ correctly utilized D.C. Official Code § 1-623.45 in his analysis on remand to determine whether Employee overcame his disability as of November 5, 2012. Additionally, insomuch as the Board believes that there is conflicting language between the Code and the DCMR, the District of Columbia Court of Appeals has held that a statute supersedes a conflicting regulation. *See Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[11] *Samuel Murray v. DYRS*, OEA No. 1601-0032-14R17, Opinion and Order on Remand, at 9 (April 24, 2018).

623.45(b)(1), the undersigned points to the plain language of the code section. For purposes of statutory interpretation, it is axiomatic that words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them.[12] In essence, D.C. Code § 1-623.45(b)(1) provides that an agency should return an injured employee back to their same or equivalent position if the injured employee's injury has been overcome within two years after the date when the workers' compensation payments began (commence).

The undersigned did not use the date on which "Employee became entitled to Workers' Compensation benefits" because the relevant section of the Code does not provide that an employee must overcome his injury within two years of being "entitled" to Workers' Compensation Benefits. Rather, the Code provides that if an Employee overcomes an injury within two years of commencement of compensation, he must be unconditionally returned to work.

Here, Employee's first workers' compensation payment (in the form of a check) began on November 18, 2010 (the date the check was issued). Thus, the undersigned relied on the date that the first workers' compensation check was issued to "commenc[e]" the two-year time frame in which Employee had to overcome his injury. Agency was required to permit Employee to "immediately and unconditionally" return to his pre-injury position until November 18, 2012—two year after his workers' compensation payments commenced. Employee overcame his injury and returned to work on November 5, 2012, without any limitations from his physician, thereby satisfying the second critical requirement under D.C. Code § 1-623.45(b)(1).

Agency contends that under § 1-623.45(b)(1), the date Employee became "eligible" for payment of compensation was August 26, 2010, the beginning date of the time period that the July 18, 2013 workers' compensation check covers. It alternatively asserts that because Employee received another workers' compensation payment on November 18, 2010, covering the period of October 30, 2010, through November 2, 2010, the "date of payment of compensation could be October 30, 2010." Neither one of these dates comport with the plain language under D.C. Code § 1-623.45(b)(1), which states that an agency must unconditionally return an employee to work if the employee has overcome his injury within two years after workers' compensation payments begin (read another way: when the compensation commences).

Agency's interpretation of the Code appears to argue that the two-year period should begin to run from the beginning of the time period that the compensation check covers, and not when the check was actually issued. Under Agency's apparent reasoning, it could indefinitely withhold an employee's workers' compensation payments for unknown reasons and prevent an employee from exercising their right to resume employment within two (2) years of his compensation payments "commenc[ing]."

Assuming *arguendo* that Employee had until August 26, 2012 (two years from August 26, *2010*, the date contended by Agency), to resume his employment with Agency, the evidence supports that Employee suffered a recurrence of his injury after his return to work on November

[12] *Providence Hospital v. District of Columbia Dept. of Employment Services*, 855 A.2d 1108 (D.C. 2004).

5, 2012. D.C. Code § 1-623.45(b)(1) further provides "that the department or agency which was the last employer shall:"

> Immediately and unconditionally accord the employee the right to resume his or her former, or an equivalent position…provided that the injury or disability has been overcome within two years…from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment…

Here, Employee contends that his injury recurred after he resumed his regular full-time employment with Agency on November 5, 2012. Agency does not concede that Employee suffered a recurrence of his injury.[13] However, the documentary evidence shows that sometime during Employee's brief return to work from November 5, 2012, through December 17, 2012, he suffered a recurrence of his work-related injury. Employee visited his treating physician on December 17, 2012, after his return to work, at which time Dr. Sankara Kothakota instructed Employee not to go back to his regular work until problems with his neck and shoulder were resolved.[14] In the same medical document, Dr. Kothakota makes clear that the patient's (Employee) visit was for a follow-up workers' compensation claim for an injury to his left shoulder—a compensable disability.

It cannot be genuinely disputed by Agency that Employee resumed regular full-time employment on November 5, 2012. Agency does dispute that Employee suffered a "recurrence" of his injury. However, the medical documents discussed above demonstrate the Employee did in fact suffer a "recurrence" of his work-related shoulder injury—a compensable disability.[15] Accordingly, I find that the two-year time period under D.C. Code § 1-623.45(b)(1) was reset when Employee suffered a "recurrence" of his injury during his return to regular full-time employment between November 5, 2012, and December 17, 2012. Employee was terminated effective November 29, 2013, prior to the two years he should have been afforded to resume employment after the recurrence of his work-related injury. Thus, I find that Employee was deprived of his retention rights under D.C. Code § 1-623.45.

D.C. Code § 1-623.45(b)(1) affords an employee the right to resume employment if they overcome their injury under two circumstances: (1) within two-years after workers' compensation payments commence; or (2) if the injury or disability has been overcome within two years from the time compensable disability recurs if the recurrence begins after the

[13] *See* Agency's Reply Brief, p. 5 (September 17, 2018).
[14] *See* Employee's Brief, Exhibit A (June 17, 2015).
[15] In Agency's September 17, 2018 Brief, it asserts that the Board "rejected the finding made by the AJ in the September 18, 2015 Initial Decision that Employee has 'suffered a reoccurrence of injury' and had 'returned to work within the two-year period' of suffering the reoccurrence." *See* Agency's September 17, 2018 Brief , at 3. However, this is an inaccurate characterization of the Board's March 7, 2017 Opinion and Order on Petition for Review. The Board did not reject such a finding, but rather remanded the matter to determine whether Employee had in fact "overcame his injury in November of 2012." The Board was "under the assumption that such documentation [] exist[ed] for Agency to have allowed Employee to return to work from November 5, 2012 through December 17, 2012." The Board's assumption was proven correct when Employee provided the "Disability Certificate" along with his July 10, 2017 Brief.

employee resumes regular full-time employment. Based on the aforementioned, I find that Employee returned to work within two years of his worker's compensation payments commencing. I further find that the two-year time frame in § 1-623.45(b)(1) was reset when Employee suffered a recurrence of his work related injury, as provided for in the medical documentation of Dr. Sankara Kothakota.

## ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's termination of Employee is **REVERSED**; and
2. Agency shall reinstate Employee to the same or comparable position prior to his termination;
3. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of his removal; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge