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One-Shotters or Have-Nots Should Come Out Ahead In the District of Columbia's Private Sector Workers' Compensation System, But Do They?

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I. INTRODUCTION

In 1974, Marc Galanter wrote *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*.[1] Galanter's article posits that the basic structure of the American legal system restricts the opportunity for using that system as a means of redistributive change; however, in District of Columbia private sector workers' compensation cases, claimants have distinct advantages built into the architecture of the system, not the least of which is the presumption of compensability in the District of Columbia Workers' Compensation Act of 1979, D.C. CODE § 32-1521 (1979), *amended by* D.C. CODE § 32-1501 (2005). Conceptually, this presumption-advantage should allow the Have-Nots to come out ahead, but analysis of published administrative appellate decisions reveals that not only is the presumption of compensability recurrently misapplied, its application on remand does not translate into a claimant-favorable change in the result of a case.

Galanter analyzed the American legal system as a series of contests between One-Shotters ("those claimants[, usually individuals,] who have only occasional recourse to the courts") and Repeat Players (litigants, usually organizations, engaged in multiple, similar cases over time).[2] These two classes of parties play the litigation game differently, and according to Galanter, Repeat Players are in a position of advantage over One-Shotters.

These classifications are not dichotomous, but generally, a Repeat Player anticipates recurrent litigation, has low stakes in the outcome of any particular case, and has sufficient resources to pursue long-term interests such as making rules and creating precedent.[3] Being a Repeat Player does not guarantee success in litigation, but based upon experience and expertise in litigating the same issues, Repeat Players engage in litigation differently; they develop advantages in the litigation process that increase the odds of a win by selectively adjudicating the cases most likely to produce favorable rules for future application as opposed to favorable outcomes for present cases.[4] "Thus, we would expect the body of 'precedent' cases—that is, cases capable of influencing the outcome of future cases—to be relatively skewed toward those favorable to [Repeat Players]."[5]

On the other hand, by definition, One-Shotters lack the intelligence gained from prior litigation experience and focus on a particular outcome. They fight for the benefits to which they think they are entitled, not for future benefits through "(1) rule-change (2) improvement in institutional facilities (3) improvement of legal services in quantity and quality [and] (4) improvement of strategic position of have-not parties."[6]

In the District of Columbia private sectors workers' compensation system, the definition of a One-Shotter can be blurred by the nature of the administrative process. Unlike a tort plaintiff who litigates once-and-for-all for comprehensive

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[1] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

[2] *Id.* at 97.

[3] *Id.* at 98.

[4] *Id.* at 99–100.

[5] *Id.* at 102.

[6] *Id.* at 135.

damages (prior medical expenses, future medical expenses, prior lost wages, future lost wages, pain and suffering, etc.) in the course of a single trial, a workers' compensation claimant litigates for medical expenses and wage loss benefits before returning to work at the end of a healing period; when the claimant returns to work at less than the preinjury wage, the claimant litigates for temporary partial disability benefits; once reaching maximum medical improvement, the claimant litigates for permanent partial disability benefits; years later, the claimant litigates for worsening of condition. Nonetheless, even if a claimant engages in multiple proceedings, the claim for relief usually is for a different type of benefit each time, and the claimant still is not likely to be familiar with the specific issues for resolution or to have "advance intelligence"[7] of the foundation which could be laid in order to increase the likelihood of success.

Galanter posits the American legal system lacks opportunities for systemic equalizing. Contrary to Galanter's hypothesis, in the District of Columbia private sector workers' compensation system, One-Shotters have distinct advantages built into the architecture of that system specifically designed to allow One-Shotters to come out ahead at each step in the litigation process. Despite these advantages, starting at the informal conference, the Repeat Players still come out ahead.

II. THE INFORMAL CONFERENCE

When a private-sector worker is injured on the job, a claim is filed with the Office of Workers' Compensation. The District of Columbia is a voluntary-payment jurisdiction so if the employer accepts the claim, there may be no further intervention by the Office of Workers' Compensation or by any other governmental entity. If, however, the employer denies the claim or terminates benefits, either party can request an informal conference.

An informal conference is a non-adjudicatory meeting.[8] This proceeding is designed "to narrow issues, encourage voluntary payments of claims, and encourage agreement between interested parties."[9] A claims examiner employed by the Office of Workers' Compensation invites the claimant, the claimant's attorney (if represented), the employer, and the employer's attorney (if represented) to attend. Either party can submit written documents,[10] but there is no testimony under oath[11] and no official, transcribed record of the proceedings.[12]

In fact, only the claimant can explain the facts of the case to the claims examiner,[13] but is not subject to cross-examination.[14] Specifically, at this initial stage of the process, the One-Shotter is the only party that can present an oral

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[7] *Id.* at 98.

[8] Gooden v. Nat'l Children's Ctr. and D.C. Guar. Fund, CRB No. 03-137, OWC No. 529469 (Apr. 14, 2006).

[9] D.C. Mun. Regs. tit. 7, § 211.2 (2020).

[10] *Id.* § 219.3.

[11] *Gooden*, CRB No 03-137.

[12] D.C. Mun. Regs. tit. 7, § 219.14 (2020).

[13] *Id.*

[14] *Gooden*, CRB No 03-137.

explanation of the facts of the case, and that explanation can elaborate on the written documentation or can explain inconsistencies in that documentation.

The Repeat Player is limited to relying on cold records and cannot call any witness to the informal conference to provide a different version of the facts. In addition, although the Repeat Player can ask the One-Shotter questions, the One-Shotter is not legally bound to give truthful answers because the One-Shotter is not under oath. Furthermore, because there is no record of the proceedings, the One-Shotter's responses are not memorialized for impeachment during cross-examination in future proceedings.

Upon completion of the informal conference, if the parties do not reach an agreement, the claims examiner issues a Memorandum of Informal Conference that includes recommendations for how the parties should handle the claim.[15] The claims examiner may recommend the employer pay benefits as requested in the claim for relief; the claims examiner may recommend the employer pay part of the claim for relief; or the claims examiner may recommend the employer pay nothing. Admittedly, regardless of the recommendation, the Memorandum of Informal Conference lacks any force if either party rejects it and timely files an Application for Formal Hearing.[16] Nonetheless, preventing the Repeat Player from offering any testimonial evidence while simultaneously allowing the One-Shotter to explain the facts without being placed under oath is an advantage to the One-Shotter.[17]

III. THE FORMAL HEARING

Pursuant to section 32-1521 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, section 32-1501 *et seq*. ("the Act"), a claimant is entitled to a presumption of compensability ("Presumption"). In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and a work-related event, activity, or requirement that has the potential to cause or to contribute to the disability;[18] the Presumption then establishes a causal connection between the employment and the claimant's disability.[19] In order to rebut the Presumption, the employer must present evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."[20] If the employer fails to satisfy its burden, the claimant wins.[21] If the employer satisfies its burden, the

[15] D.C. Mun. Regs. tit. 7, § 219.18 (2020).

[16] *Gooden*, CRB No 03-137.

[17] Memoranda of Informal Conferences are not published. If they were, it would be interesting to research the frequency with which claims examiners recommend employers accept claims as compensable. It is not unreasonable to surmise that more often than not claims examiners recommend employers accept claims as compensable. Regardless, the Repeat Players are more often in the position to decide what cases to pursue and thereby to create persuasive outcomes at the formal hearing level and precedent at the appellate level because they decide whether or not to pay the claims.

[18] Ferreira v. Dep't of Emp't Servs., 531 A.2d 651, 655 (D.C. 1987).

[19] *Id.*

[20] *Id.*

[21] Mexicano v. Dep't of Emp't Servs., 806 A.2d 198, 206 (D.C. 2002).

Presumption falls from the case and the claimant must prove entitlement by a preponderance of the evidence.[22]

Throughout the Presumption's burden-shifting analysis, the Act and the regulations give One-Shotters clear advantages. First, a "claim" is not a specific theory of employment causation, and One-Shotters are permitted to argue alternate theories of causation when making a claim for compensation.[23] Second, if a theory of employment causation, even one not raised by the One-Shotter,[24] has the potential to result in or contribute to the disability suffered, the Presumption is triggered.[25]

The One-Shotter invokes the Presumption with "some evidence" of general causation. The "some evidence" necessary to invoke the Presumption does not have to be credible.[26] In contrast, the Repeat Player must rebut the Presumption with evidence of specific causation; failure to do so means the One Shotter is not required to prove actual causation but instead can rely on the Presumption to prevail.

Finally, after the Presumption falls from the case, the opinions of the One-Shotter's treating physician are afforded a preference over the opinions of the Repeat Player's independent medical examination physician.[27] When the administrative law judge[28] relies on the opinion of the treating physician, there is no requirement to explain why the other medical opinions of record were rejected.[29] Although the administrative law judge may reject the testimony of a treating physician, the judge must give explicit reasons for so doing.[30] The judge does not need to give a reason for rejecting the testimony of an independent medical examination physician.

A presumption, in general, is an advantage to One-Shotters. Specifically, in the Presumption's burden-shifting analysis, the One-Shotter can argue alternate theories to invoke the Presumption based on some evidence of potential causation and can prevail if the Repeat Player does not rebut the Presumption with evidence specific enough to sever the causal nexus between the claimant's employment and disability. Even if the Repeat Player successfully rebuts the Presumption, the Court, when weighing the evidence as a whole, gives the opinions of the One-Shotter's treating physician preference over the opinions of a physician selected by the Repeat Player. Thus, the Presumption is likely the One-Shotter's greatest advantage for securing benefits built into the architecture of the District of Columbia private sector workers' compensation system.

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[22] Wash. Hosp. Ctr. v. Dep't of Emp't Servs., 744 A.2d 992, 998 (D.C. 2000).

[23] *Ferreira*, 531 A.2d at 660.

[24] *Id*. at 657.

[25] *Id*. at 660.

[26] Storey v. Dep't of Emp't Servs., 162 A.3d 793, 797 (D.C. 2017).

[27] Short v. Dep't Emp't Servs., 723 A.2d 845, 851 (D.C. 1998).

[28] Prior to April 3, 2001, workers' compensation adjudicators in the District of Columbia were not classified as administrative law judges. D.C. Code § 32-1543(b) (2016). Throughout this article these adjudicators uniformly are referred to as administrative law judges.

[29] Wash. Hosp. Ctr. v. Dep't of Emp't Servs., 821 A.2d 898, 904 (D.C. 2003). "Only with respect to *treating* physicians have we even held that the examiner must give reasons for rejecting medical testimony." *Id.*

[30] Canlas v. Dep't of Emp't Servs., 723 A.2d 1210, 1212 (D.C. 1999).

IV. MODIFICATION OF A COMPENSATION ORDER

According to Galanter, decreasing delay lowers costs and removes one of the Repeat Player's advantages.[31] Once an administrative law judge issues a Compensation Order in favor of the claimant, a delay is an advantage to the One-Shotter.

Res judicata and collateral estoppel apply to "administrative proceeding[s] when an agency is acting in a judicial capacity 'resolving disputed issues of fact properly before it which the parties have [had] an adequate opportunity to litigate.'"[32] Given the ongoing nature of workers' compensation claims and consistent with the Act's humanitarian purpose, however, there are exceptions to these principles. Modification of an existing Compensation Order when a claimant's condition changes is one of those exceptions.[33]

"At any time prior to [one] year after the date of the last payment of compensation or at any time prior to [one] year after the rejection of a claim,"[34] either party may request a modification of a Compensation Order if there is a change of condition which raises issues concerning "[t]he fact or the degree of disability or the amount of compensation payable pursuant thereto."[35] If the moving party fails to offer evidence warranting modification, there is no entitlement to a hearing on the merits, and the non-moving party prevails with the previous Compensation Order remaining in full force and effect.[36] If the moving party succeeds in offering preliminary evidence showing a reason to believe a change has occurred, the Presumption applies upon a showing of some evidence of a change in the degree of disability and a compensable injury that caused the previous disability.[37]

The modification process is particularly important when the previous Compensation Order required an employer to pay ongoing benefits because once an employer has been ordered to pay ongoing benefits, until it receives another Compensation Order that modifies its obligation, it must continue paying the claimant or be subject to a penalty for not timely paying benefits.[38] The process of obtaining a new Compensation Order requires filing for a formal hearing,

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[31] Galanter, *supra* note 2, at 139.

[32] Wash. Metro. Area Transit Auth. v. Dep't of Emp't Servs., 981 A.2d 1216, 1220 (D.C. 2009).

[33] *Short*, 723 A.2d at 851.

[34] D.C. Code § 32-1524(a). For a claim for permanent partial disability benefits based upon wage loss filed pursuant to § 32-1508(3)(V), the time period for modification is three years after the date of the last payment of compensation or the rejection of the claim. *Id.* § 32-1524(a).

[35] D.C. Code § 32-1524(a)(1). This initial determination is not limited to a change in medical condition. *See e.g.*, Wash. Metro. Area Transit Auth. v. Dep't of Emp't Servs., 703 A.2d 1225 (D.C. 1997).

[36] *See* Snipes v. Dep't of Emp't Servs., 542 A.2d 832 (D.C. 1988) (the preliminary hearing itself is referred to as a "Snipes hearing").

[37] The Presumption applies to the merits of a modification claim the same way it applies to an initial claim (*see Short*), but there is no presumption of a reason to believe there has been a change of conditions warranting a formal hearing on the merits of the claim for modification. Taylor v. Verizon Comm., Inc., CRB No. 14-075, OHA/AHD No. 03216E, OWC No. 571165 (Oct. 30, 2014).

[38] *See* D.C. Code § 32-1515(f); Al-Nori v. Four Points Sheraton Hotel, CRB No. 11-008, OWC No. 604611 (Aug. 10, 2011).

participating in that formal hearing, and waiting for the issuance of a new Compensation Order, all while still paying the claimant pursuant to the prior Compensation Order.

During the delay, if the employer overpays the claimant it cannot recover those funds directly from the claimant.[39] It only can request a credit against the payment of future benefits:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due. All payments prior to an award, to an employee who is injured in the course and scope of his employment, shall be considered advance payments of compensation.[40]

Initially, delay may be an advantage to a Repeat Player, but once a Compensation Order awards a One-Shotter ongoing benefits, the One-Shotter profits from delay. The One-Shotter also profits from receiving benefits it might not be entitled to and that can only be recouped by way of a credit against a payment of future benefits that might never be awarded.

V. PENALTIES FOR UNTIMELY PAYMENT OF AN AWARD OF COMPENSATION

If benefits awarded in a Compensation Order are not paid within ten days after they become due, the claimant is entitled to a mandatory penalty in the sum of 20% of the unpaid amount.[41] The ten-day time period starts to run on the date the employer receives a copy of the Compensation Order from the Office of Workers' Compensation or the Hearings and Adjudication Section.[42] Furthermore, the dispositive date is not the date the check is issued or the date the check is mailed; the dispositive date is the date the claimant or the claimant's attorney actually receives the check.[43]

It is immaterial if the untimeliness is unintentional or is not the result of culpable negligence.[44] Absent a showing of conditions beyond the employer's control that prevented the claimant's timely receipt of payment, a penalty must be imposed:

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[39] Majett v. Old Glory Bar-B-Que, Dir. Dkt. No. 99-23, H&AS No. 97-442 (Sept. 20, 1999).

[40] D.C. Code § 32-1515(j) of the Act. *See also* Brown v. Wash. Metro. Area Transit Auth., CRB No. 16-020(R), AHD No. 14-466, OWC No. 692619 (Sept. 5, 2018) (holding that the advance payment must replace income lost because of a compensable accident, must have been paid during a period of disability after the date of injury but before the issuance of an award in the current case, and must not have been paid under a separate obligation).

[41] D.C. Code § 32-1515(f).

[42] Daly v. Dep't of Emp't Servs., 121 A.3d 1257, 1260 (D.C. 2015).

[43] Orius Telecomms., Inc. v. Dep't of Emp't Servs., 857 A.2d 1061, 1067 (D.C. 2004).

[44] Brown v. Davis Memorial Goodwill Indus., CRB No. 07-161, OWC No. 568170 (Oct. 10, 2007).

> If any compensation, payable under the terms of an award, is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20% thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in § 32-1522 and an order staying payments has been issued by the Mayor or court. The Mayor may waive payment of the additional compensation after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.[45]

Because this language is clear, it is strictly interpreted to mean that when a penalty is requested, an administrative law judge has no discretion. "[E]ither the compensation is timely paid and there is no penalty, or the compensation is late and the penalty must be imposed if [the] claimant seeks it."[46]

Galanter notes, "Courts typically have no facilities for surveillance, monitoring, or securing systematic enforcement of their decrees. The task of monitoring is left to the parties."[47] Plaintiffs successful in civil litigation are lucky if they recover a fraction of a judgment, and even if they do, collection efforts can be costly. The Act encourages monitoring for systematic enforcement of Compensation Orders through penalty awards. If the claimant does not timely receive a check, the lack of discretion in imposing a penalty and the narrow interpretation of what qualifies as "circumstances beyond the Repeat Player's control" are both advantages to the One-Shotter.

VI. THE APPEAL TO THE COMPENSATION REVIEW BOARD

After conducting a formal hearing, an administrative law judge issues a Compensation Order. That Compensation Order is appealable to the Compensation Review Board.[48]

Strict filing deadlines apply when initiating an appeal before the Compensation Review Board. Section 32-1522(b)(2A)(A) of the Act provides that "a party aggrieved by a compensation order may file an application for review with the [Compensation Review] Board within 30 days of the issuance of the compensation order." Also, an "Application for Review must be filed within thirty (30) calendar days from the date shown on the certificate of service of the compensation order or final decision from which appeal is taken."[49] A "day" is

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[45] D.C. Code § 32-1515(f).

[46] Dorsey v. ITT/Continental Baking, Dir. Dkt. No 86-19, H&AS No. 85-353-A, OWC No. 0009588 (May 9, 1989).

[47] Galanter, *supra* note 2, at 138.

[48] In December 2004, the Compensation Review Board assumed administrative appellate review of Compensation Orders. D.C. Code § 32-1521.01. Before the creation of the Compensation Review Board, the Director of the Department of Employment Services ruled on appeals of Compensation Orders.

[49] D.C. Mun. Regs. tit. 7, § 258.2 (2020).

defined as "a calendar day, unless otherwise specified in the Act or this chapter;"[50] however pursuant to § 256.3 of the applicable regulations:

> The Office of the Clerk of the Board shall be open from 8:30 a.m. to 5:00 p.m. on all days except Saturdays, Sundays, and legal holidays, for the purpose of receiving Applications for Review and such other pleadings, motions and papers as are pertinent to any matter before the Board.

Thus, when the thirtieth calendar day falls on a weekend or a legal holiday, the deadline is the next business day.[51] Finally, "[f]ilings with the Board of any permitted pleading, including the Application for Review, shall be deemed effective upon actual receipt by the Office of the Clerk."[52]

If an Application for Review is not filed timely, the Compensation Review Board lacks jurisdiction to consider the merits of the appeal;[53] however, under some circumstances, One-Shotters have been permitted to break the filing rules. For example, Ms. Virginia Paniagua improperly filed her Application for Review with the associate director of the Department of Employment Services' Labor Standards Bureau. For purposes of determining the timeliness of her appeal, the Compensation Review Board considered the date she improperly filed her Application for Review with the associate director.[54]

In addition to the filing deadlines, in order to perfect an appeal the Act requires "a Memorandum of Points and Authorities, which sets forth the legal and factual basis for the review or the opposition thereto, shall be filed with an application for review and an opposition answer."[55] Similarly, the implementing regulations require "an original and three (3) copies of a supporting memorandum of points and authorities setting forth the legal and factual basis for requesting review."[56] These provisions, however, have been interpreted to classify a Memorandum of Points and Authorities as analogous to a brief filed with the District of Columbia Court of Appeals,[57] and although the rules of appellate procedure require the parties file briefs,[58] failure to do so does not prohibit the

[50] D.C. Mun. Regs. tit. 7, § 299.1 (2020).

[51] Unigwe v. Dominion Enterprises, CRB No. 11-055, AHD No 10-387A, OWC No. 659883 (Sept. 8, 2011).

[52] D.C. Mun. Regs. tit. 7, § 257.1 (2020).

[53] *Unigwe*. CRB No. 11-055.

[54] Paniagua v. Hilton Hotel Corp., CRB No 11-006, AHD 10-313, OWC 657301, at n.1 (June 7, 2011).

[55] D.C. Code § 32-1522(b)(2A)(B).

[56] D.C. Mun. Regs. tit. 7, § 258.3(b) (2020).

[57] *Short*, 723 A.2d at 849.

[58] D.C. Ct. App. R. 31(c) (2020) states, "If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move to dismiss the appeal. A party who fails to file a brief will not be heard at oral argument unless the court grants permission."

Court from ruling on the merits of the appeal.[59] Thus, a Memorandum of Points and Authorities may assist the Compensation Review Board in reaching a decision, but it is not the benchmark by which the sufficiency of the Application for Review is measured.[60] So long as a request is filed timely, is in writing, and states that an appeal is being taken, it qualifies. Literally, all it takes is a written statement asserting a right to appeal:

> While claimant was represented by counsel at the Hearings & Adjudication level, claimant files the instant appeal, *pro se*. In his appeal, claimant does not make any specific arguments, but simply states, "I wish to appeal the Compensation Order of Malcolm J. L. Harper dated April 22, 1991." Preliminarily, employer asserts that claimant's Application for Review should be dismissed because claimant did not file a Memorandum of Points and Authorities in support of the Application for Review. However, the Director [of the Department of Employment Services] concludes that the May 17, 1991 Application for Review filed by claimant sufficiently fulfills the requirements of D.C. Code, § [32-1522]. As for the sufficiency of a particular Application for Review, it is sufficient if it is timely, is in writing, and states that an appeal is being taken. Legal arguments would certainly strengthen an appeal and would assist the Director in making a decision, however, that is not how the sufficiency of an appeal is measured. *See, Armstrong v. Howard University*, H&AS No. 91-272 (Director's Order, April 16, 1992).[61]

Without a Memorandum of Points and Authorities asserting legal arguments, the Compensation Review Board must review the underlying Compensation Order to ascertain if it is supported by substantial evidence.[62] Specifically, the Compensation Review Board must perform an appellate review to determine whether the factual findings in 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.

Generally, it is assumed that the Repeat Player's "heightened level of familiarity with institutional actors allows [them] to occasionally disobey court rules or obtain information that is not readily accessible to the public (e.g., receive extensions on court filings or learn the unwritten rules of certain judges' court

[59] D.C. Ct. App. R. 3(a)(2) (2020) states, "An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the Court of Appeals to act as it considers appropriate, including dismissal of the appeal."

[60] Draughorn v. C.J. Coakley, Dir. Dkt. No. 88-155, H&AS No. 87-486-A, OWC No. 0113733 (Oct. 27, 1995).

[61] Wilson v. Mergentine/Perini, Dir. Dkt. No. 91-58, H&AS No. 91-24, OWC No. 145052 (Jan. 4, 1994).

[62] *See* Burwell v. Greater Southeast Cmty. Hosp., Dir. Dkt. No. 00-09, H&AS No. 99-390 (Aug. 16, 2000).

decorum);"[63] however, this advantage can require the Compensation Review Board analyze a Compensation Order for legal deficiencies One-Shotters may not even know to assert. In fact, the employer may not even be on notice of the specific issues the Compensation Review Board reviews until it issues its decision.

On the other hand, if an employer files an appeal of a Compensation Order awarding benefits, that appeal is not a stay of the underlying Compensation Order, and the employer must pay benefits during the pendency of the appeal.[64] Only if payment of a Compensation Order imminently threatens irreparable injury,[65] specifically the continued solvency of the moving party,[66] is a stay warranted, and even though an employer may be unable to recover benefits paid to a claimant if the underlying Compensation Order ultimately is overturned on appeal:

> [T]he prospect of an employer or insurance carrier being unable to collect payments made to a claimant pursuant to a compensation order that may later be reversed does not constitute an irreparable injury warranting a stay of a compensation order upon review. Teal v. Washington Gas Light Company, H&AS No. 86-403 (Director's Order of May 20, 1987). Or stated in other words, the insolvency or financial irresponsibility of a claimant to repay compensation paid to him or her pursuant to an order which is later reversed is not such an irreparable injury as would entitle the appealing employer or insurance carrier to a stay. The only instance in which it appears that irreparable harm can be established in such cases so as to warrant the stay of a compensation order, is when payment of the compensation order imminently threatens the solvency of the moving party.[67]

Contrary to the imbalance of power Galanter describes, on appeal to the Compensation Review Board, the One-Shotter, not the Repeat Player, is in a position of advantage. The One-Shotter can violate filing requirements and force the Compensation Review Board to analyze the Compensation Order for legal sufficiency. On the other hand, if the Repeat Player files an appeal, it must continue to pay benefits during the pendency of that appeal even though it ultimately may win on appeal and not be liable for benefits.

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[63] Bahaar Hamzehzadeh, *Repeat Player vs. One-Shotter: Is Victory All That Obvious*, 6 HASTINGS BUS. L.J. 239, 244 (Winter 2010).

[64] D.C. Mun. Regs. tit. 7, § 260.1 (2020).

[65] D.C. Mun. Regs. tit. 7, § 260.3 (2020).

[66] Whitson v. Wash. Home/Hospice, Dir. Dkt. No. 00-57, OHA No. 00-148, OWC No. 548138 (Oct. 5, 2000).

[67] *Id.*

VII. ATTORNEY'S FEES

In the District of Columbia, a claimant's attorney is paid a contingent fee if he successfully prosecutes the claim.[68] Unlike in most tort litigation, if the employer loses it can be forced to pay those fees plus costs in certain circumstances designed to encourage them to pay compensable claims without resorting to litigation:

> (a) If the employer or carrier declines to pay any compensation on or before the 30th day after receiving written notice from the Mayor that a claim for compensation has been filed, on the grounds that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits thereafter utilizes the services of an attorney-at-law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the Mayor, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.
>
> (b) If the employer or carrier pays or tenders payment of compensation without an award pursuant to this chapter, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the Mayor shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within 14 days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney-at-law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Mayor, as authorized in § 32-1507(e), and offers to tender an amount of compensation based upon the degree or length

[68] Successful prosecution does not require success on the entire claim for relief; it only requires the administrative law judge grant an award because a claimant engages counsel to obtain an award after an employer declines to pay compensation. Al-Robaie v. Ft. Myer Constr. Corp., CRB No. 12-102(A) (Sept. 24, 2013).

> of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Mayor or court in any such case, an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accordance with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.[69]

Not having to pay an hourly rate (or anything) for representation counterbalances the disincentive of the cost of litigation. In addition, the outcome of the initial formal hearing is not the most important consideration for the One-Shotter's litigation strategy; the claimant's attorney must act as a Repeat Player on the client's behalf because the focus is not on maximizing profit in this proceeding: The claimant's lawyer must consider the long-term impact of her actions on the attorney-client relationship in order to maintain the opportunity to pursue a lucrative permanent partial disability award after the claimant reaches maximum medical improvement.

[69] D.C. Code § 32-1530.

VIII. EFFECTS OF THE PRESUMPTIONS OF COMPENSABILITY ADVANTAGE

When injured workers have to litigate on-the-job injuries as tort claims, the defenses of assumption of the risk, contributory negligence, and the fellow servant rule worked to the advantage of employers. In the Act, the District of Columbia made legislative efforts to level the playing field for One-Shotters and Repeat Players. From start to finish, claimants have advantages in the District of Columbia's private sector workers' compensation system. Do the advantages make a difference, or do the Haves still come out ahead?

A. Identification of the Parties

At the outset, it is helpful to classify the litigants by Galanter's standards. In District of Columbia private sector workers' compensation cases, there are two parties—the injured worker (the claimant) and the employer. In general, employers are organizations, and organizations are more powerful than individuals; in an employment contest of employer versus employee, being an organization certainly means greater financial strength, especially when the employee is not working because of an injury. Moreover, in the sample of coded cases used throughout this research, there are only 7 claimants with more than one decision on appeal, and in all but one of these pairs of repeat cases, the underlying claim is the same. Put another way, the coded sample of 101 cases includes 94 different claimants and just 66 different employers. Thus, while not universal, it is fair to classify the claimants as One-Shotters and the employers as Repeat Players.

B. Case Selection and Coding

The ultimate focus of this research is on whether or not the presumptions at §§ 32-1521(1)–(4) of the Act (collectively "Presumptions of Compensability") were applied properly so it also is helpful to identify the cases included in the sample. A decision issued by the Compensation Review Board provides an objective assessment of whether or not the Presumptions of Compensability were applied properly at the formal hearing level. In addition, a decision issued by the Compensation Review Board is the first opportunity in the adjudication process to establish precedent. Finally, the District of Columbia Court of Appeals defers to the Compensation Review Board's interpretations of the Act; therefore, success before the Compensation Review Board increases the odds of success before the Court. For these reasons, decisions issued by the Compensation Review Board, not Compensation Orders issued by administrative law judges, were coded.[70]

[70] There are no Presumptions of Compensability in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq*.; therefore, public sector cases were rejected from the sample. In addition, decisions that do not include the Presumptions of Compensability (*e.g.* cases ruling on motions, attorney fee petitions, reasonableness and necessity of medical treatment, etc.) were rejected from the sample. Duplicates and Compensation Orders erroneously stored in the "DC Off. of Emp. Serv. Director's Decisions/Compensation Review Board from 1996" library also were rejected. Finally, even in cases that were coded, resolution of any issues not related to the Presumptions of Compensability was not examined.

To begin, a chronological cite list of all Compensation Review Board decisions issued from February 1, 2005[71] through December 31, 2019 published on Lexis Advance was created by searching for <compensation & presum!> with the date restriction 02/01/2005–12/31/2019 in the "DC Off. of Emp. Serv. Director's Decisions/Compensation Review Board from 1996" library.[72] Then, the list of 1,008 results was sorted by date (oldest-newest).[73]

Using Microsoft Excel's =RANDBETWEEN(x,y) formula where x=1 and y=1,008, a list of 350 random numbers was created. The list of random numbers was generated in 9 columns of 25 rows to accommodate duplicate numbers and rejected cases. Cases to be reviewed for coding were selected by matching the random numbers (progressing down each column from left to right) to the case numbers on the cite list. 185 cases were reviewed in order to code 10% of all Compensation Review Board decisions issued during the selected time period and published on Lexis Advance.

Each Compensation Review Board decision was coded for the following elements:[74]

- Claimant
- Employer
- Compensation Review Board Decision Date
- Claimant's Self-Representation on Appeal (Yes/No)
- Compensation Order Date
- Identification of the First Presumption Issue
- Outcome of the First Presumption Issue
- Proper Application of the Presumption Identified in the First Issue (Yes/No)
- Identification of the Second Presumption Issue
- Outcome of the Second Presumption Issue
- Proper Application of the Presumption Identified in the Second Issue (Yes/No)
- Identification of the Third Presumption Issue
- Outcome of the Third Presumption Issue
- Proper Application of the Presumption Identified in the Third Issue (Yes/No)
- Compensation Order on Remand Date
- Benefits Awarded in Compensation Order on Remand
- Date of Injury
- Average Weekly Wage

[71] The Compensation Review Board began reviewing cases in February 2005. Charles J. Willoughby, *Department of Employment Services Workers' Compensation Processes—Resolution of Disputed Claims Special Evaluation*, OIG No. 07–0021CF 20 (July 2007).

[72] Lexis Advance is the most comprehensive source for published opinions from the Office of Hearings and Adjudication, Compensation Review Board, and District of Columbia Court of Appeals; therefore, it represents the most reliable means of identifying, sampling, and reviewing those decisions.

[73] The list was generated on February 16, 2020.

[74] Elements used for identification or case tracking purposes are not detailed here.

- Compensation Rate
- Number of Days Between Compensation Order Date and Compensation Order on Remand Date
- Number of Days Between Compensation Order Date and Compensation Review Board Decision Date
- Appeal to Court of Appeals (Yes/No)[75]
- Notes

When the data needed for any particular field was not available in the Compensation Review Board's decision, the underlying Compensation Order, the Compensation Order on Remand, or any other published decision from the case was used to populate the database as completely as possible.

IX. DATA ANALYSIS

By the plain language of the Act there is a presumption of compensability designed for the claimant to win even in arguable cases. If it is functioning as an advantage to claimants as intended, one could expect claimants to be more successful than employers at the formal hearing level. In fact, following a formal hearing, claimants were awarded benefits (meaning some relief was granted even if the relief was not the full claim) in only 38 of the 101 coded cases.[76]

If the claimant loses after a formal hearing and files an appeal,[77] the claimant is designated the petitioner. If the employer loses after a formal hearing, it files the appeal, and the claimant is designated the respondent. In 72 of the 101 coded cases the claimant is the petitioner. See Table 1.

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[75] In Lexis Advance it is difficult and sometimes impossible to link a District of Columbia Court of Appeals opinion to the workers' compensation case on appeal.

[76] Several factors other than the Presumptions of Compensability may account for this low success rate:

1. Not all Compensation Orders are appealed to the Compensation Review Board, and not all of the Compensation Review Board's decisions on appeal are published. *See* "Limitations and Results," *infra*.
2. Not all of the Compensation Review Board's decisions are affirmed by the Court of Appeals. *See infra* note 94.
3. Patently compensable claims should be paid without proceeding to a formal hearing or an appeal.
4. Because of the personal interest in the immediate outcome of a case, claimants are less likely than employers to be interested in molding the law for future use and may settle even on unfavorable terms rather than wait for an uncertain result after a formal hearing or an appeal.
5. The employer ultimately determines if a claim proceeds to a formal hearing or an appeal by paying the claim or denying it regardless of its merits.
6. When a case proceeds to a formal hearing, employers have more resources to devote to creating the record; when a case proceeds to an appeal, employers have more resources to devote to researching persuasive or innovative arguments.

[77] A claimant may be awarded benefits in a Compensation Order and still file an appeal. For example, a claimant may request an award of ongoing wage loss benefits but only be granted a closed period of wage loss benefits; the claimant could file an appeal to try to increase the benefits awarded.

A. Table 1: Claimant's Party Status

Litigant	Petitioner (Loser at the Formal Hearing)	Respondent (Winner at the Formal Hearing)
Claimant	71.3%	28.7%

Of the 72 cases wherein the claimant is the petitioner, the claimant was denied benefits in the Compensation Order 63 times. In those 63 cases, benefits were awarded on remand only 6 times.[78] See Table 2.

B. Table 2: Claimant as Petitioner on Appeal

Litigant	Petitioner (Benefits Denied at the Formal Hearing)	Petitioner (Benefits Granted on Remand)
Claimant	87.5%	9.8%

The cost of the error in those 6 cases is not to be underestimated:

- In Case 43,[79] the claimant was an electrical repair mechanic who injured his back while working on a fan-coil-unit motor. An administrative law judge ruled the claimant had failed to give proper notice and denied him temporary total disability benefits for a closed period, temporary partial disability benefits for a different closed period, and medical benefits. On appeal, 87 days after the administrative law judge issued the Compensation Order, the Compensation Review Board amended the Compensation Order to award medical expenses.
- In Case 49,[80] a debt collector injured both of her knees while moving boxes and a computer to a different desk. An administrative law judge denied her claim for temporary total disability benefits for two closed periods and authorization for medical treatment including multiple surgeries. The Compensation Review Board ruled the employer had failed to rebut the Presumption and reversed the Compensation Order. 801 days after the administrative law judge issued the Compensation Order, the claimant was granted medical benefits.

[78] If a Compensation Order on Remand is not published and if no subsequent decision in that case indicates that benefits were awarded on remand, the case was coded as unknown regarding an award of benefits on remand because it is not possible to determine if benefits were awarded on remand. In 2 of these 63 cases, the outcome on remand is unknown.

[79] Dillon v. D.C. Water & Sewer Auth., CRB No. 05-032, OHA No. 05-032, OWC No. 603500 (Oct. 6, 2005).

[80] Davis v. NCO Fin., CRB No. 05-02 (Nov. 30, 2005).

- In Case 555, a bus driver suffered multiple psychological disorders as a result of "dealing with a lot of misconduct, people, dope fiends, drunks, people who don't like to follow the rules."[81] An administrative law judge denied her claim for medical benefits and temporary total disability benefits for a closed period of 1,312 days on the grounds that the claimant had failed to invoke the Presumption.[82] The claimant's average weekly wage was not disclosed, but the statutory minimum compensation rate for 2006 when the claimant was injured was $288.96. 812 days after the administrative law judge issued the Compensation Order, the claimant was awarded temporary total disability benefits for a closed period of 913 days, worth $37,688.64 at the statutory minimum compensation rate.
- In Case 762,[83] a mechanic injured his low back when he bent forward and lifted a pump engine. Although the administrative law judge ruled that the claimant had invoked the Presumption and that the employer had not rebutted the Presumption, the administrative law judge still denied the claimant's request for temporary total disability benefits from the date the claimant stopped working to the date of the formal hearing and continuing. The claimant's average weekly wage was not disclosed, but the statutory minimum compensation rate for 2013 when the claimant was injured was $354.11.[84] 183 days after the administrative law judge issued the Compensation Order, the Compensation Review Board vacated the denial of benefits in the Compensation Order. During that time period alone, the claimant was entitled to $9,257.45 in wage loss benefits at the statutory minimum compensation rate.[85] By the time the administrative law judge issued a Compensation Order on Remand 238 days after issuance of the Compensation Order, the claimant was entitled to $12,039.74 at the statutory minimum compensation rate.
- In Case 962,[86] while rushing to fill a stat order for medication, a pharmacy technician stopped short and sustained a complex degenerative tear of the medial meniscus in his left knee. An

[81] Horton v. Wash. Metro. Area Transit Auth., CRB No. 13-039, AHD No. 12-380, OWC No. 635573 (July 1, 2013).

[82] The statutory minimum compensation rate does not apply to temporary total disability benefits but has been applied here in the absence of the claimant's average weekly wage and resulting compensation rate. *See* Hiligh v. Dep't of Emp't Servs., 935 A.2d 1070 (D.C. 2007).

[83] Pettis v. Wash. Metro. Area Transit Auth., CRB No. 15-172, AHD No. 14-086, OWC No. 585487 (Apr. 1, 2016).

[84] *See supra* note 82.

[85] Ordinarily, ongoing benefits are calculated from the date of injury, but in order to calculate the cost of the error rather than the cost of the claim, benefits here are calculated from the date of the Compensation Order (when the error was made) to the date of the Compensation Order on Remand (when the error was corrected). Furthermore, calculating the cost of a misapplication is not intended as an actual dollar amount assessment, but as an indicator of the potential impact of such an error.

[86] Burr v. Children's Nat'l Med. Ctr., CRB No. 19-018, AHD No. 18-470, OWC No. 771893 (Apr. 4, 2019).

administrative law judge ruled the claimant had not invoked the Presumption with his testimony or his medical records and denied his claim for temporary total disability benefits for a closed period of 62 days. The claimant's average weekly wage of $1,357.57 yields a compensation rate of $905.05. Thus, on remand after the administrative law judge properly applied the Presumption to determine the claimant had invoked it and the employer had not rebutted it, the claimant was entitled to $8,016.16. It took 71 days for that error to be exposed and 187 days for it to be corrected.

- In Case 1000,[87] a 73-year-old document management analyst suffered "a complex tear of the medial meniscus, a Grade 1 sprain of the medial collateral ligament, adjacent marrow edema, a full-thickness delaminating fissure along the notch third of the lateral patellar facet, joint effusion, and tendinopathy"[88] of his left knee. His injuries were treated with medication, physical therapy, and surgery. Because of his knee injury he walked with an altered gait and developed lumbar radiculopathy which was treated with medication and chiropractic care. The administrative law judge rendered conflicting rulings on the issue of whether the claimant's medical expenses were causally related to his work-related injury, and denied his request for medical benefits until issuing a Compensation Order on Remand 341 days after issuing the Compensation Order on appeal.

A wrong decision denying benefits jeopardizes a claimant's financial stability; it discourages an employer from fixing dangerous working conditions and increases the Repeat Player's strength.[89]

In 29 of the 101 coded cases, the claimant is the respondent; in all those cases, the claimant was awarded benefits after a formal hearing. On remand, benefits were retained in 24 of those cases.[90] See Table 3.

[87] Grenadier v. Lockheed Martin Corp., CRB No. 19-082, AHD No. 18-428, OWC No. 754848 (Oct. 15, 2019).

[88] Grenadier v. Lockheed Martin, AHD No. 18-428, OWC No. 754848 (June 30, 2020).

[89] A wrong decision granting benefits also has negative effects. A wrong decision increases costs to consumers paying the passed-through price of benefits, and it forces an employer to pay benefits that it cannot recover from the claimant except as a credit against future benefits that may never be awarded.

[90] In 2 of these 29 cases, the outcome on remand is unknown. Having classified employers as Repeat Players, the data for the most prevalent employer in the sample, the Washington Metropolitan Area Transit Authority, was isolated. The Washington Metropolitan Area Transit Authority is a litigant in 21 cases. In 17 of those cases (81.0%), the claimant is the petitioner, and in only 3 of those 17 cases (17.6%) was the claimant successful in earning or retaining benefits on remand. In 4 of the 21 cases (19.0%), the claimant is the respondent, and in 2 of those cases (66.7%) the claimant retained benefits on remand; in 1 of these 4 cases the outcome on remand is unknown.

C. Table 3: Claimant's Success Rate on Remand

Litigant	Success Rate as Petitioner	When Respondent, Opponent's Success Rate
Claimant	18.6%	11.1%

Thus far, the data suggests the Presumptions of Compensability do not actually function as an advantage to claimants.

These numbers are not global—they only apply to appealed cases involving a presumption, but 101 of 185 cases reviewed (54.6%) involve the Presumptions of Compensability. Although being a Repeat Player does not guarantee a win, One-Shotter- Claimants already seems to be at a disadvantage despite the Presumptions of Compensability. The situation does not improve when factoring in misapplication of the Presumptions of Compensability.

In 34 of the 101 coded cases, the Compensation Review Board ruled a presumption had been misapplied.[91] Breaking down those 34 cases, 24 of them involve misapplication of the Presumptions of Compensability at the first step of the inquiry (invoking). In those 24 cases, the claimant was the petitioner 20 times; the claimant was awarded benefits in 2 of those cases after a formal hearing. In both of those cases, benefits were denied on remand. Of the 18 cases wherein the claimant was the petitioner and was denied benefits after the formal hearing, benefits were awarded on remand in only 5 cases.[92] See Table 4.

On the other hand, the claimant was the respondent in only 4 cases wherein the Compensation Review Board ruled that the Presumptions of Compensability were misapplied when invoking. In all 4 of those cases benefits had been awarded after a formal hearing, and in 2 of those cases benefits were awarded again on remand.[93] See Table 4.

[91] Proper application of the Presumptions of Compensability is objectively assessed based on whether the presumption issue in a Compensation Order is affirmed, reversed, remanded, or vacated by the Compensation Review Board. Of course, the Compensation Review Board is not infallible. Any decision it issues affirming a Compensation Order can be affirmed, reversed, vacated, or remanded by the Court of Appeals, but so few judicial opinions ruling on workers' compensation appeals are published that a longitudinal analysis is not viable. (A search for "name (employment) & compensation" performed in the "District of Columbia, Court of Appeals Cases from 1925" library with the date restriction of 02/01/2005–12/31/2019 yielded 191 cases. The Department of Employment Services is a named party in every workers' compensation case appealed to the Court of Appeals, but this search may inflate the results by yielding public sector disability cases and other irrelevant cases such as unemployment benefits cases. Of these 191 cases, 59 included the search term <presum!>.)

[92] In 1 of these 18 cases, the outcome on remand is unknown.

[93] In 1 of these 4 cases, the outcome on remand is unknown.

D. Table 4: Outcomes When Presumptions of Compensability Misapplied at Invocation

Petitioner	Misapplication at Invoking	Benefits Granted in Compensation Order after Misapplication at Invoking	Benefits Granted (Again) on Remand After Misapplication at Invoking	Benefits Denied in Compensation Order after Misapplication at Invoking	Benefits Denied (Again) on Remand After Misapplication at Invoking
Claimant	27.8%	10.0%	0%	90.0%	70.6%[94]
Employer	13.8%	100%	66.7%[95]	0%	n/a

When the claimant appeals and the Compensation Review Board rules that the Presumptions of Compensability have been misapplied at the first step in the analysis, benefits have been taken away or denied again on remand in 73.7% of the time.

Still focusing on the 34 cases wherein the Compensation Review Board ruled that the Presumptions of Compensability had been misapplied, 27 of them involve misapplication of the Presumptions of Compensability at the second step of the inquiry (rebuttal).[96] In those 27 cases, the claimant was the petitioner 18 times.[97] The claimant was awarded benefits in 3 of those cases after a formal hearing, and benefits were retained in 1 case on remand. Of the remaining 15 cases wherein the claimant was the petitioner and was denied benefits after the formal hearing, benefits were awarded on remand only 3 times.[98] See Table 5.

On the other hand, the claimant was the respondent in 9 cases wherein the Compensation Review Board ruled that the Presumptions of Compensability had been misapplied at rebuttal. In all 9 of those cases benefits had been awarded to the claimant after a formal hearing, and in 7 of those cases benefits were awarded again on remand.[99] See Table 5.

[94] In 1 of these 18 cases, the outcome on remand is unknown.
[95] In 1 of these 4 cases, the outcome on remand is unknown.
[96] A case may include more than one presumption issue.
[97] The respondent also can raise issues on appeal.
[98] In 1 of these 15 cases, the outcome on remand is unknown.
[99] In 2 of these 9 cases, the outcome on remand is unknown.

E. Table 5: Outcomes When Presumptions of Compensability Misapplied at Rebuttal

Petitioner	Misapplication at Rebuttal	Benefits Granted in Compensation Order after Misapplication at Rebuttal	Benefits Granted (Again) on Remand after Misapplication at Rebuttal	Benefits Denied in Compensation Order after Misapplication at Rebuttal	Benefits Denied (Again) on Remand after Misapplication at Rebuttal
Claimant	37.5%	16.7%	33.3%	83.3%	78.6%
Employer	93.1%	100%	100%[100]	0%	n/a

Overall, among the 34 cases wherein the Compensation Review Board ruled that the Presumptions of Compensability had been misapplied, regardless of who filed the appeal, in 13 of those cases the claimant was awarded benefits after a formal hearing; in 8 of those cases the claimant retained benefits after appeal.[101] Regardless of who filed the appeal, in 21 of the 34 cases wherein the Compensation Review Board ruled that the Presumptions of Compensability had been misapplied, benefits were denied after a formal hearing, and in only 5 of those cases were benefits granted on remand.[102] See Table 6.

F. Table 6: Comparative Outcomes After Misapplication of Presumptions of Compensability

Benefits Granted after Formal Hearing	Benefits Granted (Again) on Remand	Benefits Denied after Formal Hearing	Benefits Denied (Again) on Remand
38.2%	72.7%	61.8%	73.7%

There was a change in the outcome in only 8 of the 34 (26.7%) cases wherein the Compensation Review Board ruled that the Presumptions of Compensability had been misapplied, regardless of who brought the appeal;[103] 5 times benefits were granted on remand when they had been denied after formal hearing,[104] and 3 times benefits were denied on remand when they had been granted after a formal hearing.[105] The net result is that the Presumptions of Compensability do not seem to act as an advantage to claimants.

When injured workers had to litigate on-the-job injuries as tort claims, the defenses of assumption of the risk, contributory negligence, and the fellow servant rule worked to the advantage of employers. With implementation of the District of Columbia workers' compensation system, at every step in the process the Act counteracts the "unholy trinity" of defenses by providing claimants with

[100] In 2 of these 8 cases, the outcome on remand is unknown.
[101] In 2 of these 13 cases, the outcome on remand is unknown.
[102] In 2 of these 21 cases the outcome on remand is unknown.
[103] In 4 of these 34 cases, the outcome on remand is unknown.
[104] In 2 of these 21 cases the outcome on remand is unknown.
[105] In 2 of these 13 cases the outcome on remand is unknown.

advantages. Perhaps the most important advantages are the presumptions found at §§ 32-1521(1)–(4) of the Act. The Presumptions of Compensability enable a claimant to establish entitlement to benefits more easily, but they were misapplied in more than one-third of the coded cases. When the Presumptions of Compensability are misapplied, it appears the very purpose of the Act is circumvented; however, misapplication of the Presumptions of Compensability frequently does not result in a change in the award of benefits on remand.[106] The philosophy underlying the Presumptions of Compensability favors the claimant, but research suggests application of the Presumptions of Compensability does not.

X. LIMITATIONS AND CONCLUSIONS

There are limitations to this research. The sample cases may not be representative of all filed claims or even all litigated claims. Not all work-related injuries become workers' compensation claims. Workers may not know an injury is covered by workers' compensation, may believe that the process is too cumbersome or too intimidating to warrant use, or may not want to be hampered by compensation rates one-third less than one's average weekly wage (which is paid in full when using sick leave); employers may not know an injury is covered by workers' compensation or may want to maintain a safety record. In addition, not all claims proceed to a formal hearing, an administrative appeal, or a judicial appeal. Furthermore, not all decisions issued by the Office of Hearings and Adjudication, the Compensation Review Board, or the Court of Appeals are published or are available on Lexis Advance.[107] There are too many deficiencies in the data for this research to assert that the analyses are statistically significant. In the end, the results of this research are only suggestive of the actual application of the Presumptions of Compensability and of the consequences of misapplication, but the implications alone are sufficient to prompt further inquiry. After all, there is more at stake than winning or losing in any particular case. If claimants rarely succeed with or without the benefit of the Presumptions of Compensability, or if decisions available to the public predominately report claimants' losses, injured workers may be reluctant to pursue their rights or attorneys may be reluctant to represent claimants.[108] Moreover, whether denying or granting benefits, a misapplication of the law decreases the public's faith in the system.

[106] Future research should include a similar analysis of Alaska workers' compensation cases and federal Longshore and Harbor Workers' Compensation Act cases for comparison purposes; both of these jurisdictions have the same presumptions analyzed in this research.

[107] Published decisions may or may not differ from unpublished decisions.

[108] In 6 of the coded cases the claimant was self-represented on appeal. In all of those cases the claimant was the petitioner; in all of those cases benefits were denied after a formal hearing; and in all of those cases application of the Presumptions of Compensability were unchanged after appeal. Future research should be conducted to assess any effect of representation on the outcomes above.