

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402 - Fax

CRB No. 06-01

THOMASINE BROWN, DEPENDENT MOTHER OF THURMAN BROWN, DECEASED,

Claimant–Respondent

v.

BORG WARNER PROTECTIVE SERVICE AND LUMBERMAN’S MUTUAL CASUALTY COMPANY,

Employer/Carrier–Petitioner.

Appeal from a Compensation Order of
Claims Supervisor Mohammad Sheikh
Of the Office of Workers’ Compensation
OWC No. 517746

Kevin J. O’Connell, Esquire, for the Petitioner

Richard Galiher, Esquire, for the Respondent¹

Before E. COOPER BROWN, *Acting Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, *Administrative Appeals Judge*, and FLOYD LEWIS, *Acting Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER AND AMENDED COMPENSATION ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director’s Directive, Administrative Policy Issuance 05-01 (February 5, 2005).²

¹ This matter is before this Board on a “Joint Application of the Parties for Review of Compensation Order Again Denying Settlement Petition”. The dependent of the deceased worker is described herein as “Respondent” or “beneficiary” only for identification purposes.

² Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director’s

BACKGROUND

A Compensation Order Denying Approval of Structured Lump-Sum Settlement (the initial Compensation Order) from the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES) was issued and filed May 4, 2005. In that Compensation Order, a Claims Examiner (CE) in OWC, and the Claims Supervisor approved, the denial of approval of a jointly submitted lump sum settlement agreement. Petitioner now seeks review of that Compensation Order. That denial was appealed to this board.

As grounds for this appeal, Petitioner alleged as error that the denial of approval of the settlement agreement was not in accordance with the law, in that the settlement agreement was in the best interest of Respondent since it provided Respondent with lifetime benefits in excess of those which she was currently receiving from Petitioner voluntarily on a monthly basis, as well as an additional lump sum payment, and further because denial of approval was contrary to the express mandatory language of D.C. Official Code §§ 32-1508 (8), which governs approval of lump sum settlement agreements. Respondent joined in the appeal, and concurred with Petitioner in requesting that this board reverse the denial of approval. The CRB did so on June 28, 2005, and remanded the matter to OWC with instructions that the settlement petition be approved.

On September 15, 2005, in a Compensation Order Denying Approval of Structured Lump-Sum Settlement (the Second Compensation Order) OWC again denied approval of the settlement petition. The parties have jointly appealed the denial of approval and have requested, again, that the terms of the settlement be approved.

ANALYSIS

As an initial matter, regarding the scope of review by the Compensation Review Board (CRB) and this Review Panel, in its review of an appeal from OWC, the Board must affirm said decision unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See*, 6 Stein, Mitchell & Mezones, ADMINISTRATIVE LAW § 51.03 (2001).

Turning to the case under review, D.C. Code § 32-1508 (8) reads in pertinent part:

The Mayor may approve lump-sum settlements agreed to in writing by interested parties, discharging the liability of the employer for compensation ... in any case where the Mayor determines that it is in the best interest of an injured employee entitled to compensation or individuals entitled to benefits pursuant to § 32-1509 [dependents of deceased workers whose deaths are work related]. The Mayor

Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

shall approve the settlement, where both parties are represented by legal counsel who are eligible to receive attorney fees pursuant to § 32-1530.³ These settlements shall be the complete and final dispositions of a case and shall be a final binding compensation order.

Review of the record reveals that both parties in this action were represented by counsel before OWC, and that both counsel requested approval of the settlement agreement on behalf of their respective clients. From the body of the initial Compensation Order, it appears that Petitioner's assertions concerning the fact that the settlement terms represent an increase in the amount of benefits that Respondent receives absent the agreement are correct, both on a monthly basis, and considering that the Petitioner, under the agreement, will pay Respondent an additional lump sum of \$1,700.00, and an attorney fee of an additional \$1,700.00. Further, while under the Act, Respondent's benefits would cease upon her death, under the term of the agreement, said payments would continue for a period of ten years certain, payable to her estate in the event of her death during that time, but continue for her life regardless of time.

The initial Compensation Order contained the following language, which is the only discussion therein of the reasons for the denial of approval:

Therefore, after careful review of the records of the Office of Workers' Compensation determined [sic] that the Structured Settlement of \$324.00 per month payable for 120 months (10 years) certain and guaranteed for the lifetime thereafter of Thomasine Brown is not in the best interest of the claimant. Since Ms. Brown is currently receiving \$320.28 per month [sic]. Ms. Brown needs money now to meet her medical and other financial need.

It is hereby determined that the Structured Settlement is being returned unapproved to the employer/carrier. It is also determined that it is not in the best interest of the Beneficiary in accordance with D.C. 3-77 Section 32-1508 (8) and 32-1509 (5).

Initial Compensation Order, page 2.

From this language, it appears that the denial of approval of the settlement agreement was a function of the concerns of OWC that the weekly benefit amount is inadequate to meet Respondent's needs. While such considerations are laudatory, the clear legislative intent as evidenced by the mandatory language of § 32-1508 (8), quoted above, is to presume conclusively that a negotiated settlement between represented parties is, taking all things into account, including things about the relative merits of each side's legal position that are or may be unknown to OWC, in the best interest of the claimant. It is noteworthy that the mandatory

³ We note that the statutory requirement that "both parties" be represented by "legal counsel who are eligible to receive attorney fees pursuant to § 32-1530" can not be given its literal interpretation, because such an interpretation is an impossibility, given that § 32-1530 governs only the consideration and award of attorney fees to legal counsel representing claimants. The Act is completely silent on the subject of attorney fees paid to legal counsel for employers. We read § 32-1508(8) as covering cases where the claimant is represented by counsel eligible to receive a fee pursuant to §32-1530, and where the employer is represented by counsel qualified to practice law before the Agency.

language is the result of an amendment to the prior statute, which theretofore permitted great discretion to OWC in consideration of such settlement agreements. As pointed out by the Director in an earlier case touching on this issue:

[W]hen the Act was amended in 1999, in evaluating a settlement agreement under D.C. Code § 32-1508 (8), specific language was added to this section stating that the “mayor shall approve the settlement where both parties are represented by legal counsel”. D.C. Law 12-229 §2(e) (April 26, 1999). Thus, this change in the Act requires that the settlement be approved as written because it was signed by both attorneys.

Finch v. Washington Metropolitan Area Transit Authority, Dir. Dkt. No. 3-81, OHA No. 03-164, OWC No. 556679 (May 6, 2004).

It appeared to the CRB that the denial of the approval of the settlement agreement was contrary to the express provisions of the Act, and was therefore not in accordance with the law, which led to the remand and instruction to approve said petition.

However, on remand, the matter was addressed by the Claims Supervisor. In the second Compensation Order, OWC advanced additional reasons for denial of the requested approval, reasons not previously articulated in the initial Compensation Order. They are listed numerically, 1 – 7, on the sixth unnumbered page of the Second Compensation Order. They are as follows:

- (1) It is a death claim and the mother is the only recognized beneficiary under the statute since she was financially dependant on her son prior to his death.
- (2) The issue of dependency was litigated and it was determined by the OWC that she is a beneficiary under the Workers’ Compensation law of The District of Columbia. This determination has become final several years ago by operation of law. The beneficiary is entitled to and is receiving death benefits in the amount of \$320.28 and she will receive until she passes away. It is a legal liability of the employer/carrier to pay.
- (3) The beneficiary is old, approximately 66 years of age with little or no education. The beneficiary is suffering from several illnesses and [sic] indigent and needs money for medical treatment and other financial needs now.
- (4) The comprehension and understanding of the beneficiary is extremely limited. The beneficiary lacks the ability to understand the complexity of this matter. Therefore, the OWC has ethical, moral and fiduciary responsibility to protect her rights.
- (5) It is the finding of the OWC that it is not in the best interest of the beneficiary to settle this claim for such a small amount.
- (6) It shocks the conscious [sic] of the OWC Administrator to hear the arguments of the employer/carrier’s [sic] that three dollar and seventy two cents (\$3.72) additional monthly payment is substantial amount [sic] which the beneficiary will receive under the structured settlement. It’s a repulsive argument and the OWC overwhelmingly rejects it.

- (7) It is further stated that the OWC has a fiduciary responsibility which demands much higher standards than the apparent perfunctory [sic] responsibility of approval. The OWC is extremely mindful of it's [sic] functions and is discharging it [sic] duties in good faith.

Second Compensation Order, unnumbered page 6. Not included in this list of "reasons" for rejection of the settlement agreement are additional considerations raised earlier, in the body of the Second Compensation Order: the Supervisor appears to have concluded that, as a matter of law, the mandatory approval language contained in D.C. Code § 32-1508 (8) does not apply, because (1) the settlement petition submitted is a "structured" settlement, rather than a "lump-sum" settlement, and (2) the settlement agreement is not "complete and final". As an apparent corollary to the concerns about the settlement being structured (as opposed to being the payment of a lump-sum amount), the supervisor stated that the agreement was rejected in part because "the current carrier will transfer it's [sic] obligation to a new company under a contract. This process has been created for the convenience of the insurance carrier and not in the best interest of the injured worker as required by statute." Second Compensation Order, unnumbered page 4.

Turning first to the seven numbered items identified above, items (1), (2), (3) and (6) are mere statements of procedural fact or assessments of law by the Supervisor, within the context of the case, establishing that the beneficiary, as she is referred to, is entitled under the Act to receive \$320.28 per month for the remainder of her life from the employer/carrier, due to her status as the dependent beneficiary of the deceased under the Act; item (5) is a statement of a legal conclusion, not a statement of fact representing a reason for rejection of the settlement; item (7) is a conclusion of law by the Supervisor regarding his interpretation of the Act, namely, that OWC has, in the Supervisor's words "a fiduciary" responsibility towards the beneficiary.

None of these six listed items is a fact-based reason why the proposed settlement is not in the beneficiary's best interests, nor are any of them factual reasons why this particular agreement is deficient legally. They merely assert the existence of certain conditions, the result of which is a legal entitlement, under the Act, to receive \$320.28 per month from the employer/carrier, an entitlement which neither party contests and which entitlement is preserved by the agreement.

Item (4) is an assertion of fact concerning the mental competency of the beneficiary, which is not supported by anything in the claims file submitted by OWC in the course of these proceedings, and which is based upon nothing identified in either the initial Compensation Order or the Second Compensation Order.

Regarding the remaining, non-listed matters, the Supervisor expressed concern that "the current carrier will transfer it's [sic] obligation to a new company under a contract. This process has been created for the convenience of the insurance carrier and not in the best interest of the injured worker as required by statute."

The language concerning the purchase of an annuity to facilitate the payments contemplated in the agreement is as follows:

In consideration of this agreement, the Insurer, on behalf of the Employer, hereby agrees to pay the following sums in the following manner:

...

(b) Monthly Payments -- Commencing one month after purchase of the funding annuity, \$324.00 per month for 120 months (10 years) certain and guaranteed, and for the lifetime thereafter of Thomasine Brown”

...

[T]he insurer shall fund the liability to make the deferred payments through the purchase of either an annuity contract or reinsurance agreement from New York Life Insurance Company, an AAA rated life insurance company.

The Insurer shall be the sole owner of the annuity policy or reinsurance agreement. The Claimant shall have no legal interest, vested or contingent, in said annuity contract or reinsurance agreement, except as it relates to the payment of benefits. The Claimant shall be provided a copy of such annuity contract or reinsurance agreement. Payments under the annuity contract shall be mailed directly by the annuity company to the Claimant. The Claimant shall be responsible for maintaining proper mailing address and mortality information with the annuity company.

The obligation of the annuity issuer to make periodic payment shall be discharged upon the mailing of a valid check in the amount of such payment to the designated address of the payee, or the electronic transfer of the funds into a previously designated account of the payee. The payee shall be responsible for maintaining a proper address and mortality information with the annuity insurer. The payee shall have the right to change address for delivery of the funds without notice to or consent of the Insurer, so long as any such change shall be in writing on a form acceptable to the annuity insurer and delivered to the annuity insurer in sufficient time for the annuity insurer to make the change.

The assertion that this agreement contemplates that “a new contract between the parties will be executed” is inaccurate, in that the agreement does not contemplate any additional contracts between employer/insurer and the beneficiary.

While the Supervisor asserts that this arrangement was “created for the convenience of the insurance carrier and not in the best interest of the injured worker”, there is nothing in the agreement, the initial Compensation Order, the Second Compensation Order, or the administrative record, that supports that assertion. While it may be that the employer/insurer suggested the payment mechanism, it is equally possible that the mechanism was suggested or requested by the beneficiary. It may be that the agreement and the payment mechanism reflect a compromise between different proposals advanced by the parties in negotiating the agreement.

There is nothing in the record that sheds light on this question either way, and there is nothing about the arrangement which, on its face and of necessity, or even by extrapolation based upon facts ascertainable by resort to the record of proceedings in this case, benefits the employer/insurer to the detriment or at the expense of the beneficiary.

Review of the initial and the Second Compensation Orders makes evident that OWC's objection to the agreement is that OWC believes that the amounts agreed to be paid to the beneficiary are inadequate to meet her needs. However, the Act does not contemplate that employers are obligated to pay or that beneficiaries are guaranteed to receive enough to meet the recipient's needs generally. Rather, the Act contemplates and provides for payments in amounts which are based upon the injured or deceased worker's *earnings*, which payment amount in this case is acknowledged by all to be \$320.28 per month, and not upon the worker's or beneficiary's *needs*.

Neither of the Compensation Orders rejecting the proposed settlement agreement cite any manner in which the beneficiary will receive anything less than that to which she is otherwise entitled under the Act, based upon the deceased worker's earnings, in the absence of the agreement, or that the likelihood of her continuing to receive that to which she is entitled under the Act is in any way lessened or compromised by the existence of the agreement, which itself calls for a payment to the beneficiary of \$1,700.00 to which she is not otherwise entitled under the Act.

There is one additional reason given by the Supervisor for declining to approve the agreement. That is the assertion by the Supervisor, not made in the initial Compensation Order and not considered by this board in the first appeal, that this agreement is not one governed by the mandatory approval language of the Act, because it is "structured" rather than for a "lump-sum" settlement. In seeking approval of the agreement under §32-1508 (8) by OWC, the parties are seeking an action which "discharges" the liability of the employer/insurer for further compensation. Although he does not say it explicitly, the Supervisor at least by extrapolation is asserting that there is only one type of agreement which the parties may enter into which can discharge the employer/insurer's future obligations under the Act, and that is a lump-sum settlement.

While the Act contains no definition of "lump-sum" settlement, the regulations promulgated to carry out the Act include the following:

Under 9 (h) of the Act (D.C. Code § 36-308 (f) (1981)) [re-codified at the current § 32-1508 (8)], payment of a lump sum may be in the form of a structured settlement if it is determined by the Office that the form of payment would be in the best interest of the injured employee.

7 DCMR 226.3. This regulation, which pre-dates the amendments discussed above and referred to in *Finch, supra*, establishes that the settlements governed by § 32-1508 (8) include structured settlements, such as that presented in this case. Although the amendments specifically removed the discretion to disapprove such settlements from OWC in cases where parties are represented by counsel, the amendments did not alter the regulatory inclusion of structured settlements within the ambit of the Act. Simply stated, it is clear from the regulations that the settlements

covered by § 32-1508 (8) include structured settlements, and that the amendments stating that such settlements “shall” be approved where both parties are represented by counsel govern those settlements.

We see nothing in the agreement that compromises or diminishes the rights of the beneficiary, and we agree with the parties that the agreement appears to be of greater benefit to the beneficiary than the absence of same, given the \$1,700.00 that it provides to the beneficiary that she will otherwise not receive under the Act, and indeed benefits her estate⁴ beyond what the Act contemplates (given that the Act contemplates nothing for the estate, yet the agreement provides for additional benefits even in the event of the death of the beneficiary). Beyond this, the Act compels approval of such full and final settlements in the circumstances presented here, as discussed above.

Finally, since the creation of the CRB, emergency regulations governing proceedings on appeal to the CRB have been promulgated and became effective August 19, 2005.

Those regulations contain the following provision, at 7 DCMR 267.1:

The designated Review Panel shall dispose of the matter under review, utilizing standards of review contained in section 266 of this Chapter, by issuing a decision:

...

(c) amending the compensation order or final decision based on the Review Panel’s findings

Those regulations also provide, at 7 DCMR 267.5:

The Review Panel shall only issue an amended compensation order where a remand to the Administrative Hearings Division or the Office of Workers’ Compensation would be unnecessary (*e.g.* where there is but one action that the Review Panel decision would permit), and thus remand would be superfluous.

In this instance, the Second Compensation Order is not in accordance with the law, because it impermissibly rejected approval of the settlement petition, in contravention of the express language of D.C. Code § 32-1508 (8), and there is but one action that this determination permits, that being the approval of the settlement petition. Accordingly, this matter will not be remanded, and the settlement petition is approved.

⁴ Such a consideration, however, is not particularly germane, in that the interests of a beneficiary’s estate are beyond the purview of the Act.

CONCLUSION

The Second Compensation Order is not in accordance with the law, and must be reversed. The basis of the reversal allows but one result, that being approval of the Settlement Petition.

ORDER

The Second Compensation Order is reversed, and this Amended Compensation Order is issued, and the “Structured Lump-Sum Settlement Petition” dated March 17, 2005 is hereby approved pursuant to D.C. Code § 32-1508 (8), as amended.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

October 27, 2005
DATE