GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-134

ROYSTON CLEMENT,
Claimant–Petitioner,

v.

STERNE, KESSLER, GOLDSTEIN & FOX and CNA INSURANCE CO.,
Employer/Carrier-Respondents.

Appeal from an October 31, 2013 Supplemental Compensation Order on Remand by
Administrative Law Judge Linda F. Jory
AHD No. 03-575B, OWC No. 552839

Matthew Peffer, for the Petitioner
Joseph C. Veith, III, for the Respondents

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HENRY W. MCCOY, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, who injured his left leg at work on April 13, 2000, was awarded temporary total disability (TTD) benefits pursuant to a February 5, 2003 Final Order from the Office of Workers' Compensation (OWC). Employer twice sought modifications of this award, first in October 2007 and again in 2008, with both requests being denied; thus leaving the OWC award in effect.

Having commenced the payment of TTD benefits to Claimant on April 14, 2000, Employer issued a Notice of Final Payment of Compensation Payments on November 1, 2009 and ended payment of TTD benefits on or about November 12, 2009. Employer ended its payments predicated on the fact that Claimant had been paid TTD benefits for 500 weeks and pursuant to D.C. Code § 32-1505(b)[1] entitlement to those benefits is so limited.

Following the cessation of his benefits, Claimant filed a motion for an order declaring a default. Claimant sought to have Employer declared in default of the February 5, 2003 OWC Final Order pursuant to D.C. Code § 32-1519[2], and therefore subject to the assessment of a 20% penalty pursuant to D.C. Code § 32-1515(f)[3] for the failure to continue the payment of TTD benefits pursuant to that OWC Final Order.

After a formal hearing, a Compensation Order (CO) was issued on November 17, 2010 declaring Employer to be in default and assessed a 20% penalty on the amount due and owing to Claimant.[4] The Administrative Law Judge (ALJ), after a review of the legislative history, held that D.C. Code § 32-1505(b) did not cap the payment of TTD benefits at 500 weeks. Employer filed a timely appeal with Claimant filing in opposition.

On appeal, the Compensation Review Board (CRB) determined that the ALJ's interpretation of the statute conflicted with the Council of the District of Columbia's stated rationale for § 32-1505(b). Specifically, the CRB stated:

> After reading the rationale for the amending language to § 32-1505(b), it is now clear with regard to the phrase "temporary or permanent partial disability", the Council intended to correct a problem with the "unlimited duration of payments" for "temporary *total* and permanent partial injuries" (emphasis added). While the actual language of the provision is susceptible to alternative constructions, the rationale accompanying this amending language makes it clear that the Council intended to limit the payment of temporary total benefits to 500 weeks.[5]

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[1] D.C. Code § 32-1505(b) states in pertinent part: "For any one injury causing temporary or permanent partial disability, the payment for disability benefits shall not continue for more than a total of 500 weeks."

[2] D.C. Code § 32-1519(a) exists for the purpose of permitting persons to whom compensation is payable to avail themselves of the judgment enforcement procedures available through resort to the D.C. Superior Court. Accordingly, this provision governs the situation in which a CO has awarded a 20% penalty, the employer thereafter fails to pay the penalty, and the claimant responds by seeking an order of default that can be presented to the superior court to seek judicial enforcement of the penalty award.

[3] D.C. Code § 32-1515(f) states in pertinent part: "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[.]"

[4] *Clement v. Sterne, Kessler, Goldstein & Fox*, AHD No. 03-575B, OWC No. 552839 (November 17, 2010).

[5] *Clement v. Sterne, Kessler, Goldstein & Fox*, CRB No. 10-201, AHD No. 03-575B, OWC No. 552839 (March 26, 2013), p. 6.

Accordingly, the November 17, 2010 Supplemental Compensation Order was vacated and remanded for further consideration.[6]

On October 31, 2013, the ALJ to whom this matter was remanded issued a Supplemental Compensation Order on Remand. On remand, the ALJ followed the instructions of the CRB and denied Claimant's request stating:

> Notwithstanding the complete absence of the word "total" from the provision that limits benefits to 500 weeks and the clear language of § 32-1508(2) which states: "In case of disability total in character but temporary in quality, 66 2/3% of the employee's average weekly wages shall be paid to the employee ***during the continuance thereof***" (emphasis added) I am constrained by the CRB to conclude:
>
> **CONCLUSIONS OF LAW**
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> Based upon a review of the evidence in the record as a whole, I conclude employer's obligation to pay temporary total disability benefits pursuant to the Compensation Order ceased in November 2009; employer is accordingly not in default of the OWC or AHD orders; and claimant is not entitled to the requested 20% penalty.[7]

In a timely filed appeal, Claimant requests that the CRB reconsider our March 26, 2013 Decision and Remand Order (DRO) so as to reverse the October 31, 2013 Supplemental Compensation Order on Remand and thereby reinstate the November 17, 2010 Supplemental Order Declaring Default. Claimant argues that to do otherwise constitutes an improper administrative rewriting of § 32-1515(b) by adding the word "total" that is contrary to the law of statutory interpretation.

In opposition, Employer argues that Claimant takes no issue with the ALJ's conclusion of law on remand but is primarily a request to the CRB to reconsider the decision and order upon which the remand decision is based. As such, Employer argues that the appropriate course is to deny the appeal. We agree and affirm the Supplemental Compensation Order on Remand.

On December 5, 2013, the Law Firm of Ashcraft & Gerel, LLP, filed a motion for leave to file an amicus brief in support of the Claimant-Petitioner in this matter.[8] As the CRB's regulations do not address the procedural issue of filing amicus briefs, the movant cites to 7 DCMR § 261.4 which allows reference to the Rules of the District of Columbia Court of Appeals or the Rules of Civil Procedure of the D.C. Superior Court, where appropriate. The movant relies

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[6] Claimant appealed the CRB's Decision and Remand Order to the D.C. Court of Appeals, which, on August 12, 2013, dismissed the petition for review as it constituted an appeal of a non-final order and therefore not ripe for review.

[7] *Clement v. Sterne, Kessler, Goldstein & Fox*, AHD No. 03-575B, OWC No. 552839 (October 31, 2013), p. 6.

[8] The firm filed its *Brief of Amicus Curiae Ashcraft & Gerel In Support of Claimant-Petitioner Royston Clement* on March 7, 2014.

upon the DCCA's Rules of Court, Sec. 29(b), which requires the motion to state the movant's interest and "why the amicus brief is desirable and why the matters asserted are relevant to the disposition of the case."

In making its motion, the movant asserts that it has a legitimate interest in the disposition of the instant case as the CRB's interpretation of § 32-1515(b) has a potential impact on a large number of its clients and prospective clients. Movant argues that its amicus brief will be both desirable and relevant as it will provide an interpretation of the provision in question, examine the provision in the context of the Act as a whole, in addition to examining the legislative history and legislative intent.

The interest declared by the movant in its motion is not unique and is one shared by any and all attorneys representing injured workers in the District of Columbia. This is apparent when reviewing movant's reasons for leave to file an amicus brief. The issues it seeks to address are the same issues raised by the direct parties at interest this matter and those issues have been addressed in detail, such that leave to file an amicus brief would only serve to be mainly duplicative, as no new issues are raised, and would unnecessarily further delay the resolution of this matter at this level on its way to the next level appeal. Accordingly, the motion for leave to file an amicus brief is respectfully denied.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of 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.[9] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In addressing the core issue on remand, the ALJ quoted extensively from the CRB's March 26, 2013 DRO giving its rationale why the reference to "temporary" in § 32-1515(b) was to "temporary total", yet held fast to her opinion that § 32-1508(2) placed no limitation on the payment of temporary total disability benefits. Noting that she was constrained by the CRB decision, the ALJ concluded that Employer's obligation to pay TTD benefits ended after paying those benefits ended in November 2009, after 500 weeks.

While she acknowledged the absence of the word "total" meant § 32-1515(b) did not apply the 500 week limitation to the payment of TTD benefits while at the same time making it

[9] "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. DOESs*, 834 A.2d 882 (D.C. 2003).

apply to the payment of temporary partial disability (TPD), the ALJ essentially endorsed the proposition that the statute would then contain two conflicting provisions limiting the payment of temporary partial benefits.[10] The ALJ's interpretation would mean the Council of the District of Columbia intended to increase the period during which TPD could be paid from 5 years (260 weeks) pursuant to § 32-1508(5) to 9.6 years (500 weeks) pursuant to § 32-1515(b). Apart from having the conflicting provisions co-existing in the statute, we cannot believe this was the intent of the Council when the stated purpose in enacting the limitation in § 32-1515(b) was to cut costs.

In further arguing against the CRB's interpretation of § 32-1515(b) given the absence of the word "total" in the provision, Claimant contends if the Council intended the provision to apply to temporary total disability it would have expressly so stated, that the CRB's interpretation is detrimental to Claimant's interests in contravention of the humanitarian purposes of the Act, and reading the word "total" into the provision constitutes an impermissible administrative rewriting of the Act. We disagree on all counts.

As we pointed out in our DRO where we reviewed the legislative history, the 500 week limitation was initially introduced on April 4, 1997 by Councilmember Jack Evans as a proposed amendment to the Act, which had the stated purpose of establishing the maximum length of time during which an injured worker could receive disability compensation "for total temporary and permanent partial disabilities." However, in the actual drafting of the amendatory language, the word "total" was left out, such that the amendment read:

> For any one injury causing temporary or permanent partial disability the payment for disability benefits shall not continue for more than a total of 500 weeks.

We previously noted, and deem it appropriate to reiterate here, that by the time a Committee Print constituting an amendment in the nature of a substitute was produced on October 29, 1998, this proposed amendment to then § 36-305(b) had been omitted. This omission was still evident in the Engrossed Original, after the first reading and vote on the bill. However, with the passage on second reading, the Enrolled Original contained the amendment limiting the payment of disability benefits to 500 weeks. The "Rationale" included with the voting sheets remained true to the original purpose stated by Councilmember Evans and now sponsored by Councilmember Schwartz in that it was designed to address "[T]he unlimited duration of payments in the District for temporary total and permanent partial injuries" as it was believed unlimited payments encouraged people to stay on disability and provided a disincentive to returning to work.

It is therefore evident from a review of the legislative history that the whole purpose of the amendment was always expressly stated as being intended to limit the payment of temporary total disability payments to 500 weeks, although the actual language of the amendment never

[10] See D.C. Code § 32-1508(5) states in pertinent part: "In the case of temporary partial disability, the compensation shall be 66 2/3% of the injured employee's wage loss to be paid during the continuance of such disability, but shall not be paid for a period exceeding 5 years…."

mimicked the rationale language to include the word "total" after the word "temporary". The resulting confusion is precisely why resort is taken to reviewing the legislative history in an effort to divine the Council's intent.

We interpret § 32-1515(b), based on the legislative history, to establish a limitation on the payment of TTD benefits. This interpretation does not constitute an administrative rewriting of the statute; rather, it carries out the express legislative intent of the Council as the legislative history clearly shows. The statements in 1997 and 1998 on the purpose of this payment limitation expressly stated that it is temporary "total" disability payments that are to be limited. While it is not known why the word "total" was not carried forth on both occasions into the actual amendatory language, we do have the statements as to applicability that allows us to know what was intended. Further, contrary to Claimant's desire, it is not role of the CRB to interpret an ambiguous provision to his benefit, but rather to give expression to the statutory intent. This we have done.

As we stated in our March 26, 2013 DRO, which upon reconsideration we find no reason to disavow, the Council's stated rationale for § 32-1515(b) was and is to limit the payment of TTD benefits to 500 weeks. While it may be that a document distributed by the OWC applied this limitation to temporary partial disability, we can only surmise that it was done without proper review and analysis of the legislative history and we do not give it any great weight, and definitely not dispositive in any way, in our interpretation of the type of disability benefits that are to be limited.

CONCLUSION AND ORDER

The October 31, 2013 Supplemental Compensation Order on Remand is in accordance with the law. Accordingly, it is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

March 19, 2014
DATE