COMPENSATION REVIEW BOARD

CRB No. 10-201

ROYSTON CLEMENT,
Claimant–Respondent,

v.

STERNE, KESSLER, GOLDSTEIN & FOX and CAN INSURANCE CO.,
Employer/Carrier-Petitioner

Appeal from a November 17, 2010 Supplemental Compensation Order Declaring Default by Administrative Law Judge Linda F. Jory
AHD No. 03-575B, OWC No. 552839

Matthew Peffer, Esquire, for the Claimant/Respondent
Joseph C. Veith, III, Esquire, for the Employer/Petitioner

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

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, who worked for Employer as a copy clerk, injured his left leg at work on April 13, 2000. Both parties agree that Claimant began receiving temporary total disability (TTD) on April 14, 2000. However, it was not until the Office of Workers' Compensation (OWC) issued a Memorandum of Informal Conference (MIC) on October 18, 2002 that Employer was ordered to pay TTD benefits from the present and continuing. This memorandum was converted to a Final Order on February 5, 2003. In a January 30, 2004 Compensation Order (CO), Claimant received a schedule award for a 13% permanent partial disability of the left lower extremity.[1]

[1] *Clement v. Sterne, Kessler, Goldstein & Fox*, AHD No. 03-575, OWC No. 552839 (January 30, 2004).

On October 12, 2007, Employer filed an Application for Formal Hearing seeking a modification in order to terminate the payment of TTD benefits being paid pursuant to the February 5, 2003 OWC Final Order. In a February 28, 2008 CO, Employer's request for modification was denied, leaving the prior award in effect.[2] In late 2008, Employer again filed for a modification citing Claimant's failure to comply with vocational rehabilitation and work hardening. On February 20, 2009, a CO issued denying the requested modification and again leaving the prior 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)[3] 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[4], and therefore subject to the assessment of a 20% penalty pursuant to D.C. Code § 32-1515(f)[5] for the failure to continue the payment of TTD benefits pursuant to that OWC Final Order.

After a formal hearing, a CO was issued on November 17, 2010 declaring Employer to be in default and assessed a 20% on the amount due and owing to Claimant.[6] 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, Employer argues that the ALJ's reliance upon the legislative history associated with § 32-1505(b) and statutory construction to rule the Act contains no provision that limits the number of weeks TTD benefits can be received was in error. To the contrary, Claimant contends the ALJ interpreted the provision in question correctly as not applying to TTD benefits.

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[2] *Clement v. Sterne, Kessler, Goldstein & Fox*, AHD No. 03-575B, OWC No. 552839 (February 28, 2008).

[3] 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."

[4] 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.

[5] 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[.]"

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

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.[7] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (the "Act"), 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 the case under review, it is not disputed that Claimant sustained a compensable work place injury on April 13, 2000 and Employer commenced the payment of TTD benefits on April 14, 2000. Following a MIC on October 18, 2002 that was converted to a Final Order on February 5, 2003, Employer was formally ordered to pay ongoing TTD benefits. Employer continued paying those benefits until November 12, 2009 when it filed a Notice of Final Payment of Compensation Payments and terminated benefits pursuant to its understanding that D.C. Code § 32-1505(b) capped the payment of TTD benefits at 500 weeks.

The issue on appeal centers on Employer's contention that it is not required to make further payments of TTD benefits as the Act limits payment of those benefits to 500 weeks. Claimant counters that Employer needed to first seek a modification of the OWC Final Order before terminating benefits and that the cited provision of the Act does not apply to TTD benefits.

In response to Claimant's motion for an order declaring default, a Supplemental Order Declaring Default was issued. After looking at the language of the statute in an effort to give effect to its plain meaning[8], the ALJ essentially determined there was no clear and unambiguous meaning to D.C. Code § 32-1505(b), thus necessitating a review of the legislative history. Undertaking that review, the ALJ stated:

> Review of the legislative history reveals that although a section by section analysis of Bill 12-192 was provided by the Committee on Government Operations Chairperson, the provision in § 32-1515(b) [sic] in question was not listed in any of the sections delineated. See COMMITTEE ON GOVERNMENT OPERATIONS, REPORT ON THE WORKERS' COMPENSATION ACT OF 1998, Bill 192, at 8, 15-16 (October 29, 1998). However, further review indicates that testimony was taken during public hearings held on December 3, 1997 and December 8, 1997 on Bill 12-192 and included detailed testimony from a consultant for the D.C.

[7] "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. DOES*, 834 A.2d 882 (D.C. 2003).

[8] See *Office of People's Counsel v. Public Service Commission*, 477 A.2d 1079, 1083 (D.C. 1984).

> Chamber of Commerce, Eric Oxfeld. Mr. Oxfeld testified regarding what is causing the high costs in the District's system and opined that another high cost is the level of compensation for scheduled benefits and absence of a limitation for nonscheduled permanent partial disability (PPD awards).[9]

The ALJ next referenced an October 1, 1998 oversight hearing on the OWC attended by "counsel from both the claimants' and employers' bar" and "a representative from the AFL-CIO" where:

> "The notes for the hearing do not include any mention of a 500 week cap on temporary total disability (TTD) benefits and it is reasonable to assume that had a cap on TTD benefits been recommended that counsel for claimant's bar or the AFL-CIO would have raised their concerns on such a cap at the oversight hearing."[10]

The ALJ proceeded to recount what occurred at an October 29, 1998 Council committee meeting where "[N]o mention of limiting temporary total or permanent partial disability benefits to 500 weeks was made."[11] This led the ALJ to note further that "[A] review of the language of the purpose of Bill 12-192 as included on the first page of the 'Workers' Compensation Act of 1998' is also not helpful as it states 'to place a 500 week cap on the payment of disability benefits where 1 injury causes temporary or permanent partial disability.'"[12] The ALJ went on to reason:

> "While the undersigned agrees the legislative history is not dispositive on the question of interpretation presented by employer, nevertheless the undersigned is not persuaded that the 1998 amendments intended to limit temporary total disability benefits to 500 weeks and the legislative history does not provide even an inference that the legislators intended to do so."[13]

Using this reasoning and employing the basic maxim of statutory construction that a legislature's express mention of one thing implies the exclusion of others, commonly expressed as the Latin phrase *expressio unius est exclusio alterius*, the ALJ concluded:

> "It may fairly be presumed the D.C. City Council was aware other types of benefits were payable under the Act and chose only to limit temporary

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[9] CO at 6.

[10] *Id.*

[11] *Id.*

[12] *Id*. at 7.

[13] *Id.*

> partial and permanent partial benefits. In so presuming employer's attempt to have the section apply to any form of total disability is rejected.
>
> Thus, in the absence of the word "total" from the language of §32-1508(5) [sic] express statutory authority, Respondent cannot prevail with its defense of claimant's motion for default."[14]

The ALJ provided a considered review of the legislative history of § 32-1505(b) using the October 29, 1998 report of the Committee on Government Operations of the Council (Committee) of the District of Columbia appended to Claimant's brief arguing in support of its motion for a default. However, the brevity of that report necessitated that the complete Committee report be obtained and a review of the more detailed report calls into question the ALJ's resolution of what was intended by the language of § 32-1505(b).

The 500 week limitation at issue here was not part of the original Act approved in 1979. As the Committee report shows, the provision containing this limitation was included in Bill 12-192, the District of Columbia Workers' Compensation Act of 1979 Amendment Act of 1997, introduced on April 4, 1997 by Councilmember Jack Evans. One of the purposes of the bill was to amend the Act of 1979:

> "to establish a maximum length of time during which an injured worker may receive workers' compensation benefits for total temporary and permanent partial disabilities,"

This purpose was expressed by the amendatory language:

> Section 6(b) (D.C. Code § 36-305(b)) is amended by adding a sentence to read as follows: "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."

With the passage of time and Committee action, a Committee Print constituting an amendment in the nature of a substitute was produced on October 29, 1998 wherein the Bill 12-192 was now cited as the "Workers' Compensation Amendment Act of 1998." The salient feature of this revised bill for our purposes is that the amendment to § 36-305(b) has been deleted. The omission of this provision continued with the Engrossed Original.[15] However, with the passage of the Enrolled Original it had returned. The "Rationale" included with the vote sheets states:

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[14] *Id*. We note some confusion in the ALJ's mistaken citation of § 32-1508(5) for its lack of the word "total" in the language of that provision when she clearly meant § 32-1505(b). In reading § 32-1508(5) it is clear the provision applies to the limitation on a different type of benefit as it states: "In 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."

[15] Engrossed Original: the Engrossed Original of bill is the marked-up version of the bill that is approved after its first reading at a Legislative Session. Each bill must receive two readings in substantially the same form and upon approval after the second reading it is known as the Enrolled Original, which is then transmitted to the Mayor for his signature and then becomes an Act.

> The unlimited duration of payments in the District for temporary total and permanent partial injuries encourages people to stay on disability and provides a disincentive to return to work. The open-ended nature of potential payments also significantly drives up settlement costs for permanent partial disabilities. The average permanent partial disability case costs more than twice the national average, and significantly more than either Maryland and [sic] Virginia. Both Maryland and Virginia limit benefits to 500 weeks (though Maryland raises this amount to 667 weeks for workers who are more than 50 percent impaired). This amendment would bring the District in line with those neighboring jurisdictions. It also provides for the opportunity to continue the benefit period to provide three years of extended benefits for workers whose disability remains severe, and allows an injured employee up to three years after termination of non-schedule benefits to re-open his or her case due to change in condition.[16]

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. This resolution of any ambiguity is similar to the CRB's interpretation of the term "total disability" contained in 32-1505(c) that was also resolved by resort to the provisions legislative history.[17]

As the ALJ's interpretation of the statute conflicts with the Council's stated rationale for this provision that it limits the payment of temporary total disability payments to 500 weeks, we are constrained to return this matter for further consideration. As the Council's stated rationale may prove dispositive in the resolution of Claimant's motion, we reserve consideration of the ALJ's determination on Claimant's motion for the assessment of a penalty pursuant to 32-1515(f).

[16] The amendment to § 36-305(b) with the accompanying rationale was offered by Councilmember Schwartz at the second reading on December 1, 1998 and passed on a roll call vote of 8-5. This same amendment failed on a voice vote at the first reading on November 10, 1998. See "Handwritten Vote Sheets and Amendments (6)", Report, Committee on Government Operations, October 29, 1998.

[17] See *Hiligh v. Federal Express Corporation*, CRB No. 05-36, OHA No. 99-138, OWC No. 513435 (December 23, 2005); *Hiligh v. DOES*, 935 A.2d 1070, 1074 (D.C. 2007) (the Board concluded that the Council's intent to provide minimum compensation only for permanent partial disability was clear…Thus, we must sustain that conclusion.)

CONCLUSION AND ORDER

The November 17, 2010 Supplemental Compensation Order Declaring Default is not supported by substantial evidence in the record and is not in accordance with the law. Accordingly, it is VACATED AND REMANDED for further consideration in accordance with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

March 26, 2013
DATE