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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB (Dir.Dkt.) No. 05-264

KENNETH CONNER,

Claimant - Petitioner

v.

WASHINGTON POWER AND LIBERTY MUTUAL INSURANCE CO.,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 05-243, OWC No. 581136

Matthew Peffer, Esquire for the Petitioner

Jeffrey H. Ochsman, Esquire for the Respondent

Before LINDA F. JORY, FLOYD LEWIS, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

DECISION AND 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)[1].

[1]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 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order which was filed on August 22, 2005, the Administrative Law Judge (ALJ), concluded Petitioner had received compensation from employer which was subsequently memorialized into an Agreement to Pay Benefits and approved by the Virginia Workers' Compensation Commission (VWCC). The ALJ further concluded the payments were voluntary under the Virginia statute and constituted receipt of compensation within the meaning of D.C. Code §32-1503(a-1). The ALJ concluded that Petitioner was therefore precluded from receiving additional benefits for his work injury under the Act, citing *Mendez v. District of Columbia Department of Employment Services*, 819 A.2d 959 (D.C. 2003); *Springer v. District of Columbia Department of Employment Services*, 743 A.2d 1213 (D.C. 1999).

Claimant-Petitioner's (Petitioner) Application for Review alleges as grounds for its appeal that the ALJ committed both errors of law and fact as the wage loss benefits he received from Respondent should not preclude him from receiving additional permanent partial disability benefits for his work injury of December 31, 2000. Employer-Respondent (Respondent) has filed a response asserting the there is substantial evidence in the record to support the ALJ's decision and the Compensation Order should be affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) 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. D.C. Official Code § 32-1521.01(d)(2)(A). "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 Int'l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this panel are bound 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.

Turning to the case under review herein, Petitioner asserts that the ALJ erred in concluding that his receipt of benefits from Respondent does not bar his claim for benefits as Petitioner asserts they not made pursuant to the Virginia statute as employer alleges and, thus, not received under the workers' compensation law of any other state. Specifically, Petitioner asserts the ALJ's conclusion that claimant signing an agreement to pay benefits form in June 2001, for benefits he received at an earlier time, converts the earlier receipt of benefits to a voluntary acceptance barring his claim in the District of Columbia is not supported by substantial evidence, citing to the Court of Appeals decision in *Washington Post v. District of Columbia Department of Employment Services,* 825 A.2d 296 (May 29, 2003), (*Washington Post*) and *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services,* 825 A.2d 292 (May 29, 2003)(*WMATA*).

Petitioner asserts that the benefits he received from Respondent in February 2001 cannot be said to paid under the workers compensation law of Virginia, as similarly to the employee in *Washington Post,* the benefits were paid without an agreement of the employee. Petitioner further asserts that just like the employee in *WMATA*, he did not file a claim with the workers' compensation commission yet employer claims he was paid under Virginia law.

In *Washington Post*, the Court of Appeals affirmed the Director's conclusion that payments made to the injured employee applying the Virginia compensation schedule were not made "under the workers' compensation law of [that] state" as the payments were made without agreement of the employee which the Court called a unilateral employer action and not recognized as a voluntary payment of benefits. In *WMATA*, the Court affirmed the Director's conclusion that since the injured employee had never filed a claim with the Maryland Workers' Compensation Commission (MWCC) his claim was not barred under the Act.

Employer asserts that the facts of the instant matter are distinguishable from those in *Washington Post* as unlike the *Washington Post* employee, Petitioner signed an application for benefits which resulted in an award which resulted in the payment of benefits which were in fact received by Petitioner.

With regard to the "application for benefits" employer alleges Petitioner signed, the ALJ found on June 6, 2001, Petitioner "prepared a Claim for Benefits (Form #5) writing in ink, the VWC File Number as 204-14-99" and indicated he was seeking compensation for the total wage loss from January 31, 2000 to February 15, 2001. The ALJ further found Petitioner filed said Form with the VWC on June 8, 2001. CO at 3. The Panel has determined that the ALJ's findings in this regard are not supported by the evidence of record. Petitioner has testified, and there are no findings of incredibility, that he has not sent any documents to the VWCC. HT at 36. Petitioner further testified that he believed the forms he received concerning his injury came form Liberty Mutual and that he had received checks from Liberty Mutual before he signed any documents. HT at 33, 35.

The Panel agrees with Petitioner that the ALJ's conclusion that Petitioner's signing an "agreement to pay benefits form" in June 2001, for benefits he received at an earlier time, converts the earlier receipt of benefits to a voluntary acceptance which bars his claim in the District of Columbia, is not supported by the evidence. The Panel further finds the benefits Petitioner received in February 2001 cannot be said to be paid "under the workers' compensation law" of Virginia as there was no agreement to pay benefits when Petitioner received benefits. As the Court of Appeals stated in *Washington Post*, Petitioner's "acceptance of the payments was not a waiver of his right to claim that the benefits were being paid under the law of the wrong jurisdiction, and that even Virginia law does not recognize them as voluntary payments". *Id* at 295.

The Panel further agrees with Petitioner that the circumstances of his receipt of benefits are similar to those in the case of *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 825 A.2d 292 (May 29, 2003)(*WMATA*). Although specifically relied on by counsel for Petitioner in his closing argument in support of his claim, the ALJ did not discuss this Court of Appeals' decision which was decided on the same day as *Washington Post.*

In *WMATA*, although the employee cashed two checks received from her employer, she was not given copies of any documents or reports filed with MWCC as required by stated. The Court found employer did not communicate an any way that it deemed the injury to be under Maryland law, nor did the record reveal claimant ever filed a claim with the MWCC and did not know her employer had deemed her case to be under the purview of the MWCC when it filed its report of her accident as required by Maryland Law. However, the statute in Maryland prohibits the payment of compensation before a claim has been filed, therefore the Court found WMATA was not free to make voluntary payments of compensation benefits to an employee and went further by stating "**It is apparent that an employer may not select a forum for a claim which is binding on the injured employee**". *WMATA, supra* at 298 (emphasis added).

Notwithstanding Respondent's failure to explain how the Commonwealth of Virginia would have jurisdiction over this particular injury, the Panel agrees that the Respondent, not Petitioner, selected Virginia and sent the Virginia forms to him to sign and after he received the benefits. The Panel finds that it is not enough for an employee to receive and cash benefit checks, nor is an employee required to reject payments it believes to be paid wrongly, but the employee must make an actual claim for the particular benefits in that particular state and employer is not free to make the choice for him in order to avoid paying additional benefits in another forum.

Accordingly, pursuant to the Court of Appeals' holdings in both the *Washington Post* and *WMATA* matters, the Panel concludes Petitioner is not precluded from requesting additional benefits from the District of Columbia for the injury he sustained on December 31, 2000.

CONCLUSION

The ALJ's conclusion that Petitioner is precluded from requesting additional benefits from the District of Columbia for the injury he sustained on December 31, 2000, due to his receipt of compensation within the meaning of 32-1503(a-1) is not supported by substantial evidence and not in accordance with the prevailing case law.

ORDER

The ALJ's conclusion that Petitioner's receipt of benefits which Respondent purported to be made in accordance with Virginia law precludes him from receiving additional benefits is **REVERSED.** The matter is **REVERSED** and **REMANDED** to AHD for the ALJ to enter appropriate findings and conclusions on the nature and extent of Petitioner's disability.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY
Administrative Appeals Judge

November 3, 2005
DATE