GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-075

CARMELO FIUMARA,
Claimant-Petitioner,

v.

MARRIOTT CORPORATION,
Self-Insured Employer-Respondent.

Appeal from a July 14, 2011 Compensation Order By
Administrative Law Judge Karen R. Calmeise
AHD No. 09-467A, OWC No. 587392

Matthew Peffer, Esquire for Petitioner
Jeffrey W. Ochsman, Esquire for the Respondent

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

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

DECISION AND ORDER

BACKGROUND AND FACTS OF RECORD

Carmello Fiumara injured his low back and left leg on December 17, 2002, when he lifted a heavy door while employed as a plumber/cabinet maker for Marriott Corporation (Marriott). Marriott accepted the claim, paid voluntary payments of temporary total disability and provided medical care for various medical procedures and time periods, the details of which are not relevant to the instant appeal.

On February 28, 2009, Mr. Fiumara's claim for a schedule award to the right leg was denied by an Administrative Law Judge (ALJ) in the hearings section of the Department of Employment Services (DOES). *Fiumara v. Marriott Corporation*, AHD No. 05-230B, OWC No. 013517 (February 28, 2009).

Thereafter, on May 21, 2009, Mr. Fiumara was awarded $15,291.00 for permanent partial disability under the schedule to the same leg. *Fiumara v. Marriott Corporation*, AHD No. 05-230C, OWC No. 013517. Marriott paid the award, but also filed an appeal with the Compensation Review Board (CRB). On September 15, 2009, the CRB vacated the award, finding that it was improperly made, in that it was based upon the same evidence and claim for disability that had been the basis of the prior claim which had been denied, and which denial had not been appealed. The CRB remanded the matter for entry of a Compensation Order denying the claim on those grounds. *Fiumara v. Marriott Corporation,* AHD No. 05-230C, OWC No. 013517, CRB No. 09-095 (September 15, 2009).

Thereafter, Mr. Fiumara sought permanent total disability benefits, commencing March 11, 2009. At the time of the hearing at which Mr. Fiumara presented the claim for permanent total disability, Marriott requested that, in the event an award was made, it be granted a credit against the award in the amount of the previously paid under the schedule to the right leg and which award was subsequently vacated. In a Compensation Order issued September 24, 2010, Mr. Fiumara was awarded the permanent total disability that he sought. However, the ALJ did not address the request for a credit.

Marriott appealed the award of permanent total disability to the CRB, which affirmed the award on April 12, 2011. *Fiumara v. Marriott Corporation*, AHD No. 09-467A[1], CRB No. 10-181 (April 12, 2011). Marriott appealed that affirmance to the District of Columbia Court of Appeals (DCCA), which affirmed the action of the CRB in a Memorandum Opinion and Judgment issued October 4, 2012. *Marriott Corporation v. DOES*, 11-AA-578.

Marriott also took the claimed credit at the time it paid the September 24, 2010 permanent total disability award. At the same time, Mr. Fiumara sought an adjustment in his compensation rate commencing January 1, 2010, and for another such supplemental allowance adjustment commencing January 1, 2011, under the supplemental allowance provisions of D.C. Code § 32-1506. Marriott declined to make any such adjustments.

The dispute concerning the denials of the supplemental awards was presented for resolution before an ALJ in the hearings section of DOES, with Mr. Fiumara seeking an order of default against Marriott for failing to pay the full amount due under the permanent total disability award, and seeking awards of supplemental allowances for the years 2010 and 2011.

The ALJ issued a Compensation Order on July 14, 2011, in which both requests were denied. *Fiumara v. Marriott Corporation*, AHD No. 09-467A,[2] OWC No. 639622 (July 14, 2011). Mr. Fiumara appealed these denials to the CRB, which is the instant appeal. Marriott has filed an opposition to the appeal.

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[1] For reasons unknown to us, the hearings section changed the numerical predicate of the claim from 05-230 to 09-467.

[2] The ALJ's Compensation Order uses the same AHD number for this matter as it did the previous case, counter to the numbering system usually employed, in which the numerical predicate would remain the same, with the alphabetic suffix changing to the next letter alphabetically in line, which in this case would have been from A to B.

We affirm both decisions of the ALJ.

DISCUSSION AND ANALYSIS[3]

Under the Act, a permanently and totally disabled worker is entitled to receive a supplemental allowance under certain circumstances. Those circumstances are outlined in D.C. Code § 32-1506. That provision reads as follows:

> § 32-1506. Supplemental allowance
>
> (a) When the average weekly wage has changed as provided for in § 32-1505, any person who has a total and permanent disability or any surviving spouse or domestic partner who is receiving payments for income benefits under this chapter in amounts per week less than the new maximum for total disability or death shall receive weekly from the carrier, without application, an additional supplemental allowance calculated by the Mayor in accordance with the provisions of subsections (b) and (c) of this section; provided, that such allowance shall not commence to accrue and be payable until the average weekly wage exceeds $ 396.78. The Mayor shall notify the carrier of the amount of such additional supplemental allowance.
>
> (b) In any case where a person with a total disability, or surviving spouse or domestic partner is receiving the maximum weekly income benefit applicable *at the time such award was made under this chapter*, the supplemental allowance shall be an amount which, when added to such award, will equal the new maximum weekly benefit.
>
> (c) In any case where a person with a total disability, or a surviving spouse or domestic partner is receiving less than the maximum weekly income benefit rate applicable *at the time such award was made under this chapter*, the supplemental allowance shall be an amount equal to the difference between the amount the claimant is presently receiving and a percentage of the new maximum determined by multiplying it by a fraction, the numerator of which is his present award and the denominator of which is the maximum weekly rate applicable *at the time such award was made*.
>
> (d) No supplemental allowance referred to in subsections (b) and (c) of this section shall exceed 5% of the maximum weekly benefit received the preceding benefit year.

D.C. Code § 32-1506 (emphasis added).

The amount of the supplemental allowance is a function of the ratio of the injured workers' compensation rate to the maximum compensation rate payable in the District of Columbia as

[3] The CRB reviews a Compensation Order to determine whether the factual findings are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB will affirm 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.

established by D.C. Code §32-1505 as of the time that the worker is deemed to have become permanently and totally disabled.[4] The maximum compensation rate payable in the District of Columbia is itself a function of the average weekly wage for all workers employed in the District of Columbia. The average weekly wage of all workers in the District of Columbia and the maximum compensation rate are determined annually by the Office of Workers' Compensation (OWC) in DOES. Under the Act, this calculation is to be performed in November, and the result, including the amount of any change in the rate, is to be published to become effective the following January 1 of each year.

The ALJ in this case denied the claim for supplemental allowances, writing:

> The operative words in this section of the Act is [sic] ***"When the average weekly wage has changed"*** (emphasis added)
>
> However, the average weekly wage for the District of Columbia in 2010 was not changed from what was established in 2009. In fact, the average weekly wage actually decreased- 0.44% on January 1, 2011. (EE C).
>
> Claimant, who's [sic] average weekly wage was set as of the date of the 2002 work injury. [sic] Claimant was adjudged totally and continuously disabled in March 2009 and thus, became eligible to receive supplemental allowance benefits on January 1, 2010. However, no supplemental allowance rate was established in 2010 since the average weekly rate was not adjusted to include an increase over the previous year [footnote omitted]. Thus, Claimant, along with all other eligible claimants found to be permanently totally disabled in 2009, is not entitled to a supplemental allowance for 2010 and continuing.

Compensation Order, page 3 – 4 (bold and italics in original).

Although the ALJ misstated the date upon which Mr. Fiumara became "eligible" for a supplemental allowance were one to be granted[5], she is correct when she states that the operative language triggering entitlement to a supplemental allowance is a change in the average weekly wage for workers' in the District of Columbia, as determined by the Mayor on an annual basis, pursuant to D.C. Code § 32-1505.

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[4] Commencing eligibility for a supplemental award prior to the date that permanent disability status is determined would, in effect, constitute awarding a supplemental allowance for temporary total disability, which the Act does not contemplate.

[5] Under *Long v. Plaza Realty Investors*, Dir. Dkt. 97-45, H&AS No. 92-462B, OWC No. 104068, 1998 DC Wrk. Comp LEXIS 427 (October 14, 1998), a permanently and totally disabled worker becomes eligible upon being such for one continuous year, and is entitled to receive the supplemental allowance after that one year of eligibility has passed. In other words, the supplemental allowance "kicks in" on the second anniversary of the attainment of permanent total disability status. In this case, that date would be March 11, 2011, in that, as the ALJ stated, "It is uncontested that Claimant became permanently disabled as of March 11, 2009". Compensation Order, page 3. That is, Mr. Fiumara would have been permanently and totally disabled for one year as of March 10, 2010, and would be eligible for a supplemental allowance after maintaining that status (i.e., totally disabled for one year) on March 11, 2011.

D.C. Code § 32-1505 (e) states "The average weekly wage shall not be deemed to have changed for any calendar year unless the computation in subsection (d) of this section results in an increase or decrease of $ 2 or more, raised to the next even dollar."

It is undisputed that there was no published change in the city-wide average weekly wage in 2010, and that there was a small decrease in 2011. Thus, there was no trigger for consideration of making a supplemental allowance, and the denial thereof was in accordance with the law.

Mr. Fiumara argues that March 11, 2009 is not the date from which consideration of a change in the city-wide average weekly wage ought to determined; rather, he argues it is the date of injury, or December 17, 2002, that governs. He cites two cases in support of this proposition, *Long v. Plaza Realty Investors*, Dir. Dkt. 97-45, H&AS No. 92-462B, OWC No. 104068, 1998 DC Wrk. Comp LEXIS 427 (October 14, 1998), (erroneously cited in his memorandum as 1999 DC Wrk. Comp LEXIS 227 (October 14 1999), and *Palmer v. George Washington University Medical Center*, OHA No. 01-061C, 2004 DC Wrk. Comp LEXIS 119 (May 21, 2004).

With regard to these supposed authorities, the Palmer holding is of little precedential value since it was not a District of Columbia Court of Appeals (DCCA), Director's or CRB decision. And regarding the substance of the decision, as Marriott points out, the ALJ in *Palmer* made an error in using the date of injury as opposed to the date that permanency was attained as the comparator.

With regard to *Long*, it established the one year lag between "eligibility" and commencement of increased payments. It assumed that the appropriate date for comparison was the date permanency was achieved, not the date of injury, and hence is of no support for Mr. Fiumara's argument.

Regarding Mr. Fiumara's claim for an order of default, we point out that the sole purpose of the default provisions under the Act is to establish a dollar amount of unpaid compensation benefits to which a claimant is entitled in order to permit the claimant to seek payment of the amount owed via the collection processes available through the District of Columbia Superior Court, or by making application for such payment to the Trustee of the Special Fund established by D.C. Code § 32-1540. See, D.C. Code § 32-1519.

It is undisputed that the schedule award to the right leg has been vacated. As such, it is legally a nullity. See*, Hessey v. Burden*, 615 A.2d 562 (1992), at 569 – 570; also*, District of Columbia v. Tinker*, 691 A.2d 57 (1997), at 65. And, citing *Tinker* and *Hessey*, the CRB has stated:

> When an appellate body reverses a trial court ruling, which it deems erroneous, the ruling is set aside and no longer exists. The effect of a reversal is to restore the parties to the position that they held before the ruling and proceed to a decision anew. *See, District of Columbia v. Tinker* [*supra*]; *Hessey v. Burden* [*supra*].
>
> …

> A significant change in the history of this matter occurred between the time the May 31, 2006 Compensation Order was issued and the time the current Supplemental Compensation Order Awarding Penalties issued, and the change cannot be ignored. The significant change occurred when the prior Review Panel reversed the award of benefits in the May 31, 2006 Compensation Order. The reversal set aside the award of benefits and that award no longer existed. *See, Tinker, supra.* Since the award no longer existed, then the Petitioner could not be liable for penalties associated with the award.

Fernades v. Fort Myer Construction Company, CRB No. 08-183, AHD No. 03-396, OWC No. 586505 (October 23, 2008). *Fernades* dealt not with a request for default, but with an award of a penalty for non-payment/late payment of an award that was subsequently vacated. The reasoning in *Fernandes* is even more compelling in the case of a default order; the level of futility and pointlessness of issuing a default order which the Superior Court is unable to enforce is a double futility.

The ALJ did not err in denying the requested order declaring a default.

CONCLUSION AND ORDER

The denial of the claim for supplemental allowances and the request for an order declaring a default are supported by substantial evidence and are in accordance with the law. Accordingly, the July 14, 2011 Compensation Order is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Chief Administrative Appeals Judge

July 10, 2013
DATE