

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. 05-16

DOMENICO GIARDINA,

Claimant – Respondent,

v.

HILLWOOD MUSEUM AND TRAVELERS INSURANCE,

Employer/Carrier – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
OHA No. 93-611F, OWC No. 250354

Roger S. Mackey, Esq., for the Petitioner

Joseph A. Malouf, Esq., for the Respondent

Before FLOYD LEWIS, LINDA F. JORY and SHARMAN J. MONROE, *Administrative Appeals Judges.*

SHARMAN J. MONROE, *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 2004, Title J, the D.C. 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 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review

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 November 10, 2004, the Administrative Law Judge (ALJ) awarded the full payment of permanent total disability benefits which were awarded in a February 1, 1999 Compensation Order, but reduced by a set-off pursuant to D.C. Code § 36-308(9). The Employer/Carrier-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the Compensation Order is arbitrary, capricious, unsupported by substantial evidence in the record and is not in accordance with the law.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review 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. 2003). 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.

The issue facing the ALJ was whether the Petitioner was entitled to a set-off, pursuant to D.C. Code § 36-308(9),² based upon the Respondent’s receipt of Social Security benefits given that D.C. Official Code § 32-1508(9) was repealed on April 15, 1999. The parties stipulated, *inter alia*, that the Petitioner filed for Social Security benefits on May 15, 1999 and that he was awarded Social Security benefits retroactive to November 1998. In deciding the issue in the negative, the ALJ relied upon *Lloyd v. Giant Foods, Inc.*, Dir.Dkt. No. 03-70, OHA No. 97-110E, OWC Nos. 501519, 230297, 265731 (September 30, 2004), wherein the Director held that “the controlling date for the application of the repeal of D.C. Official Code § 32-1508(9) is not the date of a worker’s injury, but is the effective date of the repeal, *i.e.*, April 16, 1999.

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. 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 D.C. Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

² D.C. Code § 36-308(9) was recodified to D.C. Official Code § 32-1508(9). For the balance of this decision the recodified citation will be used.

Therefore, as of April 16, 1999, an employer is not permitted to take the statutory offset for monies identified in D.C. Official Code § 32-1508(9) that an injured worker receives after April 16, 1999.”

In its appeal, the Petitioner asserts that the Director’s holding in *Lloyd* and the ALJ’s subsequent ruling herein do not comport with the law in the District of Columbia. The Petitioner argues that *Lloyd* ignores the ruling in *D.C. Employees’ Compensation Appeals Board v. Henry*, 516 A.2d 941 (1986), as well as prior cases with similar facts to this case. The Petitioner urges that the issue of the applicability of the repeal of D.C. Official Code § 32-1508(9) be revisited.

Since the issuance of *Lloyd*, the appellate authority of the Director, DOES was delegated to the CRB. Under the new appellate scheme, decisions of the Director are considered persuasive authority and the CRB is free to adopt a prior ruling of the Director or if circumstances warrant, to revisit prior rulings and decide them anew. *See* 7 DCMR § 255.7. *See generally* *Sullivan v. Boatman & Magnani*, CRB No. 03-74, OHA No. 90-597E, OWC No. 088187 (August 31, 2005); *Gooden, et al. v. National Children’s Center, et al.*, CRB Nos. 03-137, 03-142, OWC No. 529469, 552703 (April 14, 2006). The question of the effect of the repeal of D.C. Official Code § 32-1508(9) was addressed by the CRB in *Oubre v. A.A. Beiro Construction Co.*, CRB No. 06-26, AHD No. 85-276B, OWC No. 56181 (May 3, 2006). In *Oubre*, the CRB adopted the reasoning and holding of *Lloyd*.

The Panel reviewed the record in this case in its entirety. The record fully supports the ALJ’s thorough, well reasoned decision, and the Panel, therefore, adopts the reasoning and legal analysis expressed by the ALJ in that decision in affirming the Compensation Order in all respects.³

CONCLUSION

The Compensation Order of November 10, 2004 is supported by substantial evidence in the record and is not in accordance with the law.

ORDER

The Compensation Order of November 10, 2004 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

June 22, 2006
DATE

³ D.C. Workers’ Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(B) requires a more detailed and thorough written order than the instant Decision and Order where there is a reversal of the Compensation Order.