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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
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CRB No. 07-138

GWENDOLYN BECKWITH,

Claimant – Respondent

v.

PROVIDENCE HOSPITAL,

Self-Insured Employer –Petitioner.

Appeal from a Supplemental Compensation Order of
Administrative Law Judge Terri Thompson Mallett
AHD No. 06-139, OWC No. 615744

Jeffrey W. Ochsman, Esquire for the Petitioner

Jessica G. Bhagan, Esquire for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge,* FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges.*

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND REMAND 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, 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. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility

BACKGROUND

This appeal follows the issuance of a Supplemental 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 Order, which was filed on July 20, 2006, the Administrative Law Judge (ALJ) denied the request by Employer-Petitioner (Petitioner) for a credit or offset based upon the amount of unemployment compensation benefits received by Claimant-Respondent (Respondent). Petitioner now appeals that Compensation Order.

As grounds for this appeal, Petitioner alleges that the ALJ's decision is not in accordance with the law.

ANALYSIS

As an initial matter, the scope 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 §32-1522(d)(2). "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 scope 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.

Turning to the case under review herein, Petitioner alleges that the ALJ committed error by refusing to grant Petitioner a credit to the extent of Respondent's receipt of unemployment compensation benefits. The sole issue before the ALJ was whether Petitioner was entitled to a credit for unemployment compensation benefits paid to Respondent during Respondent's disability period.

The ALJ, in holding that Petitioner was not entitled to a credit for the unemployment benefits that Respondent received, noted the absence of any statutory authority for a credit for unemployment compensation benefits under the Act. The ALJ concluded that

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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.

D.C. Official Code § 32-1515(j), which provides for reimbursement of advance payments of compensation, did not apply, and noted that in 1999 the City Council repealed the only provision of the Act (former D.C. Code § 36-308(g)) that expressly provided for a credit or set-off against disability compensation upon the receipt of specifically identified benefits.[2] The ALJ acknowledged previous AHD decisions, cited by Petitioner, that had allowed a credit for unemployment benefits,[3] but rejected their precedential value since these decisions did not cite any authority or provide any analysis to support their allowance of the credit. Accordingly, the ALJ concluded, citing the humanitarian purposes of the Act favoring the award of disability benefits, that Petitioner was not entitled to an off-set or credit for the unemployment benefits that Respondent received during the disability period.[4]

While it is true that unemployment benefits are not advance payments of compensation within the meaning of D.C. Official Code § 32-1515(j),[5] the Director has held, and the CRB affirmed, that an employer is nevertheless entitled to a credit for an employee's receipt of unemployment benefits. Citing the Director's prior holdings in *Stanford v. Cary International, Inc.*, Dir. Dkt. No. 99-68, OHA No. 99-144, OWC No. 533475 (April 30, 2002), and *Flanagan v. Auger Enterprises*, Dir. Dkt. No. 94-65; H&AS No. 92-714; OWC No. 198453 (May 11, 1995), the CRB recently held that an employer was entitled to a credit for unemployment benefits that had been paid during the disability period, stating:

> In this jurisdiction, an employer is entitled to a credit for unemployment benefits, not because the unemployment benefits qualify as an advance payment of compensation, but to prevent an injured employee from receiving a double recovery of monies from an employer.

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[2] Former Section 36-308(g) provided for the reduction in disability benefits where receipt thereof, when combined with the receipt by the employee of federal old age or survivors insurance benefits, or benefits received under an ERISA employee benefits plan or income maintenance plan funded by the employer, exceeded in the aggregate 80% of the employee's average weekly wage.

[3] *I.e. Hedgepeth v. Sodexho Marriott Services*, OHA No. 03-579A, OWC No. 543273 (April 28, 2005), and *Hylton v. Cornell Companies*, OHA No. 02-21, OWC No. 568121 (January 30, 2004). *See also, Frye v. Grant Park Care Center*, OHA No. 03-507, OWC No. 582744 (Dec. 17, 2003) (cited by Petitioner on appeal).

[4] Petitioner also notes that the ALJ suggests another rationale for denying the credit, contending that unemployment benefits are paid by the District of Columbia Government and not an employer. However, as pointed out by Petitioner, unemployment benefits are funded through an assessment on an employer's payroll, which establishes an employer's contribution rates to the District Unemployment Fund, based on payroll. *See* D.C. Official Code §§ 51-102-103. Thus, ultimately it is the employer that provides the financing for the unemployment benefits which are received by the employee.

[5] In *Lincoln Hockey v. D.C. Dept. of Employment Services*, 810 A.2d 862 (2002), the Court of Appeals affirmed the Director's interpretation of the provisions of D.C. Official Code § 32-1515(f) to apply only to compensation payments within the meaning of Section 32-1501(6) of the Act "made after the date of injury which the employer was not otherwise under a separate obligation to pay." 810 A.2d at 867.

Watts v. Guardian Service Group, CRB No. 07-55, AHD No. 05-053 (May 18, 2007), slip op. at 4.

In *Stanford v. Cary Int'l.*, cited by Petitioner, the Director held that notwithstanding the limitation of Section 36-515(j) [now § 32-1515(j)] to monies "paid by the employer during a period of disability to replace income lost by virtue of the injury",

> In this jurisdiction, it is well settled that an employer is entitled to a credit for unemployment compensation benefits received by an injured employee at the same time the employee is receiving workers' compensation benefits. *See Flanagan v. Auger Enterprises*, Dir. Dkt. No. 99-68, OHA No. 144, OWC No. 533475 (*Decision and Remand Order of the Director, April 30, 2002*). The rationale behind this holding, however, is not because the unemployment benefits qualify as an advance payment of compensation, but to prevent the injured employee from receiving a double recovery of monies from the employer.

Stanford at 6.

The Director's rationale is consistent with what the Court of Appeals has described as "the basic purpose of the legislation, namely, to assure that the employee will not receive more money for not working than for working" where he/she sustains a work-related injury resulting in wage loss. *See Washington Metro Area Transit Authority v. D.C. Dept. of Employment Services*, 731 A.2d 845, 849 (D.C. 1999). As the Director noted in *Stanford,* "it is well-settled that the Act is a wage loss statute," providing as such a wage replacement remedy. An employer's entitlement to a credit for an employee's receipt of unemployment benefits is thus appropriate as a matter of policy due to the wage loss replacement purpose of the Act, as the receipt of unemployment benefits reduces the amount of an employee's wage loss. As Professor Larson has explained:

> Wage-loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now, if a worker undergoes a period of wage loss due to all three conditions, it does not follow that he or she should receive three sets of benefits simultaneously and thereby recover more than his or her actual wage. The worker is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit. This conclusion is inevitable, once it is recognized that workers' compensation, unemployment compensation, nonoccupational sickness and disability insurance, and old age and survivors' insurance are all parts of a system based upon a common principle.

Larson's Workers' Compensation Law, § 9-157.01.

Moreover, we do not find, as did neither the CRB in *Watts* nor the Director before, the repeal of former Section 36-308(g) of relevance to the disposition we are here called upon to make. As previously noted in footnote 2, *supra*, unemployment insurance benefits were not included or covered by that former section of the Act.

Thus, not only is an employer's entitlement to a credit for an employee's receipt of unemployment benefits during the disability period well settled in this jurisdiction as a result of prior Agency holdings, such a credit supports the policy against a double recovery and the impropriety of duplicative benefits, while ensuring that an injured employee does not receive more money under wage-loss legislation while not working than that employee earned before he or she was injured.

In the instant matter, it must be emphasized that the ALJ specifically noted that Respondent's receipt of unemployment compensation benefits was undisputed and as such, this matter must be remanded to the ALJ for the entry of an Order granting Petitioner a credit for Respondent's receipt of unemployment benefits.

Accordingly, after a complete review of the record, this Panel concludes that the ALJ's denial of Petitioner's request for a credit for Respondent's receipt of unemployment benefits is not in accordance with the law.

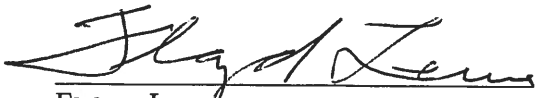
CONCLUSION

The Supplemental Compensation Order of July 20, 2006, is not in accordance with the law. This matter must be remanded to the ALJ for the entry of an Order granting Petitioner a credit for the amount of unemployment compensation benefits received by Respondent.

ORDER

The Supplemental Compensation Order of July 20, 2006 is hereby REVERSED and REMANDED to the Administrative Hearings Division for further proceedings in accordance with the above-discussion.

FOR THE COMPENSATION REVIEW BOARD:



FLOYD LEWIS
Administrative Appeals Judge

September 7, 2007
DATE