

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. 05-07

CAROLYN HARDY,

Claimant - Petitioner

v.

CHESAPEAKE HOME HEALTH,

Employer- Respondent.

Appeal from an Order of
Alonzo Patterson, Custodian of the Special Fund
OWC No. 546955

Heather C. Leslie, Esquire, for the Petitioner

Before LINDA F. JORY, FLOYD LEWIS AND SHARMAN J. MONROE, *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 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005)¹. Pursuant to § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the

¹Pursuant 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.

Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

BACKGROUND

This appeal follows the issuance by the Custodian of the Special Fund division of the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES) of an Order denying additional relief to Petitioner pursuant to §32-1519(a)(b) and Title 7 (Chapter 2) of the District of Columbia Municipal Regulations Section 231.

Petitioner has appealed OWC's Order contending the Special Fund arbitrarily denied her Claim for relief without a hearing of any kind. Respondent has not filed a response.

PROCEDURAL HISTORY

Review of the appealed order from the Custodian reveals a Memorandum of Informal Conference issued on May 2, 2000 and a Final Order issued on August 16, 2000, requiring Respondent to pay Ms. Hardy temporary total disability benefits, as well as authorized medical treatments and the payment of all causally related medical expenses. Respondent did not comply with the order to pay benefits and the OWC issued a Supplemental Order Declaring Default on April 18, 2001 finding Respondent in default of said order and the total amount in default was \$13,452.00 (representing TTD benefits from August 28, 1999 to November 7, 2001) and \$460.00 in medical expenses.

Pursuant to §32-1519, Petitioner filed the Supplemental Order with the Clerk of the Superior Court on January 22, 2002 and the Court entered a Judgment Order declaring Respondent in default, the sum of \$13,912.00 on January 23, 2002. Petitioner submitted both orders to Respondent for payment. Respondent was found to be uninsured. Petitioner petitioned the Special Fund for relief on August 26, 2002 and was awarded the total amount of the default on April 29, 2003.

On April 26, 2004, Petitioner requested the Superior Court Modify the prior judgment declaring default to include TTD benefits from November 8, 2002 to April 15, 2004. A Judgment Order was issued by the Superior Court on April 26, 2004 which noted that a Supplemental Order Declaring a Default issued by OWC had been filed therewith. The Judgment Order found Respondent liable to Petitioner in the amount of \$14,445.45.

On April 27, 2004, Petitioner petitioned the Special Fund for additional relief in the amount of \$14,445.45 (TTD benefits from November 8, 2001 to April 15, 2004), which was denied and is the subject of the instant appeal.

ANALYSIS

In the review of an appeal from OWC, the Board must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with the law. *See* 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, §51.93 (2001). For the reasons set forth herein, the Board concludes herein, that the Special Fund Custodian's September 24, 2004 is not in accordance with the law.

In her appeal, Petitioner asserts that the Special Fund's denial without requesting a modification of the prior order is a procedural error and "until such time as the Special Fund requests modification of the prior binding order Petitioner is entitled to the Special Fund Relief". It is the Petitioner's position that the Special Fund is bound by the final order issued by OWC on August 12, 2000 finding her entitled to temporary and total disability benefits from August 28, 1999 to the present and continuing, as Respondent did not reject it. Petitioner asserts that the Final Order remains in effect as no request for modification has been made by Respondent, therefore as a matter of law she is entitled to temporary and total disability benefits from August 28, 1999 to the present and continuing and until such time as OWC issues a subsequent order.

Lastly, although Petitioner asserts she is entitled to a hearing in front of OWC to establish a modification if any, she argues that the Special Fund's interpretation that for every continuing Order, there must be subsequent Orders to keep the continuing order in effect would result in "a plethora of formal hearing requests and in direct contravention of the humanitarian purposes of the Act".

The Act provides the preliminary steps a claimant, attorney or beneficiary should take in order to receive reimbursement from the Special Fund in § 32-1519(a) and (b) and 7 DCMR § 231². The code provisions states:

(a) In case of default by the employer in the payment of compensation due under any award of compensation for a period of 30 days after the compensation is due and payable, the person to whom such compensation is payable may, within 2 years after such default, make application to the Mayor for a supplementary order declaring the amount in default. After investigation, notice and hearing, as provided in §32-1520, the mayor shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. . . . The applicant may file a certified copy of such supplementary order with the Clerk of the Superior Court of the District of Columbia. ***Such supplementary order of the Mayor shall be final***, and the Court shall upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order. No fee shall be required either for filing the supplementary order or for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the Court shall otherwise direct. The Court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the Court.

² With regard to Petitioner's argument that the Special Fund should have filed a request for modification of the existing OWC order, Petitioner is reminded that the Special Fund was not a party to the original conference or award and thus, would not have not standing to request a modification of the same.

(b) In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Mayor may in his discretion, and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in §32-1540 make payment from such fund upon any award made under this chapter, and, in addition, provide any necessary medical, surgical, and other treatment required by §32-1507 in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer. . .

(Emphasis added).

The denial of additional special fund relief which is the subject of the instant appeal did not specifically state what the Custodian's denial was based upon. The order instead lists 10 findings of fact without stating any conclusion. The first 6 findings outline the procedural history as included above. Finding number 7 states:

Claimant did not establish continuing disability within the OWC prior to seeking a Modified Judgment. The informal level was not granted the opportunity to review whether or not the claimant demonstrated a change in her physical condition as it related to the occupational injury sustained on August 28, 1999.

Although the Custodian did not specify the basis for the denial of special fund relief, the Panel determines that Finding Number 7 is not arbitrary or capricious basis for denying relief and is not an abuse of discretion or otherwise not in accordance with the law. As noted above the necessary steps are contained at § 32-1519 (a) and (b) and specifically require "the person to whom such compensation is payable may, within 2 years after such default, make application to the Mayor for a supplementary order declaring the amount in default. After investigation, notice **and hearing, as provided in § 32-1520**, the mayor shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. . . Such supplementary order of the Mayor shall be final, and the Court shall upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order. . . . The Court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the Court".

After careful review of the administrative files of OWC and the Special Fund, the Panel could not locate a second supplementary order from OWC declaring a new amount in default. Thereafter, an Order was issued by the Panel chair ordering Petitioner to produce the order referred to by the Superior Court, in its order declaring judgment against the Respondent by September 30, 2005. As of the date of the instant Decision and Order, Petitioner has not produced said order, thus the Panel has no option but to infer that one does not exist. Petitioner's Application for Review makes no mention as to why Petitioner did not follow the requisite steps, although she was fully aware of the necessary steps given the prior award of relief from the Special Fund. Nevertheless, given the finality the Act declares on the supplementary order declaring default in §32-1519, it is clear to this Panel that a determination that an injured party is entitled to some benefit and employer is in fact in default in the payment of a benefit, is necessary for each request for Special Fund relief. This determination insures that each party

receives notice and an opportunity to be heard on the question of default. Without this necessary determination, a judgment from the D.C. Superior Court is not in accordance with the procedures for an entry of judgment on a default under the Act.

Accordingly for the reasons foregoing, the Panel concludes the denial of the Special Fund relief is in accordance with the law and must be affirmed.

The Panel must however vacate the Custodian's Findings of Fact numbered 8, 9 and 10 which deal with an IME scheduled by the Custodian of the Special Fund resulting in an IME report which was received by OWC on August 20, 2004. According to the Custodian, the report concluded that there were no objective findings to support Petitioner's ongoing subjective complaints and she is able to return to a full duty capacity. The Panel finds the Custodian exceeded his authority in making findings of fact with regard to the disability status of Petitioner. The Panel agrees the Custodian of the Special Fund has a fiduciary duty and obligation to investigate any request for payment and, if necessary, on behalf of the uninsured employer, request an independent medical examination. *See* 7 D.C. M.R. §§ 231.1; 231.19, 231.21. Nevertheless, the Custodian cannot step into the shoes of employer to make inquiry of claimant's disability status and then steps into the shoes of an adjudicator and make findings of fact with regard to the disability status. At this juncture, the Special Fund becomes a party to the dispute and ceases to be an impartial examiner when it obtains evidence to oppose Petitioner's request.

Lastly, with regard to Petitioner's "modification argument", the Panel agrees that the mere issuance of a Memorandum of Informal Conference that awards temporary benefits but indicates benefits are payable to the present and continuing does not provide for a *carte blanche* reimbursement from the Special Fund upon request. Looking at the plain language of D.C. Official Code §32-1519(a), the Panel determines that the word "final" in the sentence "[s]uch supplemental order of the Mayor shall be final and the Court shall upon the filing of a copy, enter judgment for the amount declared in default by the supplemental order" applies to the supplemental order, not the underlying ward and means that the supplemental order is final for purposes of presenting it to the Court. The party with the award must still make application to the mayor for a supplementary order declaring a specific amount in default after requesting employer pay the award. While the Act does state the Superior Court shall modify its judgment to conform to any later compensation order upon presentation of a certified copy thereof to the Court, it is clear, the party must receive a separate compensation order for each period of default requested and request a supplementary order declaring the amount to be in default before requesting another judgment. The Panel has concluded this step was omitted from the process and we cannot speculate as to why the Court issued the modification without a new default order. As far as the §32-1519 of the Act and the regulations governing Special Fund Relief, are concerned as stated earlier herein, the Superior Court's Judgment is not valid.

CONCLUSION

The Custodian's denial of Special Fund Relief is in accordance with the law. The Custodian exceeded his authority by making findings of fact with regard to the disability status of Petitioner; therefore, said findings are not binding on the parties.

ORDER

That portion of the Order of September 24, 2004 issued by the Custodian of the Special Fund, denying Special Fund relief is hereby AFFIRMED. The Findings of Fact numbered 8, 9, and 10 rendered by the Custodian of the Special Fund are hereby vacated. The issue of Petitioner's entitlement to any benefits under the Act must be resolved by OWC at an informal conference or by AHD at a formal hearing with the Special Fund named as a party. In the event a determination is made that Petitioner remains entitled to benefits which employer fails to pay, Petitioner must request a supplemental order declaring employer in default.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

October 3, 2005
DATE