

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. 06-92

HARRY SWINTON,

Claimant - Petitioner

v.

EDMAR CONSTRUCTION CO. AND HARTFORD INSURANCE COMPANY,

Employer/Carrier - Respondent

Appeal from an Order of
Sr. Claims Examiner Karen Bivens
OWC No. 299126

Harry Swinton, *pro se*¹

David Jones, Esquire, for the Respondent

Before LINDA F. JORY, AND SHARMAN J. MONROE, AND JEFFREY 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 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005)².

¹ The Application for Review was filed on behalf of Petitioner by the law office of Alan S. Toppelberg, however the Application advised that Mr. Toppelberg would not be able to represent Petitioner and that he would need to seek new legal representation. As of the date of this order Petitioner has not notified the CRB that he has secured additional legal counsel.

²Pursuant 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

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

BACKGROUND

This appeal follows the August 30, 2006 issuance by the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES) of a Final Order, appealable by operation of law which denied Petitioner's Motion for Default Judgment³.

As grounds for this appeal, Petitioner alleges that OWC erred in denying Petitioner the request for a default and penalty as it was not based upon any facts or law and was in violation of OWC's own outstanding Order. The Panel acknowledges that Petitioner's September 28, 2006 Application for Review included a request for an extension of time to perfect his appeal as he needed to obtain new legal representation. Petitioner's request was granted by the Clerk of the CRB and Petitioner was afforded to and including October 14, 2006 to file a Memorandum of Points and Authorities in Support of the Application for Review and Respondent was afforded an opportunity to file any Memorandum in Opposition until October 24, 2006. To date Petitioner has not submitted the Memorandum in Support of his Application for Review nor has the clerk received notification that there has been a change in Petitioner's counsel.

Respondent asserts in its response that the Claims Examiner,⁴ as the finder of fact, properly denied Petitioner's request for a Compensation Order Declaring Default Judgment and Awarding 20% penalty.

ANALYSIS

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 Claims Examiner's April 1, 2004 Final Order is neither arbitrary, capricious nor an abuse of discretion and is in accordance with the law.

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.

³The Panel notes that the Order issued by OWC was actually entitled "Compensation Order Declaring Default and Awarding 20% Penalty" however the Claims Examiner ultimately concluded that Petitioner's request for a default Order and 20% Penalty should be denied.

⁴Employer inadvertently referred to the author of the Order as an "Administrative Law Judge".

Inasmuch as Petitioner failed to provide a Memorandum in Support of its Application for Review and the Application for review states only that it is Petitioner's contention that the order was not based upon any facts or law, and was in violation of OWC's own outstanding order, a review was conducted of OWC's administrative file.

According to the administrative file, Petitioner through the representation of Alan S. Toppelberg, filed a Petitioner for Settlement with OWC on June 14, 1996 which was found to not be in the best interests of Petitioner. Accordingly, the Petition was not approved and the parties were notified via letter dated July 15, 1996 from Claims Examiner William Jenkins. On December 23, 1996, Attorney Toppelberg filed another Petition for Settlement with a letter describing the differences in the new Settlement Petition and attaching Petitioner's medical records involving recent surgical procedures. The Panel notes that the medical information in the file identifies Petitioner's date of birth to be February 19, 1956. Attorney Toppelberg's letter indicated that the lump sum settlement requested would involve a lump sum of \$55,000 payable when the settlement was approved and a monthly payment of \$600.00 to be made for another 5 years. At age 60, a lump sum payment would be made to Petitioner in the amount of \$30,000.00.

The Petition presented to OWC on December 23, 1996 was approved in a "Compensation Order Approval of Lump Sum Settlement [Pursuant] to Section 36-308(f)" on January 14, 1997. The Panel notes that the Petition as approved indicates the \$30,000 lump sum payment would be made on February 19, 2006 instead of the date of Petitioner's actual 60th birthday which the Panel takes administrative notice to be February 19, 2016.

On June 21, 2006, OWC received from counsel to Petitioner, a Motion for a Default Judgment against Respondent. In support thereof, Petitioner asserted that the settlement petition was approved by OWC in January 1997, "with the clear understanding that a lump sum annuity payment was to be made to the claimant on February 19, 2006". According to Petitioner's Motion for Default, the annuity service center at the Hartford refused to honor the Order as their Annuity Contract Certification showed that the annuity was supposed to be paid on February 19, 2016. In the Motion for Default, Petitioner added:

While claimant acknowledges that this payment plan was the original intent, it does not change the fact that what was finalized and signed by the authorized representatives of the Carrier was for a final payment date of February 19, 2006.

and concluded:

Wherefore, the claimant respectfully requests that the D.C. Office of Workers Compensation issue an Order declaring the employer/carrier in default for the lump sum payment of \$30,000, plus interest on accrued benefits, bad faith and legal fees.

In response to Petitioner's Motion for Default, OWC issued an Order to Show Cause, as to why the same should not be granted, to Respondent on or about August 8, 2006. Respondent filed a timely response asserting that the parties agreed to a lump sum payment on February 10, 2016 which would be Petitioner's 60th birthday, but that the parties inadvertently placed the date of

February 19, 2006 in the lump sum settlement agreement. Respondent further asserted that the Law Office representing Petitioner acknowledged in a letter dated April 22, 1997, that the correct date was February 16, 2016 and attached the letter as an exhibit to his response to show cause. Inasmuch as the second page of the letter was not included in the OWC file it is unclear whether this letter was sent with service to OWC and Respondent or how Respondent acquired said letter. However the administrative file contains enough documentation to reasonably conclude that the parties intended the final lump sum to be paid on Petitioner's 60th birthday which as noted above is February 19, 2016 and not February 19, 2006 without reference to the April 22, 1997 letter.

Having concluded that the settlement agreement contains a typographical error with regard to the date of the final lump sum payment, the Panel agrees there is no legal basis which Petitioner can rely on to support a default judgment against employer. Based on the reasons foregoing the Panel must affirm the August 30, 2006 order of OWC while entitled "Compensation Order Declaring Default and Awarding 20% Penalty" but actually denies Petitioner's request for penalties and default judgment shall not be disturbed.

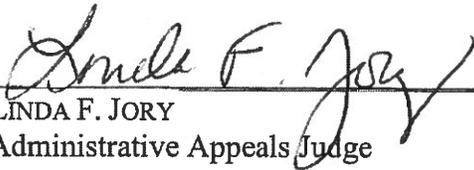
CONCLUSION

OWC's Order denying Petitioner's request for a default judgment and penalties assessed against Respondent is neither arbitrary, capricious nor an abuse of discretion and is in accordance with the law.

ORDER

The Compensation Order of August 30, 2006 is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:



LINDA F. JORY
Administrative Appeals Judge

November 16, 2006
DATE