

**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 No. 07-35

LARRY BENNETT,

Claimant – Respondent

v.

MILLER & LONG AND LIBERTY MUTUAL INSURANCE CO.,

Employer/Carrier – Petitioner.

Appeal from an Order of
Claims Examiner Selwyn Johnson
OWC No. 600998

Christopher R. Costabile, Esq., for the Petitioner

Jessica Bhagan, Esq., for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *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

BACKGROUND

This appeal follows the issuance of a Final Order from the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES). In that Final Order, which was filed on January 9, 2007, the Claims Examiner (CE) adopted the Memorandum of Informal Conference issued on April 21, 2006, which recommended the payment of temporary total disability payments from January 8, 2006 through January 15, 2006 and from January 29, 2006 through March 6, 2006 and temporary partial disability benefits continuing from March 7, 2006 and medical benefits, as a Final Order.

As grounds for this appeal, the Petitioner alleges that the decision below is arbitrary, capricious, unsupported by substantial evidence and not in accordance with the law.

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).

Turning to the case at hand, the Petitioner asserts that the January 9, 2007 was not issued in accordance with the agency's regulations and should be reversed. Specifically, the Petitioner avers that the Final Order relates to Memorandum of Informal Conference issued on April 21, 2006 that recommended the payment of benefits to the Claimant-Respondent (Respondent). The Petitioner maintains that neither it nor the Respondent disputed the recommendation as evidenced by the statement in the Memorandum that it did not refute the benefits and the Respondent's failure to request a formal hearing within 34 days of the issuance of the Memorandum. Consequently, the Petitioner asserts that the Final Order, issued 9 to 10 months after the Memorandum was issued and containing a reference that the Respondent was not receiving timely payments of benefits in December 2006, which was not a matter at issue at the informal conference, is arbitrary and not supported by any evidence.

7 DCMR § 219.22 provides:

If an application for formal hearing is not filed in accordance with § 220 of the chapter within thirty-four (34) working days after the issuance of the Memorandum of Informal Conference, said Memorandum shall become final. Thereafter, the Office shall issue a Final Order which shall be sent by certified

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 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.

mail to the parties and their representatives, and the Hearings and Adjudication Section. An aggrieved party may request a review by the Director, DOES.

In *Sandoval v. WMATA*, Dir. Dkt. No. 99-57, OHA No. 99-177, OWC No. 532188 (November 1, 1999), the Director held that if an application for formal hearing is not filed within 34 days as proscribed in 7 DCMR § 219.22, the memorandum of informal conference becomes final by the “quiet expiration of time, *i.e.*, thirty-four (34) days.” The Director adopted the ALJ’s reasoning that the failure of the OWC to complete the formality of issuing a formal order with a cover sheet and designation of “Final Order,” would merely extend the time period within which an aggrieved party could take an appeal of the final memorandum. The Director indicated that otherwise “the parties would have no incentive to request a hearing if, after an unfavorable memorandum, they could request a hearing at any time. The latter would frustrate the process and have the effect of stalling the matter at the informal level.” *Sandoval* at pp. 5-6. Subsequently, the CRB adopted the reasoning of *Sandoval* in *Gebremesih v. Interpark*, CRB No. 07-15, OWC No. 589533 (February 28, 2007).²

A review of the OWC file reveals that the Respondent filed a request for an informal conference on March 7, 2006 and that a conference was held on April 19, 2006. Thereafter, the CE issued a Memorandum on April 21, 2006 recommending that benefits be paid. There is no indication in the file that either party rejected the recommendation and applied for a formal hearing within 34 days of the issuance of the recommendation. Thus, the April 21, 2006 Memorandum became final by operation of law at the expiration of the 34-day period irrespective of the OWC’s issuance of a document entitled “Final Order”.

In its appeal, the Petitioner takes issue with the statement in the Final Order “[I]n speaking to the attorney for claimant, she indicated that payments are not being made on a timely basis.” The Petitioner asserts that the question of untimely payments was not presented for resolution at the informal conference, thus making the Final Order arbitrary and capricious. Given that the Memorandum became a final order by operation of law at the end of the expiration 34-day period, the language is mere surplusage and has not effect on the terms of the Final Order.

However, *assuming arguendo* that the CE reasoned that since the Respondent was not receiving benefits timely as recommended in the Memorandum and that converting the Memorandum into a Final Order would “order” or force the Petitioner to make timely payments, such reasoning is an error as a matter of law. The proper mechanism to enforce a memorandum awarding benefits that has become a final order, either by operation of law or by the issuance of a document entitled “Final Order”, is a request for default pursuant to D.C. Official Code § 32-1515. If such is the case, the Petitioner is correct in arguing that the receipt of timely payment of benefits was not an issue at the informal conference held in this matter and, therefore, the Final Order addressing the issue was unsupported and arbitrary and a the Final Order would need to be vacated and remanded.³ As stated earlier herein, the Panel determines that the language is mere surplusage and the Final Order is affirmed.

² 7 DCMR § 255.7 provides that decisions issued by the Director shall be accorded persuasive authority by the CRB.

³ The OWC file contains a Motion For Order Declaring Default filed by the Respondent on January 23, 2007. The Motion was later withdrawn on January 31, 2007.

CONCLUSION

The Final Order of January 9, 2007 is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

ORDER

The Final Order of January 9, 2007 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

April 12, 2007
DATE