

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. 08-171

MARTA ECHEVERRIA

Claimant-Petitioner

v.

RITZ-CARLTON HOTEL AND MARRIOTT CLAIMS SERVICES

Employer and Insurer-Respondent

Appeal from an Order Denying Claimant's Motion for Default
Administrative Law Judge David L. Boddie
AHD No. 02-005, OWC No. 517977

2009 JUL 30 AM 8 26

LABOR STANDARDS BUREAU
COMPENSATION REVIEW
BOARD

Benjamin T. Boscolo, Esquire, for Claimant-Petitioner.

Curtis B. Hane, Esquire, for Employer and Insurer-Respondent.

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, *Administrative Appeals Judge*, and LAWRENCE D. TARR,¹ *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department Employment Services Director's Directive, DOES Administrative Policy Issuance No. 05-01 (February 5, 2005).

OVERVIEW

This appeal challenges an May 1, 2008, Order issued by an Administrative Law Judge (ALJ) from the Administrative Hearings Division, Office of Hearings and Adjudication, District of Columbia Department of Employment Services (DOES). The

¹ Administrative Law Judge Tarr is appointed by the Director of the Department Of Employment Services (DOES) as an Interim Board Member pursuant to DOES Administrative Issuance No. 09-06 (May 20, 2009) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

Order denied the Claimant-Petitioner's July 17, 2007, request for an Order awarding penalties and declaring default against the Employer and Insurer-Respondent (Respondent).

The Claimant-Petitioner (Petitioner) sustained an accidental injury on July 27, 1997, while working as a housekeeper for the Respondent. At the time of the injury, the Petitioner also was self-employed as a housekeeper for two private employers. After a few tries at light duty work, the Petitioner was unable to continue working for the Respondent after 2000.

By Compensation Order (CO) dated February 28, 2002, an ALJ determined that the Petitioner injured her left shoulder but did not injure her right shoulder at work and awarded ongoing temporary partial benefits beginning July 17, 2002. On December 9, 2002, (then) Director Gregory P. Irish affirmed in part and reversed in part the CO. Director Irish affirmed that the Petitioner injured her left shoulder in the work accident. He reversed the finding regarding the right shoulder and determined the Respondent also was liable for disability and medical treatment related to the Petitioner's right shoulder.

In the latter part of 2004, the Petitioner filed an Application for Formal Hearing seeking permanent partial disability benefits under the schedule in D.C. Official Code § 32-1508 (3) (A) for the sixteen percent loss to both of her arms and for permanent partial disability benefits based on her partial wage loss, under D.C. Official Code § 32-1508 (V) (i).

At the hearing, the Petitioner testified, as she had at the first formal hearing in 2002, that before the accident, in addition to working for the Respondent, she worked as a housekeeper for two private employers. The Petitioner further testified that after the accident she no longer could do the private housekeeping work. She hired two employees who are able to clean about five houses a week. Petitioner supervises their work. Petitioner testified that the number of persons for whom she and her employees provide housecleaning services varies from month to month (Tr. at 51) and that her charges per house range from \$75 to \$100 (Tr. at 51, 64-65, 67).

In the June 1, 2005, CO the ALJ held that the Petitioner attained maximum medical improvement on June 4, 2002, and proved permanent partial losses to both her arms. The ALJ awarded benefits under the schedule for the sixteen percent loss to each arm. This holding was not appealed.

The ALJ further held that the Petitioner had a permanent partial disability due to cervical problems from the work accident that caused ongoing partial wage loss. The ALJ accepted the stipulation that the Petitioner's pre-injury average weekly wage was \$517.84 (\$416.00 from the Respondent and \$101.84 from her private housecleaning business). The ALJ further found that the current hourly wage for Respondent's housekeepers was \$12.50 (\$500.00 a week), that the Petitioner pays her two employees a combined salary of \$50.00 per house.

The ALJ did not calculate the specific dollar amount to which the Petitioner was entitled under D.C. Official Code §32-1508 (V) (i). Instead, the ALJ paraphrased the statutory options for determining a permanent partial disability award based on a wage loss

under D.C. Official Code §32-1508 (V) (i) and held the Petitioner could elect which option she preferred.

The Petitioner appealed the ALJ's June 1, 2005, CO to the Compensation Review Board (CRB), alleging that the ALJ erred by not calculating the dollar amount to which the claimant was entitled. The Petitioner also asserted on appeal that the ALJ misstated the statutory formula for determining a permanent partial disability award based on a wage loss.

On September 23, 2005, the CRB issued a Decision and Order that upheld the ALJ's decision not to identify the specific dollar amount for the permanent partial disability compensation rate caused by the wage loss. The CRB held:

With respect to Petitioner's argument that the ALJ failed to identify the dollar amount of compensation rate, the Panel accepts the Respondent's position that there is no legal basis for requiring the ALJ to state the specific weekly amount of benefits to be paid. Indeed, a review of the record does not show that the Petitioner requested a specific dollar amount in her claim for relief. Rather, she requested a category of benefits which the ALJ awarded. The ALJ is affirmed on this point.

The CRB further held that the ALJ incorrectly stated the compensation rate at which the Petitioner could elect to be paid when he paraphrased the relevant code sections. The CRB remanded the case to the ALJ:

for further proceedings, consistent with the above discussion, to allow the Petitioner to establish the compensation rate payable for the permanent partial disability benefits awarded for her cervical condition. All other aspects of the Compensation Order are affirmed.

On April 30, 2007, the ALJ issued his Compensation Order on Remand (COR). In the COR, the ALJ identified that there was only one issue to be decided: "whether the statutory provision for determining Claimant's permanent partial disability award based on wage loss was properly stated in the June 1, 2005 Compensation Order." COR at 3.

The ALJ acknowledged that his earlier paraphrasing of the Code resulted in an incomplete statement of the Petitioner's statutory options. The ALJ quoted the entire Code section and held "Claimant may elect to have the disability compensation payment calculated in accordance with either the formula set forth in sub-subparagraph (ii) (I) or the formula set forth in sub-subparagraph (ii) (II) above."

Consistent with the CO, The ALJ again did not specify the dollar amounts available under each option in the COR. The ALJ held that he:

... is not required to state the specific weekly amount of benefits to be paid, but rather, is obligated to issue findings of fact and conclusions of law to allow Claimant to establish the compensation rate payable for her disability payments. Findings of fact were made in the June 1, 2005, Compensation Order as to Claimant's actual

wages and her average weekly wage, and are restated herein. The legal standard for determining disability compensation has been set forth in this order. Claimant is now free to elect or choose the amount of her compensation rate to be paid by applying her wages to the provision set forth and determining which is greater.

Neither party appealed the April 30, 2007, COR.

On July 17, 2007, the Petitioner filed a Motion for Order Declaring Default. In the Motion the Petitioner asserted that her average weekly wage working for the Respondent at the time of injury was \$416 and her average weekly wage working for the Respondent when she reached maximum improvement would have been \$500. The Respondent does not challenge these calculations.

The Motion for Order Declaring Default also asserted that the average weekly wage the Petitioner received from her personal housecleaning business on the date of injury “was found to be \$101.84, while the actual weekly wage she received from her personal housekeeping business when she reached maximum medical improvement was \$175.00.” Motion at par. 4.

It should be noted now that while the ALJ held the Petitioner’s average weekly wage from the personal housecleaning business on the date of injury was \$101.84, the ALJ did not find the Petitioner received \$175.00 a week from her personal business when she reached maximum medical improvement. In fact, the ALJ did not make any findings regarding the average weekly wage from the personal housecleaning business when Petitioner reached maximum medical improvement.

The Petitioner asserted her belief that she had the right to choose between receiving permanent partial disability benefits at the rate of \$277.33 a week (2/3 of \$416) or at the rate of \$333.33 (2/3 of \$500). The Petitioner further stated she “elects to receive \$333.33 per week, from June 4, 2004 to the present and continuing” and that since this compensation had not been paid pursuant to the April 30, 2007, Compensation Order, she was entitled to a twenty percent penalty in accordance with D.C. Official Code §32-1515 (f).

The Respondent filed an Opposition to the Petitioner’s Motion for Order Declaring Default on July 18, 2007. Respondent stated that there is no basis for determining an average weekly wage under sub-subparagraph (ii) (I) because the Petitioner’s job after she became disabled did not exist at the time of injury. Therefore, referring to that sub-subparagraph, the Respondent asserted there can be no “average weekly wage, at the time of injury, of the job that the employee holds after she became disabled.”

The Respondent also argued that there also is no basis for determining the amount of benefits to which the Petitioner is entitled under sub-subparagraph (ii) (II). The Respondent noted that the Petitioner did not submit any evidence (such as pay stubs, cancelled checks or tax returns) documenting the wages earned by the Petitioner as a supervisor in her personal housecleaning business. Therefore, the Respondent asserted, there is no way to determine the actual wage of the job the Petitioner held after she returned to work.

On September 17, 2007, the ALJ issued an Order to Show Cause in response to Petitioner's Motion for Order Declaring Default. The ALJ ordered the Petitioner "to prepare a proposed computation of the amount of disability compensation benefits that are due, owing and not timely paid, which are sought to be declared in default and the amount of penalties and to file a proposed computation with AHD by September 28, 2007."

The ALJ also ordered the Respondent to show cause by October 5, 2007, "why an Order Declaring Default and a Penalty should not be entered in this case" and to state whether it has evidence to submit at a formal hearing. The ALJ warned that the failure to timely respond would "result in the issuance of an Order, without a hearing, based upon the claimant's proposed calculations of the amount of disability compensation payments due and owing."

Petitioner filed a letter on September 28, 2007, that declared her calculations and asserted that she was owed \$57,442.50.

Respondent, as its response to the Order to Show Cause, refilled its July 18, 2007 Opposition to Claimant's Motion for Order Declaring Default.

On May 1, 2008, the ALJ issued the Order that is the subject of this appeal. The ALJ held:

In their response and opposition the Employer asserted that the Claimant has not been forthcoming with the information necessary to establish the amount of her wage loss or difference in wages earned upon her return to work following her work injury so that it, the Employer could determine the proper amount to pay her pursuant to the workers' compensation benefits awarded in the April 30, 20067 Compensation Order on Remand.

Upon review and consideration of the Claimant's Motion for Penalties and a Default, and the Employer's response in opposition to the Claimant's motion that it has failed to timely pay worker's compensation benefits awarded in the April 30, 20067 Compensation Order on Remand, no good cause being shown, the Claimant's Motion is denied.

In her Application for Review the Petitioner argues that the ALJ's decision should be reversed because it is arbitrary, capricious, unsupported by substantial evidence in the record and not in accordance with the law.

We disagree.

While the previous decisions held the Petitioner was entitled to temporary partial benefits and that she was permitted to choose the greater benefit calculated in accordance with sub-paragraph (ii) (I) or (ii) (II), neither the CRB's previous decisions, nor the ALJ's CO or COR, establish she is entitled to the penalty and default she now seeks.

Analysis

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. *See* 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) (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 International v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, this Review Panel will 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.

Although the Petitioner titled her motion, “Motion for Order Declaring Default”, she requested penalties and a default order.

The penalty provision of the Code is found in D.C. Official Code §32-1515 (f) and states:

If any compensation, payable under the terms of an award, is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20% thereof, which shall be paid at the same time as, but in addition to, such compensation...

D.C. Official Code §32-1519 (a) relates to defaults and states:

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 of the 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.

As these Code sections show, to permit assessing penalties or declaring default, there must be unpaid compensation that was due or payable under the terms of an award. The mere declaration of a right to benefit entitlement does not establish compensation was due or payable.

A similar issue was involved in the CRB's recent case, *Tagoe v Howard University*, CRB No. 08-187, AHD No. 03-287, OWC No. 568310 (February 13, 2009). In *Tagoe*, the injured worker received an award requiring the employer to pay for her causally related medical expenses. After

the award, the worker paid for certain specific medical expenses for which the employer had refused.

The worker then filed with AHD a request seeing a default order requiring the employer to reimburse her for her out-of-pocket payments. An ALJ denied the order, holding medical expenses were not "compensation" for which a default order could be obtained. The CRB reversed, holding that the worker was entitled to seek an order of default for medical expenses.

In a concurring opinion, Chief Administrative Appeals Judge Brown, joined by administrative appeals Judge Russell, agreed with reversing the ALJ and finding that medical expenses are compensation.

In language that is relevant to the case at bar, Chief Judge Brown wrote:

However, upon remand to AHD it does not follow that Petitioner in the instant case is automatically entitled to the default order she seeks.

In order to obtain an order of default, Petitioner must first obtain a compensation order identifying with specificity which medical bills in what amounts are to be paid, beyond the current existing compensation order which merely orders that causally related medical care to be provided, but does not identify specific bills or services by date and amount. Upon obtaining that compensation order, Petitioner can, if the specific bills remain unpaid, return and seek a default order after the period for compliance has passed...

Consistent with the foregoing, before Petitioner in the instant case may seek a supplementary order of default pursuant to D.C. Official Code §32-1519 (a), she must institute a claim under the Act seeking the award of payment of the expenses and/or debt she has incurred for causally related medical expenses

With a statute such as D.C. Official Code §32-1508 (V) (i), where the benefit amount is calculated pursuant to the formula stated in that Code section, the right to seek a penalty or default order obtains when the elements of the formula are established either by stipulation or judicial decree. In other words, Petitioner could be awarded a penalty and default order only when any dispute as to each element of the statutory formula is resolved voluntarily or by CO.

Here, the ALJ properly dismissed Petitioner's request for penalty and default order because critical elements in the formulas of sub-subparagraphs (V) (I) (ii) (I) and (V) (I) (ii) (II) are contested. The Respondent contests whether the job the Petitioner held after maximum medical improvement was the same job she held at the time of injury and contests the claimant's allegation of the actual wage was of the job Petitioner held after she returned to work.²

² The Petitioner's Motion, which sought penalty and default under (ii) (II), is premised on her belief that she earned \$175 in her post-accident employment as a private housecleaning supervisor. None of the prior decisions held Petitioner earned that amount. The undisputed evidence at the formal hearing showed that Petitioner's wages after she hired the two employees fluctuated. Therefore, there was no stipulation or finding that Petitioner earned \$175.

Our decision should not be interpreted as a finding that the Petitioner may not seek, upon proper application, a judicial determination of the specific dollar amount to which she may be entitled under D.C. Official Code §32-1508 (V) (ii) (I) or (II). If such request were made, the Petitioner would have the burden of presenting evidence that is sufficient to establish each element of the statutory formulas³.

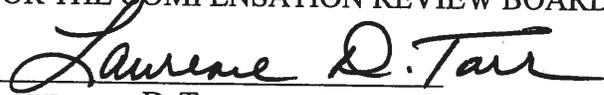
Conclusion

The May 1, 2008, Order denying Petitioner's Motion for Order Declaring Default is supported by substantial evidence and is in accordance with the law.

ORDER

The May 1, 2008, Order denying Petitioner's Motion for Order Declaring Default is **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:



LAWRENCE D. TARR
Administrative Appeals Judge



DATE

³ Nor should our decision be interpreted as endorsing Respondent's argument that the Petitioner is foreclosed from having her compensation calculated in accordance with D.C. Official Code §32-1508 (V) (ii) (I) merely because the job she held when she returned to work did not exist at the time of injury. We offer no opinion as to whether Petitioner could present sufficient evidence to permit a determination as to what the post-disability job would have paid at the time of accident.