

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. 03-52

CINDY MCGEE,

Claimant–Petitioner,

v.

CUSTODIAN OF THE SPECIAL FUND, D. C. DEPARTMENT OF EMPLOYMENT SERVICES,

Respondent.

Appeal from an Order of Alonzo Patterson, Custodian of the Special Fund,
Denying Special Fund Relief
Special Fund No. 441, OWC No. 517770

W. Scott Funger, Esquire, for the Petitioner

Office of the Attorney General of the District of Columbia, for the Respondent¹

Before JEFFREY P. RUSSELL, LINDA F. JORY and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation 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, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).² Pursuant

¹ As is more fully discussed in the body of this Decision and Order, the legal interests of the Special Fund are deemed to be represented by the Office of the Attorney General (OAG). That office has been served with the notices and orders issued by CRB in this case. However, the OAG has not filed any response to the appeal, nor has it responded to any of the notices or orders issued. Instead, the Custodian of the Special Fund has filed response dated June 13, 2006.

² 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as

to § 230.04, the authority of the CRB 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 public and private sector Acts.

BACKGROUND

This appeal follows the issuance of an Order of the Custodian of the Special Fund created by D.C. Code § 32-1540, in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on April 29, 2003, the Custodian of the Special Fund (Custodian) denied the request by Petitioner for payment from the Special Fund, and dismissed the Petition for Special Fund Relief. Petitioner now seeks review of that Order.

As grounds for this appeal, Petitioner asserts that since the decision of the Special Fund Custodian is required by law and pursuant to *DiVincenzo v. Angelo Brothers Roofing*, Dir. Dkt. No. 02-46, OHA No. 92-903A (April 3, 2003) to be “fiscally based and grounded in his or her obligation to responsibly manage the Special Fund so as not to deplete its contents” the Custodian’s order is deficient because “there is no discussion of what funds are available under the Settlement [Agreement reached in Banruptcy proceedings of the defaulting employer] to pay the workers compensation claims of the affected claimants”, and further that the order does not state whether the Settlement Agreement upon which the Custodian relies as the basis for the denial has been approved by the Bankruptcy Court.

Petitioner makes a second argument in objection to the Order, that being that it is “premature” to “attempt to fully and finally pass the liability for payment of any and all workers compensation claims [covered by the Settlement Agreement] to the District of Columbia Government”.

Upon assumption by the CRB of this appeal, which was brought prior to the statute creating this board, the CRB issued a “Notice of Assignment to CRB Review Panel”, on March 22, 2006. On June 30, 2006, the Clerk of the CRB issued a “Request for Certified Evidence and Administrative File”, which was served upon counsel for Petitioner, the Office of the Attorney General, the General Counsel of the Department of Employment Services, and the Director of the Office of Workers' Compensation. The Request sought those documents and materials relating to the action of the Custodian relating to the Petitioner for Special Fund Relief, and it included a concluding paragraph, which reads as follows:

Further, please advise whether counsel to the Special Fund, through the Office of the Attorney General, intends to file an opposition or other response to the appeal. This advice may be communicated to CRB by the Office of the Attorney General directly to the Clerk of CRB.

amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

Request for Certified Evidence and Administrative File, June 30, 2006 (bold in original). On July 13, 2006, the Custodian filed with CRB a memorandum on Office of Workers' Compensation letterhead, purporting to be the response to this appeal. The CRB received no response from the Office of the Attorney General.

ANALYSIS

Before embarking on the specific case at hand, we note that there are significant questions concerning our proper role in reviewing decisions of the Custodian of the Special Fund in this area.

The Special Fund is created by D.C. Code §32-1540. It is created “in the Treasury of the District of Columbia”. It has four purposes: payment for vocational rehabilitation services by the Special Fund, where the Mayor has determined that employer-provided services are inadequate (§ 32-1507(c)); Mayor-ordered IMEs to determine the extent of a disability, where the Mayor, claimant or employer “finds” that there has been an improper estimation of such disability by “a physician” (§ 32-1507(e)); payment for “second injuries” (under the now-repealed § 32-1508(6)); and where there are employer defaults under § 32-1519(b).

Pursuant to regulation, the Associate Director for OWC or his designee shall be the “custodian” of the Special Fund, and shall administer it (7 DCMR 231.1).

The regulations governing the Special Fund are found at 7 DCMR § 231, consisting of regulations §231.1 through §231.21. Of these, regulations §231.6 through §231.15 deal exclusively with “second injury” claims, which are claims wherein an employer was allowed to seek reimbursement from the Special Fund, under D.C. Official Code § 32-1508(6), for excess liability caused by the combined effects of a pre-existent injury or condition and a work injury for which the employer is liable, beyond that caused by the work injury alone. This provision no longer exists, having been repealed with the enactment of the 1998 Amendments to the Act. While that provision of the Act did exist, rule 231.11 gave “employers aggrieved” by a denial of relief from the Fund the right to a formal hearing in the Hearings and Adjudications Section (H&AS) (now, OHA/AHD). It is only in connection with these “second injury” cases that the regulations provide for a formal hearing in cases involving claims for payments from the Special Fund. These “second injury” cases are the only class of Special Fund matters to which a party has, by statute, an entitlement to fund payments upon proof of a requisite set of facts.

Further, there are no provisions in the regulations governing appeals from Special Fund decisions, except by implication that the establishment to a right to appeal a Special Fund denial of a second injury claim to a formal hearing in AHD implies a right to CRB review of that decision. Aggrieved employers in second injury denials are the only parties that the regulations governing the Special Fund identify as having a right to such a formal hearing.

None of the regulations dealing with the other functions of the Special Fund reference any appeal rights.

Payments from the Special Fund are not “awards” or “compensation”. Rather, 7 DCMR § 231.2 defines an “award” [as used in that section] as being a “final order” issued finding an *employer*

liable for benefits. That is, either an AHD or OWC order finding an employer liable for compensation benefits is an “award”. Thus, a determination by the Special Fund to pay (whether it is for an IME, for vocational rehabilitation, for a “second injury” or for a default on a compensation order) from the Special Fund is not an “award”.

The regulations governing “Administrative and Judicial Review” are found at 7 DCMR §230.1 through §230.13, the section *preceding* the Fund regulations. Under regulation §230.2 the review regulations govern “compensation orders”. Again, these regulations make no reference to the Special Fund.

The only regulatory authority to bring a matter to the CRB is 7 DCMR § 258, “Application For Review”. Rule 258.1 states that “any party adversely affected or aggrieved by a compensation order or a final decision issued by AHD or OWC may appeal *the compensation order* or final decision to the Board”, (emphasis supplied). While it may be that one could interpret the rule to include a decision of the Special Fund by asserting that the Special Fund is within OWC, that is not the only interpretation that could be given. First, the OWC orders which are the subject of the regulation are, by the terms of the regulation itself, “compensation orders”. Second, although the Associate Director for OWC or his designee is the *custodian* of the Special Fund, neither of them *are* the Special Fund, which by the terms of the statute is created “within the Treasury” of the District of Columbia.

Although it does not appear that the legislation creating this review board anticipated that it would have jurisdiction over matters other than review of Compensation Orders, it is arguable that the Director could assign to the CRB additional review powers beyond what is included in the statute, which defines only the CRB’s required/mandatory authority. In other words, while the CRB may not exceed the authority given it by statute where it acts purely pursuant to statute, as a division or office within the Department of Employment services, there does not appear to be any reason why the Director could not delegate additional duties to the CRB, as long as those duties are within the Director’s authority. Thus, while CRB has a mandated, statutorily created power and authority to review “compensation orders”, the Director could assign additional authority, as long as such authority is delegable. Thus, even if a final order emanating from OWC is not a “compensation order”, to the extent that such is reviewable by the Director, the Director could delegate that review authority to CRB. That is what the Director did, for example, in Administrative Policy Issuance No. 05-01, where, in addition to conforming agency policy to the requirements of the Act creating CRB, he added review of Public Sector decisions and OWC “final orders” to CRB’s statutory authority over Private Sector appeals. The specific delegation of authority is as follows:

3. Delegation of Authority and Assignment of Responsibilities.

Each Division [of OHA, being AHD and CRB] is hereby delegated the authority and assigned the responsibility to act for the Director, respectively, in (a) the conduct of formal administrative hearings and as a result thereof, the issuance of compensation orders under the public and private sector Acts; and (b) the administrative review of compensation orders issued by [AHD] and OWC.

Absent is a specific delegation of authority to review decisions of the custodian of the Special Fund. There is nothing in the Act which gives CRB specific authority to review Special Fund decisions, and there is nothing in the directive specifically assigning that authority from the Director to the CRB. Even if one were to view OWC as including the Special Fund, as previously noted, decisions of the Special Fund are not “compensation orders” or “awards”.

Further, unlike matters concerning the determination of questions relating to whether an employee has sustained a compensable work related injury, and if so, what the extent of that injury is, there is no reason to presume that the legislature or the Director believed that the ALJs in OHA, from whom the membership of this board is drawn, have any special competence to consider the totally discretionary actions of the Special Fund in cases involving payments on defaulted awards, where the payor is the Treasury of the District of Columbia. That is a matter in large part driven by fiscal concerns, or decisions relating to how to allocate funds among competing claims for relief, about which we have no information, in which we have no institutional interest, and over which we have no control. And, unlike the now-repealed provisions which afforded employers an *entitlement* to payment from the Special Fund in specific, defined circumstances, there is no entitlement by a claimant to a payment from the Special Fund in cases of a default; rather such payments are within the discretion of the Special Fund.

Otherwise put, requests for payment from the Special Fund in connection with defaulted employer obligations under the Act are not workers’ compensation claims, they are claims akin to indemnification from a discretionary account in which no applicant has a vested interest or entitlement.

While the CRB is presumably technically capable of determining whether an applicant for relief from the Special Fund has obtained a decision that is legally sufficient, under existing and recognized principles of administrative law, the entire subject area is so far removed from our core competence, i.e. determinations concerning disability claims issues, and is so much closer to fiscal and political policy making, that our involvement should only be at the explicit direction of either the legislature or the Agency, and the scope of our authority ought to be clearly delineated.

Because of the significance of these issues, the Chief Judge of the CRB has made inquiry to the Office of General Counsel of the Agency, and has obtained in response a “General Counsel Opinion”, issued by Eugene E. Ervin, General Counsel, on June 9, 2006. A copy of the entire opinion is attached to this Decision and Order as Attachment 1. The pertinent portions are discussed herein.

The first question posed by the Chief Judge was whether the Director of the Agency has delegated to the CRB authority to review decisions rendered by the Custodian of the Special Fund. After reviewing the regulations, the Act, and the Mayor’s Order of June 24, 1982 (delegating Mayoral authority under the Act to the Director of the Department of Employment Services (the Agency)), the opinion concluded that:

[T]he Director specifically intended as part of the general grant of jurisdiction pursuant to Section 3 (c) of the Director’s Administrative Policy Issuance No. 05-01 (February 5, 2005) (hereafter, “API 05-01”) that all of the appellate responsibility

vested in him be transferred to the CRB. Pursuant to Section 3 (a) of APA 05-01, the Director delegated to the CRB authority under the Workers' Compensation Act of 1979, as amended, for administrative review of compensation orders issued by the Administrative Hearings Division and OWC. Pursuant to Section 3 (c), the Director delegated to CRB all other "administrative review authority formerly vested in the Office of the Director under the public and private sector Acts. ..." The broad delegation to the CRB contained in Section 3 (c) necessarily included the delegation of the Director's authority to review decisions of the Custodian of the Special Fund. *See DiVincenzo v. Angelo Brothers Roofing*, Dir. Dkt. No. 02-46, OHA No. 92-903A (April 3, 2003) (upholding authority of the Director to review Special Fund decisions).

General Counsel Opinion, page 2.

Further, in response to the question of what standard of review the Director intended that CRB apply in reviewing Special Fund decisions, the General Counsel wrote "[t]he standard applicable in the review of decisions of the Special Fund by the CRB is the same standard of review applicable to decisions rendered by OWC: whether the decision of the Custodian of the Special Fund is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law'. 7 DCMR § 266.4." *Id.*

Lastly, in response to the question of who represents the legal interests of the Special Fund before the CRB, after discussing whether outside counsel could be retained by the Special Fund, the opinion states "[w]hen instances have arisen in the past necessitating legal representation for the special fund, the Office of the Attorney General has provided representation. From all indications, such representation has been ably executed. In view of this fact, no reason exists to warrant a change in past practice." *Id.*, page 3.

Accordingly, we take it as established that CRB has the authority to review Special Fund decisions, that such decisions are to be reviewed under the same rules, regulations and authority as govern review of any decision, order or recommendation issued from OWC, and that the Office of the Attorney General represents the Special Fund before the CRB.

Turning then to the case at hand, the procedural facts are as follows: Petitioner obtained an order declaring her former employer, Greater Southeast Community Hospital (GSECH) to be in default of a prior Compensation Order issued by AHD, and the default was determined to be in the amount of \$71,999.36. Petitioner thereupon obtained an Order of Default in that amount from the Superior Court of the District of Columbia. Petitioner thereupon presented that Superior Court Order of Default to the Custodian of the Special Fund, seeking payment of the default amount from the Special Fund. In response to this request for payment, the Custodian issued an order on April 29, 2003, which reads in its substantive entirety:

Pursuant to Title 7 of the District of Columbia Municipal Regulations Section 231.19, the Custodian of the Special Fund has conducted an investigation and found the following:

In November, 2001, the D.C. Office of the Corporation Counsel (OCC) on behalf of the District of Columbia Government (D.C.) settled D.C. claims in the U.S. Bankruptcy Court by entering into a Settlement Agreement (Agreement) with the Greater Southeast Community Hospital Foundation, et al. (GSECH); and

This Agreement (at p.5, para. 3) assigned to the District Government the liability to pay each workers' compensation claimant against GSECH any and all claims, "whether known or unknown, filed or not filed, now existing or discovered in the future ... and/or (3) any claim for fees and costs associated therewith."

Accordingly, your application for Special Fund relief, based on employer default by GSECH will not be countenanced by the Custodian of the Special Fund, in these circumstances, and your Petition for relief is hereby dismissed.

Order, Custodian of the Special Fund, April 29, 2003. We take this Order to be a denial by the Custodian, with prejudice, on the grounds that liability for the amount of the default has been assumed as an obligation of the District of Columbia Government generally, for which Petitioner may seek payment in some other forum, and for which the Special Fund has no obligation. In other words, we take the Order to mean that to the extent that Petitioner has a cognizable and recoverable claim against GSECH for default of the prior Compensation Order, the Custodian views the District of Columbia Government generally, and not the Special Fund specifically, as the party obligated to make payment. There are, in the Custodian's view, other avenues for recovery of the default amount.

Petitioner first objects to this order, and asserts that since the decision of the Special Fund Custodian is "fiscally based and grounded in his or her obligation to responsibly manage the Special Fund so as not to deplete its contents" the Custodian's order is deficient because "there is no discussion of what funds are available under the Settlement to pay the workers compensation claims of the affected claimants", and further that the order does not state whether the Settlement has been approved by the Bankruptcy Court.

Petitioner makes a second argument in objection to the order, that being that it is "premature" to "attempt to fully and finally pass the liability for payment of any and all workers compensation claims [covered by the Settlement Agreement] to the District of Columbia Government".

As to the fiscal discussions that Petitioner asserts are needed, we disagree. The Custodian's decision is that, there being another avenue through which Petitioner could seek to collect on the defaulted payment, any payment thereon from the fund would be inappropriate, given the fact that such payments would obviously diminish the fund unnecessarily, since the obligation can be satisfied without recourse to the fund. Even where such satisfaction may only be partial, or may be dependent upon processes or procedures over which the Custodian has no continuing power, influence or control, the fact that there are such avenues available is a rational basis upon which the Custodian could deny payment.

To the extent that Petitioner argues that a determination of non-liability is premature, because it remains to be seen whether Petitioner will ultimately be able to recover the amount pursuant to the Bankruptcy settlement, we again disagree. The District of Columbia Government, GSECH, and its creditors (including, presumably, Petitioner) are or were engaged in a process, the Bankruptcy Court process, whereby a mechanism for resolution of how GSECH's liabilities will be paid has or will be reached according to law. We have no jurisdiction over that process, no way of knowing what that process is, whether it is ongoing, has been completed, is about to begin, or otherwise. Subject to the following caveat, neither the Custodian of the Special Fund nor the CRB are in a position to advocate for or protect the interests of Petitioner or any other creditor whose interests are or were being adjudicated in those proceedings. The determination by the Custodian that there has been a settlement agreement which contemplates that Petitioner's claim will be paid by an entity other than the Special Fund is not arbitrary, capricious or otherwise not in accordance with the exercise of the broad discretion of the Custodian in making Special Fund payment decisions.

The caveat is this: we agree that the order does not recite whether the agreement cited as the basis for denial of the claim has been approved by the Bankruptcy Court. Until such time as it has been approved by the Bankruptcy Court and become final, it remains only an anticipated agreement. While the approval of the Settlement Agreement by the Bankruptcy Court is asserted by the Custodian in the memorandum response to the appeal herein, the fact that approval is questioned by Petitioner explicitly in the appeal to the CRB makes that issue central. Accordingly, it can not be said that a fundamental basis for the Custodian's decision is asserted in the denial order. In order to avoid being deemed arbitrary and capricious, the factual predicate, that is, the existence in law of the described Settlement Agreement, must be addressed in the Order.

Accordingly, the Order is affirmed in part and reversed in part and remanded for issuance of a new or a supplemental Order by the Custodian addressing whether the Settlement Agreement has been fully approved by the Bankruptcy Court, and is in effect.

CONCLUSION

The decision of the Custodian denying the claim for payment to Petitioner is affirmed as being properly within the discretion of the Custodian, except that the Order fails to assert that the settlement agreement upon which the order is based has been approved and is in effect.

ORDER

The Order of April 29, 2003 is AFFIRMED in part and REVERSED in part and REMANDED for issuance of a new or a supplemental Order by the Custodian addressing whether the Settlement Agreement has been fully approved by the Bankruptcy Court, and is in effect.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

July 17, 2006
DATE