

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-141

NEILL S. BASSI,
Claimant–Petitioner,

v.

RESTAURANT ENTERPRISES, INC.
and LIBERTY MUTUAL INSURANCE COMPANY,
Employer/Insurer–Respondents.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JAN 27 AM 10 16

Appeal from a July 31, 2015 Compensation Order on Remand by
Administrative Law Judge Joan E. Knight
AHD No. 10-435, OWC No. 645779

(Decided January 27, 2016)

Matthew J. Peffer for the Claimant
Robin Cole for the Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The facts and procedural history are set out in *Bassi v. Restaurant Enterprises, Inc.*, CRB No. 12-050, AHD No. 10-435 (June 20, 2012) (hereinafter DRO):

Neill Bassi, Respondent, was attacked and injured while employed as a doorman at Petitioner's bar and restaurant. Respondent subsequently filed a lawsuit against the perpetrators of the assault in the United States District Court for the District of Columbia, which he then settled. Petitioner did not approve the settlement in writing or otherwise. Pursuant to court order, the terms of the settlement were to be kept confidential.

Respondent subsequently sought to be paid a 13.5% permanent partial disability award to right arm under the schedule, which Petitioner declined to pay. The dispute over entitlement to the award, as well as entitlement to an award for causally related medical expenses, was presented to an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) at a formal hearing on December 7, 2011. At the formal hearing, Respondent testified concerning the effects of the injuries on his ability to use his right arm, and medical care and treatment he underwent to treat them. He also presented medical records and reports concerning that treatment, including surgical and physical therapy reports, plus an evaluation of his medical impairment in which Dr. David Bradshaw opined that he had sustained a 13.5% permanent medical impairment to his right arm as a result of his injuries. Respondent also offered a notarized statement from Respondent's father detailing a series of alleged events and dealings with Petitioner prior to and leading up to the lawsuit and its settlement. Petitioner offered no evidence, relying instead on its legal argument that the claims for schedule and medical benefits are barred due to the fact that Petitioner did not give its written authorization to enter into the settlement with the third parties who visited the injuries upon Respondent.

On March 1, 2012, the ALJ issued an "Errata Compensation Order" (the CO), in which she found that Respondent did, in fact, enter into a settlement agreement without Petitioner's authorization, that Respondent's claim for a schedule award was nonetheless not barred under the provisions of D.C. Code § 32-1535 because Respondent had not previously obtained an "award of compensation" and Petitioner was never "assigned" Respondent's rights to recover from the third parties prior to the unauthorized settlement. However, the ALJ ruled that Respondent's claim for a schedule award was nonetheless barred on a different theory, that of unjust enrichment. The ALJ also awarded causally related medical care.

DRO at 1-2.

In the DRO, the Compensation Review Board (CRB) affirmed the underlying order's award of medical care, concluding it was in accordance with *Pannell-Pringle v. DOES*, 806 A.2d 209 (D.C. 2002). However, the CRB remanded the case for further findings of fact and conclusions of law regarding whether Employer was equitably estopped from arguing Claimant's claim for monetary compensation is barred, due to the actions, or inaction, of Employer during Claimant's proceedings against the third party. Specifically,

Respondent argued at the formal hearing and argues here that Petitioner ought to be equitably estopped from avoiding further obligation for compensation. Respondent argues Petitioner had denied compensability of the claim, and adduced evidence that Petitioner had been placed on notice concerning the lawsuit that had been filed and which was ultimately settled, had been provided with the settlement conference notice, had made statements which may or may not have been misrepresentations to Respondent and/or persons acting on Respondent's behalf, and acted in other ways so as to make inequitable the application of the statutory bar on Respondent's entitlement to additional compensation.

The ALJ did not address this argument, and made no factual findings concerning the allegations concerning the actions and knowledge of Petitioner throughout the pendency of Respondent's proceedings against the third party. Accordingly, we must vacate the erroneous decision concerning the claim not being barred under the Act, and remand for further findings of fact and conclusions of law concerning whether despite the applicability of *Pannell-Pringle* to this case, Respondent's claims are nonetheless not barred, due to the alleged estoppel resulting from Petitioner's alleged inequitable actions.

DRO at 5-6.

A Compensation Order on Remand (COR) was issued on July 31, 2015, which denied Claimant's request for a scheduled award. Claimant appealed. Claimant argues that the COR failed to comply with the remand instructions. Claimant also argues the Employer should be equitably estopped from arguing Claimant is not entitled to compensation benefits as Employer refused to participate in third party settlement negotiations.

Employer opposes the appeal, arguing Claimant is not entitled to any benefits as the third party settlement was not approved by Employer to award any benefits would unjustly enrich Claimant.¹

ANALYSIS²

As Claimant argues, in the prior DRO, the ALJ was tasked on remand to make further findings of fact and conclusions of law in response to Claimant's argument that Employer should be equitably estopped from asserting Claimant's right to further compensation is extinguished because of an unauthorized settlement due to Employer's inequitable conduct in the settlement process. Claimant argues,

¹ Employer's opposition to Claimant's appeal was received by the CRB on September 28, 2015, more than 15 days after Claimant filed an application for review. In an accompanying Motion to Accept Late Filed Opposition to Claimant's Application for Review, Employer posits the opposition was mailed timely via the United Parcel Service (UPS), however returned due to a clerical error; the opposition was mailed to the CRB's old address on New York Avenue, NE. Employer also states it has "reached out to Claimant's counsel and requested consent for this motion, however, Claimant's counsel has not yet responded." Motion at 2. Claimant has not responded to Employer's motion. Taking into consideration Employer's argument and Claimant's lack of response, Employer's motion is granted and the arguments raised in opposition will be taken into consideration by the CRB.

² The scope of review by the CRB is generally 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

The Compensation Order on Remand failed to comply with the limited issue on remand from the CRB: Determine if the facts and circumstances of the Employer's refusal to participate in settlement negotiations with the third party tortfeasor warrants the Employer be equitably estopped from asserting that Mr. Bassi's failure to obtain their written approval for a settlement agreement precludes Mr. Bassi receiving a schedule member award.

Claimant's argument at 4.

A review of the COR shows that the ALJ adopted, without addition, the findings of facts outlined in the previous order. After discussing D.C. Code § 32-1535(f) and (g), the ALJ stated:

The case of *Pannell-Pringle v. Nursing Enterprises, Inc.*, Dir. Dkt. No. 00-23, H&AS No. 00-124, OWC No. 529278 (December 4, 2000), which the District of Columbia Court of Appeals affirmed in *Pannell-Pringle v. DOES*, 806 A.2d 209 (D.C. 2002), governs the instant case. The Director in *Pannell-Pringle* affirmed a hearing examiner's award of medical benefits and denial of indemnity benefits to a claimant who had entered into an unauthorized settlement of a claim against a negligent third party automobile operator's insurance company. The settlement was made prior to the claimant's seeking or receiving an award of compensation or any compensation at all, and even prior to her having filed a workers' compensation claim. Both the Director's Decision affirming the Compensation Order and the decision of the D.C. Court of Appeals, affirming the Director's decision represent the law in the District of Columbia. These decisions mandate a finding that subsections (f) and (g) operate to extinguish an employer's obligation to pay additional compensation.

Claimant's testimony at the hearing was un-rebutted and un-contradicted, by Employer. However, Claimant entered into a confidential settlement for injuries received during the January 14, 2007 incident. There is no evidence that Claimant obtained written approval, from Employer, of his third-party settlement. Therefore, Claimant is barred from receiving a schedule award as disability compensation as a result of his work injury.

As heretofore discussed, *Pannell-Pringle* is the law in the District of Columbia. That case mandates a finding that subsections (f) and (g) operate to extinguish an employer's obligations to pay "compensation" after a settlement is entered into without an agreement from the employer.

COR at 3-4.

We agree with Claimant that the ALJ did not follow the instructions of the prior DRO. Indeed, in concluding that "there is no evidence that Claimant obtained written approval, from Employer, of his third party settlement" the ALJ seems to ignore Claimant's exhibit 7 and the concern expressed by the CRB in the prior DRO, that the ALJ did not address Claimant's arguments that:

- Employer denied compensability of the claim;
- That Claimant had adduced evidence that Employer had been placed on notice concerning the lawsuit that had been filed and which was ultimately settled;
- Employer had been provided with the settlement conference notice;
- Employer failed to show up at the settlement conference, or participate in any way;
- Employer had made statements which may or may not have been misrepresentations to Claimant and/or persons acting on Claimant's behalf, and acted in other ways so as to make inequitable the application of the statutory bar on Claimant's entitlement to additional compensation.

Until such time as the ALJ makes additional findings of fact and conclusions of law on the above, we cannot say the COR is supported by the substantial evidence and in accordance with the law. Until the ALJ addresses these concerns, we decline to address Claimant's other argument.

CONCLUSION

As we stated on June 20, 2012,

The award of medical care is in accordance with the law. The determination that there must first be an award in a Compensation Order and award for a claimant's entitlement to ongoing indemnity compensation benefits (including schedule awards) to be extinguished by an unauthorized settlement, and the failure to address Respondent's argument that Petitioner is nonetheless estopped from asserting that Respondent's entitlement is extinguished due to Petitioner's alleged inequitable conduct in the settlement process, render the Compensation Order not in accordance with the law.

DRO at 7.

ORDER

The July 31, 2015 Compensation Order on Remand is not supported by the substantial evidence in the record or in accordance with the law. The award of medical care is affirmed. It is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

So ordered.