

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. 09-041

REBECCA A. PASMORE,

Claimant–Respondent,

v.

BALDUCCI’S AND CNA INSURANCE COMPANY,

Employer/Carrier–Petitioner.

Appeal from an Order of
Lead Claims Examiner Selwyn Johnson
OWC No. 630386

Joseph C. Veith, III, Esquire, for the Employer/Carrier-Petitioner

W. Scott Fungler, Esquire, for the Claimant-Respondent
Before MELISSA LIN KLEMENS,¹ JEFFREY P. RUSSELL, and AMELIA G. GOVAN² *Administrative Appeals Judges*.

MELISSA LIN KLEMENS, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (hereinafter “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). Pursuant 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

¹ Administrative Law Judge Klemens is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Issuance No. 09-02 (December 8, 2008) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

² Administrative Law Judge Govan is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Issuance No. 09-03 (January 29, 2009) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

Hearings Division or the Office of Workers' Compensation (hereinafter "OWC").

OVERVIEW

On August 15, 2006, Respondent slipped and fell at work. She injured her shoulders, cervical spine, lower back, and hip.

On February 6, 2008, the parties attended an informal conference before a claims examiner at the OWC. Respondent requested "authorization for physical therapy recommended by her treating physician." In a Memorandum of Informal Conference dated February 11, 2008, the claims examiner recommended Petitioner authorize the requested physical therapy.

The Memorandum of Informal Conference was not controverted nor did either party request a formal hearing. Consequently, a Final Order issued on May 6, 2008.

Claimant attended physical therapy under the direction of Dr. P. Steven Macedo from April 2008 to June 2008. On September 24, 2008, after almost twenty (20) physical therapy sessions and multiple visits for palliative care, Petitioner advised Dr. Macedo it no longer would authorize medical treatment.

Respondent filed with the OWC a motion for Default Order on October 27, 2008. An Order to Show Cause issued on November 3, 2008, and on December 15, 2008, a Supplementary Compensation Order Declaring Default issued on the basis that

District of Columbia Municipal Regulations §229.17 of the statute states The Order of the Associate Director, issued pursuant to this section shall become final unless a written request for a Formal hearing is made to the Chief, Hearings and Adjudication Section within twenty (20) working days of the issuance. (stipulation does not supersede a Final Order). Here, as provided by Section 32-1515(f) of the Act, claimant should have received medical treatment Ordered by the claims examiner no later than 10 days after the issuance of the respective Final Order.³

An Application for Review (hereinafter "AFR") was filed on January 14, 2009. Petitioner asserts medical benefits are not compensation as defined in the D.C. Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* (hereinafter "Act"). In addition, Petitioner argues the Supplementary Compensation Order Declaring Default is deficient because it does not state an amount in default and because there is no basis for declaring a default.

Respondent filed no opposition to the AFR.

ANALYSIS

Upon review of an appeal from the OWC, the CRB 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).

³ The legal validity of this assertion has not been raised on appeal.

Pursuant to §32-1519(a) of the Act,

[i]n 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.

In a motion for Default Order, Respondent argued she was entitled to a default because Petitioner had stopped paying temporary total disability benefits and had denied further medical treatment as recommended by Dr. Macedo. Specifically, Respondent requested a supplementary order

declaring employer and its carrier \$2,585.38 in default for TTD; declaring employer and its carrier \$5,556.38 in default for the medical bill of Washington Medical Group, Inc. and ordering employer and its carrier to pay for claimant's continuing medical treatment.

Taking each item in the order requested, we begin with the demand for default based upon a failure to pay temporary total disability benefits. The claim at the informal conference was

Claimant continues complaint of pain in her shoulder, cervical spine, lower back, and her hip, resulting from the multiple injuries she sustained on August 15, 2006, when she slipped and fell at work. The claimant seeks authorization for physical therapy recommended by her treating physician.

Respondent did not request payment of indemnity benefits at the February 6, 2008 informal conference, and the February 11, 2008 Memorandum of Informal Conference made no recommendation regarding indemnity benefits. As such, any request for default for failure to pay temporary total disability benefits was inappropriate, and the OWC had no authority to grant a default on that basis in the December 15, 2008 Supplementary Compensation Order Declaring Default.

Next, Respondent requested Petitioner be declared in default for failure to pay the medical bill of Washington Medical Group, Inc.

§32-1515(f) of the Act states

[i]f 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, unless review of the compensation order making such award is had as provided in §32-1522 and an order staying payments has been issued by the Mayor or court. The Mayor may waive payment of the additional compensation after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment. (Emphasis added.)

Because Respondent filed no response to the AFR, we are unable to ascertain the basis for the previous assertion that Petitioner has not paid Five Thousand Five Hundred Fifty-six Dollars and Thirty-Eight Cents (\$5,556.38) in medical bills from Washington Medical Group, Inc.⁴ What we can ascertain is that Petitioner did make multiple payments to Washington Medical Group from January 23, 2008 to October 28, 2008 (Respondent's Exhibit D); nonetheless, even had Petitioner not paid the medical bill of Washington Medical Group, Inc., medical expenses constitute compensation under the Act only when an employer refuses to pay such expenses and thereafter is required to reimburse the injured worker pursuant to an award. *Tagoe v. Howard University Hospital*, CRB No. 08-187, AHD No. 03-287, OWC No. 568310 (February 13, 2009). Thus, this request cannot result in a default.

Finally, Respondent requested a default for failure to pay for continuing medical treatment. The only medical treatment recommended in the Memorandum of Informal Conference and incorporated into the Final Order, however, was "physical therapy recommended by" Dr. Macedo.

A default is limited to circumstances where there has been a failure to pay compensation as previously defined. Failure to pay for medical expenses not yet incurred is not a basis for a default.

Moreover, neither a Final Order nor a Supplementary Compensation Order Declaring Default can impose authorization for additional treatment that was not presented at the underlying proceeding. In other words, the physical therapy treatment plan that had been recommended by Dr. Macedo at the time of the informal conference was ten (10) visits; Petitioner provided that treatment in compliance with the Final Order, and the Final Order cannot be interpreted to authorize payment for any and all prospective treatment without limit.⁵

CONCLUSION

The December 15, 2008 Supplementary Compensation Order Declaring Default is not in accordance with the law because Respondent did not present to the OWC any valid basis for the imposition of a default order against Petitioner.

⁴ The administrative file does contain an October 21, 2008 invoice; however, that invoice does not provide any explanation regarding the purported "non-budget due."

⁵ If Respondent believes she is in need of additional medical treatment, there are procedures under the Act whereby she may request authorization for such treatment, a request for a default of the May 6, 2008 Final Order is not the proper procedure under these circumstances.

ORDER

The Supplementary Compensation Order Declaring Default dated December 15, 2008 is VACATED.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN KLEMENS
Administrative Appeals Judge

March 6, 2009

DATE