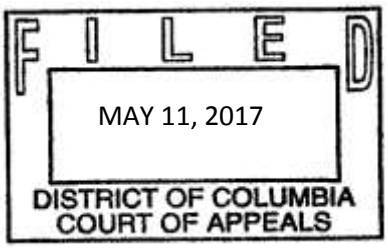
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-1293



BRYANT MOORE, PETITIONER,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

MARSHALL HEIGHTS COMMUNITY DEVELOPMENT ORGANIZATION, INC.,
INTERVENOR.

Petition for Review from the District of Columbia
Department of Employment Services
Compensation Review Board
(CRB-107-15)

(Submitted October 28, 2016 Decided May 11, 2017)

Before GLICKMAN and MCLEESE, *Associate Judges*, and STEADMAN, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Bryant Moore was injured in a motor vehicle accident while in the course of his employment with Marshall Heights Community Development Organization, Inc. (Marshall Heights). Moore settled his claim against an alleged third party tortfeasor without the knowledge or approval of Marshall Heights. He now petitions for reversal of a decision by the Compensation Review Board (CRB) that, pursuant to D.C. Code § 32-1535 (g) (2012 Repl.), Moore lost his right to any further workers' compensation benefits from Marshall Heights.

Our deferential scope of review of CRB decisions is well-established. Briefly put, unless the language of a statute is unambiguous, we defer to the agency's interpretation of a statute that it administers so long as it is reasonable.

See, e.g., Colbert v. District of Columbia Dep't of Emp't Servs., 933 A.2d 817, 819 (D.C. 2007).

D.C. Code § 32-1535 sets up a scheme to reconcile a claim to workers' compensation with a claim the worker may have against a third party for damages. As we explained in *Pannell-Pringle v. District of Columbia Dep't of Emp't Servs*., 806 A.2d 209, 212 (D.C. 2002), the workers' compensation law "allows a worker injured on the job by a third party to sue the third party without forfeiting the right to workers' compensation from his or her employer, so long as the amount recovered from the third party is less than the entitled employer compensation." D.C. Code § 32-1535 (a), (b), and (f). However, we noted, to protect the employer from being prejudiced by a low settlement that would leave the employer liable for the remainder of the employer's entitled compensation, section 32-1535 (g) prohibits the employee from recovering workers' compensation if the suit against the party is settled without the written approval of the employer.[1] In his application for CRB review, Moore presented two grounds for not applying this subsection to his case. The CRB rejected both grounds with statutory analysis that we deem reasonable.

First, Moore argued that personal injury cases include damages for emotional distress, pain, and suffering, suggesting that his settlement was so limited. Nothing in the record indicates the action was other than a typical one for all damages resulting from the accident or that his settlement agreement was confined to noneconomic damages. Nor does the statute make any such distinction. *See generally* D.C. Code § 32-1535. The CRB noted, in rejecting this argument, that such an approach could permit an employee to file personal injury

[1] "If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled under this chapter, the employer shall be liable for compensation as determined in subsection (f) of this section, only if the written approval of such compromise is obtained from the employer and his insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise in a form and manner prescribed by the Mayor." D.C. Code § 32-1535 (g). The only two cases in our court addressing subsection (g) appear to be *Pannell-Pringle*, *supra*, and *Colbert*, *supra*. Both of these cases rather strictly apply the section to defeat an employee's claim for workers' compensation.

claims without protecting the employer's interests "simply by classifying the settlement funds as payment for noneconomic damages."

Second, Moore noted that Marshall Heights did not carry workers' compensation insurance at the time of the accident.[2] Hence, he argued, the subsection does not apply because it refers to the requirement of written consent from both the employer and his insurance carrier, thus indicating that only insured employers would be entitled to the protection of the statute. In rejecting this argument, the CRB noted that subsection (h) provides for an insurance company's right to subrogation "where the employer is insured," thus contemplating that some employers will be uninsured. Furthermore, the statute already contains sanctions against an uninsured employer, who in any event remains liable for workers' compensation payments. D.C. Code § 32-1539. No basis, the CRB concluded, exists to impose this additional sanction.

In fact, a third issue was addressed by the Administrative Law Judge; namely, whether, by the settlement, Moore had lost his right to payment for medical services in addition to any right to disability payments. The Administrative Law Judge concluded that he had. Moore, acting *pro se* in his application for review by the CRB, listed as his "reasons for disagreement with the Compensation Order" only the two arguments we have discussed *supra,* and the CRB understandably limited its discussion and analysis to those two issues. However, Marshall Heights in its brief to us explicitly states that Moore, before the CRB, raised three issues on appeal, the two already discussed and, thirdly, "the claimant remains entitled to reimbursement for causally related medical care, even in the face of his settlement of his third party claim." Marshall Heights cites not only to the application for review but also to Moore's memorandum of points and authorities. While the issue is raised in Moore's briefing to the CRB rather tangentially, we accept the concession of Marshall Heights that the issue was sufficiently preserved for CRB review.[3]

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[2] The Administrative Law Judge in the case made a finding, unchallenged before the CRB, that Marshall Heights nonetheless paid $15,325.73 in benefits to Moore before learning of the settlement.

[3] Moore in his brief to us presents certain additional issues never in any way raised before the CRB. "We generally do not consider arguments on appeal that were not raised before the agency." *Levelle, Inc. v. District of Columbia Alcoholic*

(continued…)

As already indicated, the CRB undertook no analysis whatsoever of this third issue. Considering our standard of review, we thus find ourselves in a position where we would be addressing a statutory issue to which the CRB had not applied its "expertise and . . . responsibility for administering the Workers' Compensation Act." *Hensley v. District of Columbia Dep't of Emp't Servs*., 49 A.3d 1195, 1205 (D.C. 2012) (citations omitted). In this posture, as in *Hensley*, and the more recent case of *Levy v. District of Columbia Dep't of Emp't Servs*., 84 A.3d 518, 520-21 (D.C. 2014), we have determined to remand the case to the CRB for a review and resolution of this third issue.[4]

So ordered.

ENTERED BY DIRECTION OF THE COURT:

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Clerk of the Court

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(…continued)
Beverage Control Bd., 924 A.2d 1030, 1038 n.9 (D.C. 2007). We see no reason to make any exception here.

[4] If any party, depending on the outcome, wishes to contest before us the determination of the CRB on remand, a new petition for review must be filed with this court.

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