

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-050

NEILL S. BASSI,

Claimant–Respondent,

v.

RESTAURANT ENTERPRISES, INC. and LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Insurer–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Leslie A. Meek
AHD No. 10-435, OWC No. 645779

Robin Cole, Esquire, for the Petitioner

Matthew J. Peffer, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ HEATHER C. LESLIE AND HENRY W. MCCOY, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

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

¹ Judges Russell and Leslie are appointed by the Director of DOES as an Board Members pursuant to DOES Administrative Policy Issuance Nos. 11-03 and 11-04 (October 5, 2011).

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.

Petitioner appealed the award of medical care and the ruling that the claims are not barred under D.C. Code §32-1535, to which appeal Respondent filed an opposition. We affirm the award of medical expenses, and vacate and reverse the ruling that the claim was not barred under the Act, and remand the matter for further consideration of the claim.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, 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. Official Code § 32-1501, *et seq.*, at § 32-1521.01 (d)(2)(A), (the Act), 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.

DISCUSSION AND ANALYSIS

D.C. Code § 32-1535 reads as follows:

Compensation for injuries where third persons are liable

(a) If, on account of a disability or death for which compensation is payable under this chapter, the person entitled to such compensation determines that some person other than those enumerated in § 32-1504(b) is liable for damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed with the Mayor shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within 6 months after such award.

(c) A payment made pursuant to §§ 32-1509 and 32-1540(d)(1) shall operate as an assignment to the employer of all rights of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to:

(A) The expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the Mayor);

(B) The cost of all benefits actually furnished by him to the employee under § 32-1507;

(C) All amounts paid as compensation; and

(D) The present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Mayor, and the present value of the cost of all benefits thereafter to be furnished under § 32-1507, to be estimated by the Mayor, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one fifth of such excess which shall belong to the employer.

(f) If the person entitled to compensation institutes proceedings within the period ascribed in subsection (b) of this section, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Mayor determines is payable on account of such injury or death over the amount recovered against such third person.

(g) 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.

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representative if he is killed, by the negligence or wrong of any other person or persons in the same employ; provided, that this provision shall not affect the liability of a person other than an officer or employee of the employer.

This case is governed by *Pannell-Pringle v. Nursing Enterprises, Inc.*, Dir. Dkt. No. 00-23, H&AS No. 00-124, OWC No. 529278 (December 4, 2000), which was affirmed by the District of Columbia Court of Appeals (DCCA) in *Pannell-Pringle v. DOES*, 806 A.2d 209 (D.C. 2002). In that case, the Director 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.

In the case under review herein, the ALJ erroneously held that D.C. Code §32-1535 (g) only applies where a claimant has sought and obtained "an award" of compensation. While the subsection (b) assignment to the employer of an injured employee's right to sue liable third parties does not operate until six months after there has been an award, there is no requirement for the entry of an award in subsection (g). Subsections (b) through (e) are concerned with assigning the right to sue the third party, and all assume and require that there be an award; subsection (f) deals with the situation in which there has been an award and no assignment, because the claimant instituted an action against the third party within six months of an award.

Subsection (g), on the other hand, is concerned with the circumstance in which the injured employee might prejudice the employer's ability to recover as much of its payments as possible from the third party because the cause of action against the third party is extinguished by the claimant settling the claim for an unreasonably low amount and releasing the liable third party.

The ALJ erroneously links the employer's interest in not having its potential recovery amount impaired by an unauthorized settlement, with the employer's having become assigned the right to bring an action against the third party. The ALJ wrote that "A claimant is only required to obtain written approval of a compromise when said claimant has assigned his rights to his employer", CO, page 9. She cites no authority for this proposition, and it is incorrect.

Even where the employer never obtains the right to sue, such as where the claimant brings an action within six months of an award, subsection (g) applies. If a claimant brings a negligence action against a third party within six months of an award, and then settles the suit before it goes to a trial and judgment, without agreement from the employer, subsection (g) relieves the employer from paying amounts that otherwise would have been due under subsection (f), being "a sum equal to the

excess of the amount ... payable on account of such injury or death over the amount recovered against such third person.”

In other words, if the case had gone to trial, a verdict would have been reached, and to the extent that the verdict was less than the amount of compensation to which the claimant was entitled, the employer is still liable for the excess of the amount of compensation owed over the amount of the verdict. But if instead of taking the case to trial and obtaining a verdict, the claimant settled the claim without the employer’s agreement, the employer would not be liable for any further payments.

There was no award in *Pannell-Pringle* when, a week after her auto accident, Ms. Pannell-Pringle settled her claim against the third party for \$1,000.00, she had barely incurred any medical bills, let alone the \$34,000.00 that would ultimately be incurred, and she hadn’t made a dent in missing the nearly one year of time from work that would eventually be lost. At no point were Ms. Pannell-Pringle’s rights to recover money damages against the third party assigned to Nursing Enterprises, Inc. or to Liberty Mutual Insurance Company.

The ALJ in the case before us referred to *Pannell-Pringle*. She discussed it at some length on page 10 of the CO, concluding her discussion with:

Ultimately, the reviewing Court in *Pannell-Pringle* ruled Section 32-1535 of the Act was ambiguous and the Court’s ruling of ambiguity required that although Section 32-1535 (g) of the Act did not explicitly mandate the barring of claimant’s claim, the Court was required to defer to the lower tribunal’s/agency’s interpretation of the Act.

After this, however, the ALJ proceeds to ignore the “agency’s/tribunal’s interpretation of the Act” as made in *Pannell-Pringle*, and to rule that “Claimant’s claim is not barred by the Act contrary to the ruling in *Pannell-Pringle*, *Supra*. However, Claimant’s claim is barred by the doctrine of unjust enrichment.”

We can not tell whether the ALJ meant to somehow convey that this case is distinguishable from *Pannell-Pringle*, but if she did, she does not say how. We do not know whether, on the other hand, she meant to convey her view that *Pannell-Pringle* is for some reason no longer good law, but if she did, she was in error. Both the Director’s Decision affirming the Compensation Order and DCCA decision affirming the Director’s decision represent the law in the District of Columbia, and they mandate a finding that subsections (f) and (g) operate to extinguish an employer’s obligations to pay “compensation” thereafter.

However, 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.

Regarding Petitioner's argument on appeal that the unauthorized settlement extinguishes its obligation to provide medical benefits, we turn again to the *Pannell-Pringle* cases. In the Compensation Order issued by the hearing examiner, the hearing examiner wrote that, to the extent that subsections (g) and (f) operate to extinguish an employer's obligations, inasmuch as they refer to "compensation", they only apply to "the money allowance payable to an employee...as provided in the Act", which is the definition of "compensation" found in then D.C. Code §36-301 (6), now §32-1501 (6).

Accordingly, the ALJ's determination that Respondent remains entitled to causally related medical care is affirmed.

CONCLUSION

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.

ORDER

The award of medical care is affirmed. The disposition of the claim for a schedule award is vacated and reversed, and the matter is remanded for further consideration of Respondent's argument that Petitioner is estopped from asserting that Respondent's right to a schedule award was extinguished due to an unauthorized settlement, in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

June 20, 2012
DATE