

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. 04-57

SONYA COLBERT,

Claimant – Petitioner,

v.

JEWISH SOCIAL SERVICES AGENCY AND HARTFORD INSURANCE GROUP,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
OHA No. 02-362A, OWC No. 557934

Richard S. Basile., for the Petitioner

Francis H. Foley, Esq., for the Respondent

Before FLOYD LEWIS, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board 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).¹

¹ 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on May 13, 2004, the Administrative Law Judge (ALJ) firstly denied the relief requested for permanent partial disability benefits based upon a 10% impairment to the right shoulder and a 10% impairment to the left knee because the Act does not provide for schedule awards for these body parts. Secondly, the ALJ denied the relief requested due the Claimant-Petitioner's (Petitioner) compromise of her third party claim without the Employer-Respondent's (Respondent) prior authorization. The Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the Compensation Order is arbitrary, capricious, not supported by the evidence, and contrary to the requirements of the statute.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is 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. D.C. Official Code § 32-1521.01 (d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, the Petitioner alleges that the ALJ erred in concluding that her request for schedule permanent partial disability benefits was not in the proper posture for adjudication. The Petitioner asserts that since the medical evidence clearly established some impairment to her leg and arm as a result of the impairments to her knee and shoulder, a physician was not required to convert the impairments to her knee and shoulder to ratings to the leg and arm. Additionally, the Petitioner alleges that the ALJ erred in finding that the arbitration decision in her favor against the driver of the automobile which caused her February 3, 2000 work injury constituted a compromise within the meaning of D.C. Official Code § 32-1535(g) requiring her to get prior authorization from the Respondent. The Petitioner

administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

asserts that the arbitration decision was not a compromise because she did not consent to it as with a traditional settlement. Rather, the Petitioner maintains that the arbitration was a judicial determination in that it was rendered by an impartial judge after a full trial with opening and closing statements, direct and cross examination of witnesses, and submission of documentary evidence. The Petitioner also points to the fact that the arbitration award, after enrollment, became a final judgment of the D.C. Superior Court. She argues that the D.C. Court of Appeals in *Pannell-Pringle v. District of Columbia Department of Employment Services*, 806 A.2d 209, 212, fn. 5 (D.C. 2002) indicated that “approval is not required when the suit has been resolved by a judicial determination of damages because that is considered to be independent evaluation of a trial judge.”

The Panel will first address the application of D.C. Official Code § 32-1535(g) to this case. D.C. Official Code § 32-1535(g) states:

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.

The evidence shows that the Petitioner herein filed a civil action for automobile negligence/personal injury in D.C. Superior Court against the driver of the vehicle which struck her vehicle on February 3, 2000 causing her work-related injuries. The action, however, did not proceed to trial by judge or jury as the parties agreed to submit the matter to binding arbitration. The evidence shows that the arbitration was conducted by a judge retained by the parties who, although a duly sworn judge of the state of Maryland, was not acting in that capacity for the arbitration proceeding. At the arbitration, opening and closing statements were presented by counsel for the parties in the civil action, as well as testimonial and documentary evidence. At the conclusion of the arbitration, the judge made an award of \$87,500.00 in the Petitioner’s favor. It is clear from the record that the Respondent herein did not have notice of the arbitration and did not consent to the proceeding. The dispositive question is whether the arbitration was a “compromise” within the meaning of the Act. If the answer to the question is “yes”, the Respondent will not be liable for workers’ compensation benefits.

After reviewing the facts and the case law, the ALJ found that the arbitration was a compromise. The ALJ reviewed *Pannell-Pringle, supra* and nevertheless rejected the Petitioner’s position, stating that arbitration was “not a judicial determination as it is neither ‘judicial’ or ‘referring to or by the court nor a ‘determination’, or ‘final decision by a court or administrative agency.’” The Panel agrees.

D.C. Official Code § 32-1535(g) contains strong language limiting the liability of the employer when the employee has entered into an unauthorized settlement with a third-party and reflects the statutory purpose of preventing prejudice to the employer in the form of low

settlements.² *Pannell-Pringle* at 213. Indeed, the language is so strong that the humanitarian purpose of the Act, which governs the payment of benefits by the employer, is irrelevant to third-party actions. See *4934, Inc. v. D.C. Department of Employment Services*, 605 A.2d 50, 57 (D.C. 1992).

A way to effectuate the purpose of D.C. Official Code § 32-1535(g) is a judicial determination of third-party liability.³ A judicial determination is a final judgment rendered via either a court or a formal administrative proceeding.⁴ A judicial determination encompasses an order of remitter, see *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968), but not an acceptance of an offer of settlement under Federal Rule of Civil Procedure 68. See *Broussard v. Houma Land & Offshore*, 30 BRBS 53 (1996).⁵

Arbitration is a mode of settling differences through the investigation and determination, by one or more persons selected for the purpose, of some disputed matter submitted to them by the contending parties for decision and award, *in lieu of a judicial proceeding*. See BALLENTINE'S LAW DICTIONARY (3rd ed. 1969) [emphasis added].

In the instant case, there is no indication that the arbitration was, in any manner, ordered by the court. Rather, the evidence shows that the parties herein voluntarily agreed to remove the civil action from the court docket and place it in an arbitration proceeding. HT (March 4, 2004) at pp. 21-22. The Petitioner's witness testified that the civil action was dismissed. HT (March 4, 2004) at pp. 24. The Petitioner's witness further testified that if the defendant in the civil action failed to pay the arbitration award, the Petitioner would have to apply to court to have the award reduced to a judgment and to proceed based thereon. HT (March 4, 2004) at p. 17. Although the Petitioner asserted that, after enrollment, the award became a final judgment of the D.C. Superior Court, there is no evidence of an enrollment of the award or final judgment from the D.C. Superior Court derived from the award. Indeed, the Petitioner did not present a copy of the award into evidence. The Panel upholds the ALJ's finding that arbitration was a compromise within the meaning of the Act and that the Petitioner is barred from further compensation. With this ruling, it is not necessary to address the Petitioner's argument concerning her entitlement to permanent partial disability benefits pursuant to the schedule.

CONCLUSION

The Compensation Order of May 13, 2004 is supported by substantial evidence in the record and is in accordance with the law.

² In *Pannell-Pringle*, the D.C. Court of Appeals upheld the agency's interpretation that an affirmative showing of prejudice to the employer is not required as a compromise is presumed prejudicial to the employer.

³ The purpose of D.C. Official Code § 32-1535(g) may also be effectuated by 1) obtaining the employer's consent or 2) a settlement for an amount greater than or equal to the employer's liability under the Act.

⁴ See BLACK'S LAW DICTIONARY 460, 850 (7th ed. 1999).

⁵ In citing these cases, the Panel recognizes that cases interpreting 33 U.S.C. § 933, from which D.C. Official Code § 1535 is derived, are treated as persuasive authority and is not setting a precedence that the cases are binding authority.

ORDER

The Compensation Order of May 13, 2004 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

March 8, 2006

DATE