

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. 03-089

DARLENE WHITTLE,

Claimant – Petitioner

v.

GEORGETOWN UNIVERSITY,

Self-Insured Employer – Respondent.

Appeal from an Order of
Administrative Law Judge Amelia G. Govan
OHA No. 00-336B, OWC No. 544107

Kirk D. Williams, Esq., for the Petitioner

Jeffrey W. Ochsman, Esq., for the Respondent¹

Before E. COOPER BROWN, *Chief Administrative Law Judge*, 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).²

¹ On June 24, 2005, counsel for the Petitioner submitted a copy of a Praecipe/Substitution of Appearance filed by counsel for the Respondent. On September 1, 2004, Jeffrey W. Ochsman substituted his appearance on behalf of the Respondent for that of Sarah Rollman, Esq.

² 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

BACKGROUND

This appeal follows the issuance of an 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 Order, which was filed on July 1, 2003, the Administrative Law Judge (ALJ) granted the Motion to Vacate the November 25, 2002 Compensation Order on Remand filed by the Employer-Respondent (Respondent) and denied the Motion for a Supplemental Order Declaring Employer/Carrier in Default filed by the Claimant-Petitioner (Petitioner). Petitioner now seeks review of that Order.

As grounds for this appeal, the Petitioner alleges as error that the July 1, 2003 Order is contrary to the law and not supported by substantial evidence.

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. App. 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 raises three issues with respect to the July 1, 2003 Order: 1) whether AHD erred as a matter of law in denying the Motion for a Supplemental Order where the Respondent has failed to pay pursuant to the November 25, 2002 Compensation Order on Remand and is without an order staying enforcement of the Supplemental Order, 2) whether AHD had jurisdiction to issue the July 1, 2003 Order vacating the November 25, 2002 Compensation Order on Remand which is pending appeal, and 3) whether AHD had jurisdiction to issue the November 25, 2002 Compensation Order on Remand where the record is without an order remanding the relevant issues to the Office of Workers’ Compensation (OWC). The Petitioner maintains that the issuance of the July 1, 2003 Order was a reversible error in that AHD was not empowered to vacate a decision which was pending

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 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.

appeal, and that AHD denied, without explanation, the statutorily mandated penalty due her because of the Respondent's failure to pay benefits as ordered. The Petitioner further maintains that the OWC did not have jurisdiction to approve a settlement agreement on September 5, 2002 since substantial issues of wage replacement benefits, medical expenses and attorney fees were pending before AHD and the Director at that time. *See* Claimant Memorandum at pp. 1-2, 9-11, 14-15.

In opposition, the Respondent asserts that the July 1, 2003 Order was properly issued and should be affirmed. It maintains that the November 25, 2002 Compensation Order on Remand was null and void because at the time it was issued, there was no controversy pending before AHD. As support, the Respondent points to the settlement agreement the parties entered into and the OWC approved on September 5, 2002, that is a full and final settlement of all claims relating to the Petitioner's August 3, 1999 work-related injury. The Respondent argues that, despite the presence of an appeal, where an order is issued without jurisdiction, it is proper for the issuing body to recognize the error and revoke the order. Further, the Respondent asserts that since the November Compensation Order was null and void, requiring it to comply with the Compensation Order would violate its due process rights and would be unenforceable. Finally, the Respondent asserts that AHD had jurisdiction over all issues relating to the compensability of the Petitioner's work-related injury, including the issue on temporary total disability benefits remanded by the Director, via the Joint Pre-Hearing Statement filed on May 9, 2002. Thus, when it remanded this matter to OWC, that jurisdiction was transferred to OWC, giving OWC authority to approve the parties' settlement agreement. *See* Self-Insured Employer Memorandum at pp. 5-10.

Because the procedural history of this case is complicated, and to aid in the reading and the comprehension of this decision, the procedural history is outlined below:

<u>Date</u>	<u>Activity</u>
May 18, 2000	Petitioner (with Counsel 1) files an Application for Formal Hearing (AFH) on the issue of temporary total disability (TTD) benefits continuing from Aug. 17, 1999.
Oct. 31, 2000	Compensation Order (CO) issued awarding only medical benefits.
Nov. 30, 2000	Petitioner files an Application for Review (AFR).
March 29, 2001	Petitioner files a 2 nd AFH on the issue of TTD benefits continuing from March 27, 2001.
June 21, 2001	2 nd AFH dismissed because issue not severable from issues on appeal.
Nov. 10, 2001	Counsel 1 files a petition for fees with AHD
Jan. 3, 2002	Fee petition dismissed as not ripe given 11/20/2000 AFR.
Feb. 2, 2002	AFR filed on dismissal of fee petition.
April 4, 2002	Petitioner (with Counsel 2) files an 3 rd AFH on issue of permanent partial disability (PPD) benefits.
April 11, 2002	Decision of Director issued reversing and remanding

	October CO.
May 9, 2002	Issue of continuing TTD benefits incorporated into Joint Pre-Hearing Statement for 3 rd AFH.
June 27, 2002	Parties request a remand due to resolution.
July 2, 2002	AHD issued Order remanding matter to the Office of Workers' Compensation (OWC) due to settlement.
Sept. 5, 2002	OWC approves lump-sum settlement agreement.
Oct. 25, 2002	Decision of Director remanding fee issue of Counsel 1 to AHD.
Nov. 5, 2002	AHD issued Order to Show Cause on fee petition
Nov. 25, 2002	CO on Remand issued awarding TTD benefits continuing from Aug. 17, 1999.
Dec. 20, 2002	Counsel 1 files Motion for Supplemental Order Declaring Default of Nov. 25, 2002 CO on Remand.
Dec. 31, 2002	Respondent files AFR of CO on Remand. ³
Jan. 8, 2003	Respondent files Motion to Vacate CO on Remand.
July 1, 2003	Order issued denying Motion for Supplemental Order and granting Motion to Vacate.
July 15, 2003	Petitioner files an AFR of July 1, 2003 Order.

After reviewing the record in this matter, the Panel determines that the best way to resolve this appeal is to first decide whether the AHD had jurisdiction to issue the November 25, 2002 Compensation Order on Remand. If the AHD did not have the requisite jurisdiction, then the other issues raised by the Petitioner become moot as they are predicated upon the efficacy of the November 25, 2002 Compensation Order on Remand.

The confusion in this case stems from the presence of multiple counsels for Petitioner, multiple applications for formal hearing, the assignment of multiple case file numbers to this matter and the assignment, simultaneously, of this matter to different administrative law judges. In order to eliminate the confusion and to bring about a resolution of this matter, the Panel takes administrative notice of the contents in AHD file numbers OHA Nos. 00-336A and 00-336B.

Petitioner, in her brief, takes the position that she had two separate matters before the agency, and that the two matters had to be processed and adjudicated separately. A review of the filings in the aforementioned AHD records shows that each matter addressed the compensability of Petitioner's claim for a work-related injury to her right lower extremity which was sustained on August 3, 1999 while in the course of her employment for the Respondent. There is, between the

³ On October 7, 2005, the Panel issued an Order consolidating the Respondent's appeal of the November 25, 2002 Compensation Order on Remand (CRB (Dir.Dkt.) No. 03-01) with the instant appeal as both address the viability of the November 25, 2002 Compensation Order on Remand, albeit from different perspectives. On October 18, 2005, the Respondent notified the Panel that CRB (Dir.Dkt.) No 03-01 had been dismissed on July 31, 2003 based upon its request to dismiss its appeal. The notification included copies of the pertinent documents. Consequently, this matter will proceed solely on the Petitioner's July 15, 2003 Application for Review.

two matters, a unity of parties and of issues.⁴ Therefore, the Panel determines that although this case was separated into two files with different numbers giving the appearance of separate matters, these matters were, in effect, one case.⁵ Our decision that the Petitioner has one case before this agency cannot rest on the presence, or absence, of the same counsel as representative since counsel is merely an agent for the injured worker, or the employer, who is the interested party in a workers' compensation action. Counsel can be changed at the desire of the interested party as this case clearly demonstrates.

Jurisdiction to adjudicate the compensability of the Petitioner's claim was properly vested in AHD once the May 18, 2000 Application for Formal Hearing was filed until the October 31, 2000 Compensation Order was issued. (OHA No. 00-336A). In that decision, the Petitioner was awarded medical benefits but not temporary total disability from August 17, 1999 to the present and continuing. On November 20, 2000, the Petitioner timely filed an Application for Review on the denial of disability benefits and jurisdiction to adjudicate the compensability of the Petitioner's claim was transferred to the Director, DOES.⁶

The Director, after reviewing the evidence, held that the ALJ's finding that the Petitioner had not sustained her burden of proof on the nature and extent of her disability was not based upon substantial evidence. The Director determined that the Petitioner's uncontradicted testimony and her treating physician's opinion demonstrated that she was physically incapacitated during the period for which she was seeking disability benefits. Accordingly, the Director reversed the denial of disability benefits and remanded the matter for findings of fact and conclusions of law on the nature and extent of the Petitioner's disability from August 10, 1999 to the present and continuing. Additionally, the Director stated that the Compensation Order was remanded "for further proceedings consistent with this opinion." *Whittle v. Georgetown University Employee Health Service*, Dir. Dkt. No. 00-79, OHA No. 00-33, OWC No. 544107 (Remand Order of the Director, April 11, 2002). This April 11, 2002 decision returned jurisdiction to AHD to institute any proceedings necessary to determine the compensability of the Petitioner's claim for disability benefits from August 17, 1999.

The AHD official records show that at the time that this matter was remanded, the Petitioner had just filed another Application for Formal Hearing on or about April 4, 2002 seeking permanent partial disability benefits due to her August 3, 1999 work-related injury. (OHA No. 00-336B). The parties incorporated the remanded issue of entitlement to temporary total

⁴ The Panel recognizes that OHA No. 00-336A also involved the issue of unauthorized medical treatment. However, the presence of this issue does not negate our decision on unity as this issue still centers on the compensability of the Petitioner's claim.

⁵ The Panel understands that for purposes of orderly administration and processing, each Application for Formal Hearing was assigned a different file number and is not, in any way, advocating that this practice be discontinued.

⁶ In certain circumstances, AHD and the Director, now the Compensation Review Board, have concurrent jurisdiction over a case. Despite a timely filed Application for Review, AHD retains jurisdiction to adjudicate a request for a default based upon a failure to pay as directed in a Compensation Order as said order is due and payable thirty (30) days after issuance, unless a request for stay is granted. *See Teal v. Washington Gas Light Co.*, H&AS No. 86-403, OWC No. 0090338 (May 20, 1987); D.C. Official Code § 32-1519. Also, AHD may adjudicate any issues which are severable from the issues raised in an appeal.

disability from August 17, 1999 into the upcoming formal hearing proceeding.⁷ To signify the incorporation, the parties submitted Joint Pre-Hearing Statements which included the remanded issue. In her brief, the Petitioner argues that this incorporation was ineffective because a Pre-Hearing Statement can only be altered, changed or modified by order of an ALJ and the presiding ALJ did not issue such an order in this case. The Petitioner maintains that an order with the signature of the ALJ affords the ALJ the authority to better manage his caseload, and protects the parties' due process rights. *See* Claimant Memorandum at pp. 12-13. The Panel rejects the Petitioner's argument.

After the April 4, 2002 Application for Formal Hearing was filed, the Petitioner submitted a Joint Pre-Hearing Statement on May 9, 2002 showing a claim for relief of temporary total disability benefits from August 10, 1999 or, in the alternative, schedule permanent partial disability benefits. Due to a delay in receiving the AHD Scheduling Order, the Respondent filed an amended Joint Pre-Hearing Statement on May 20, 2002 which showed the same claim for relief.⁸ Thus, contrary to the Petitioner's argument, the Joint Pre-Hearing Statement was not amended to incorporate the remanded issue, but included that issue *ab initio*, thereby placing it into controversy to be decided in the upcoming formal hearing proceeding.

The AHD official records show that on June 27, 2002, the parties informed the ALJ presiding over OHA No. 00-336B that the matter was resolved and requested a remand of this case for appropriate action. On July 2, 2002, the ALJ issued an order remanding this matter to OWC "for such further action as may be warranted" and jurisdiction to adjudicate the compensability of the Petitioner's claim was transferred to OWC. The Panel notes that a pending appeal did not foreclose the parties from settling this matter. It is well recognized that the parties to an action retain the right to settle a controversy at any stage of litigation.

The record shows that, in exercising its jurisdiction, the OWC approved a lump-sum settlement agreement in favor of the Petitioner on September 5, 2002. The settlement agreement referenced the April 11, 2002 Remand Order of the Director and the Petitioner's request for schedule permanent partial disability benefits. The agreement indicated that it was a full and final settlement of "all past, present and future claims" relating to the August 3, 1999 work injury. The Petitioner, as well as the counsels for the Petitioner and the Respondent, signed the settlement agreement. The Panel rejects the Petitioner's argument that since substantial issues of wage replacement benefits, medical expenses and attorney fees were pending before AHD and the Director at the time the settlement was approved, OWC could not consider all the contested issues in this case and lacked jurisdiction to approve a "full and final settlement" of all issues. As stated earlier herein, the issues of wage replacement benefits, including the remanded issue on temporary total disability benefits, and medical expenses were at issue in OHA No. 00-336B via the May 9, 2002 Joint Pre-Hearing Statement. It thus follows that the July 2, 2002 order from AHD, which remanded this matter to OWC, divested AHD of jurisdiction over the aforesaid issues and transferred them to OWC. As to the issue of attorney fee, such a decision is

⁷ While it may have been unexpected, neither the Director's remand order, nor the Act nor its regulations precluded this course of action.

⁸ The Joint Pre-Hearing Statement filed by the Respondent was amended to reflect the issues it wished to raise at the formal hearing.

considered severable from a decision on the merits of a worker's claim for compensation and can be processed separately.⁹ See Footnote 6, *supra*.

On December 20, 2002, Counsel 1, on behalf of the Petitioner, filed a Motion for Supplemental Order Declaring a Default of the November 25, 2002 Compensation Order on Remand. On January 8, 2003, the Respondent filed a Motion to Vacate the November Compensation Order on the basis that AHD lacked jurisdiction to issue the decision. Thus, the parties placed the viability of the November 25, 2002 Compensation Order on Remand before AHD to address. Accordingly, the AHD had jurisdiction to issue the July 1, 2003 Order which was provided in response to the parties' motions. On examination of both case files in this matter and consideration of the parties' oral arguments at a status conference, the ALJ to whom the motion were submitted determined that AHD lacked authority to issue the November 25, 2002 Compensation Order on Remand, the issue addressed in that decision having been resolved via an approved settlement agreement. Consequently, it was proper for the ALJ to vacate the erroneously issued Compensation Order. Further, given that the Compensation Order was vacated, it was proper for the ALJ to deny the Motion for a Default Order which was predicated upon that Compensation Order.

CONCLUSION

The Order of July 1, 2003 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Order of July 1, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

January 4, 2006
DATE

⁹ As the question was not raised by either party, the Panel declines to address whether AHD has the authority to comply with the October 25, 2002 Remand Order concerning attorney fees given the existence of the approved settlement agreement.