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. 07-55

JERRY WATTS,

Claimant – Respondent

v.

GUARDIAN SERVICE GROUP AND WAUSAU INSURANCE COMPANY,

Employer/Carrier – Petitioner.

Appeal from an Order Declaring Default of
Interim Chief Administrative Law Terri Thompson Mallett
AHD No. 05-053, OWC No. 603484

Anita U. Ajenifuja, Esq., for the Petitioner

Matthew Peffer, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

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

DECISION AND REMAND 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]

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[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

BACKGROUND

This appeal follows the issuance of an Order Declaring Default 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 February 2, 2007, the Administrative Law Judge (ALJ) granted the Motion for Order Declaring Default filed by the Claimant-Respondent (Respondent) due to Employer/Carrier-Petitioner's (Petitioner) failure to pay workers' compensation benefits as awarded in the March 9, 2005 Compensation Order that was issued in this case. The Petitioner now seeks review of that Order.

As grounds for this appeal, the Petitioner alleges as error that the Order Declaring Default is based upon an error of fact, is not supported by substantial evidence and is not in accordance with the law.[2] The Respondent did not file an Opposition.

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 alleges that the ALJ erred in not considering its response to the Order to Show Cause issued on July 25, 2005 on the basis that it was untimely filed. The Petitioner asserts that it filed a Consent Motion requesting an extension of ten days to file its response, which was not ruled on, and that it filed its

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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.

[2] The Petitioner attached ten (10) numbered exhibits to its Application for Review. Pursuant to 7 DCMR § 266.1, the CRB's appellate jurisdiction is limited to a review of the record made before AHD or OWC, as applicable. It is not empowered to conduct a *de novo* review of matters appealed to it. Upon exercise of official notice, the Panel finds that Exhibits Nos. 3 and 10 are not part of the official file created before AHD in this case and will, therefore, not be considered in rendering this decision. However, Exhibit Nos. 1-2, and 4-9 are part of the official file and will be reviewed.

response within the timeframe requested. With respect to the merits of the Order Declaring Default, the Petitioner argues that the ALJ incorrectly ruled that it was not entitled to a credit for unemployment benefits received by the Respondent which is contrary to the case law in this jurisdiction. The Petitioner cites *Segovia v. Miller & Long*, OHA No. 03-570 (April 19, 2004) as support for assertion. Also, the Petitioner argues that penalties pursuant to D.C. Code § 32-1515(f) should not have been awarded as the Respondent submitted his Motion for Order Declaring Default with "unclean hands", *i.e.*, the Respondent held himself out as "ready, willing and able to work" when he filed for unemployment benefits and then actually worked. Finally, the Petitioner asserts that the ALJ's determination that benefits had not been paid to the Respondent since February 17, 2005 is contrary to the evidence in the Computation of Benefits Due submitted by the Respondent.

D.C. Official Code § 32-1519(a), in pertinent part, states:

> In 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. After investigation, notice and hearing, as provided in § 32-1520, the Mayor shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment in default is an installment of the award the Mayor may, in his discretion, declare the whole of the award as the amount in default. . .

A review of the record in this case shows that, pursuant to a Compensation Order issued on March 9, 2005, the Respondent was awarded temporary total disability benefits from May 27, 2004 to the present and continuing, interest thereon and causally related medical care. *See Watts v. Guardian Service Group*, OHA No. 05-053, OWC No. 603484 (March 9, 2005). On June 3, 2005, the Respondent filed a Motion for Order Declaring Default alleging therein that the Petitioner paid benefits covering May 28, 2004 through February 17, 2005, but had not paid any further benefits. As part of its investigation, AHD issued an Order to Show Cause on July 25, 2005 directing the Respondent to submit a computation of the benefits alleged owed by August 15, 2005 and directing the Petitioner to show cause why a supplemental order declaring a default should not be issued by August 30, 2005.

In its appeal, the Petitioner asserts that at the August 24, 2005 formal hearing held on the its request to modify the March 9, 2005 Compensation Order, an "off the record" discussion was held on the Motion for Order Declaring Default. The Petitioner asserts that during this discussion, the presiding ALJ noted the Respondent's failure to file his computations by August 15, 2005 whereupon the Respondent promised to provide the information. As a consequence thereof, the presiding ALJ directed the Petitioner to file its response by September 10, 2005. *See* Petitioner Memorandum of Points and Authorities

at p. 3. A review of the record in this case reveals that the Petitioner memorialized this conversation in a letter to the presiding ALJ which was received by AHD on September 13, 2005.[3]

The record shows that the Respondent did not file his computation of benefits owed until September 15, 2005. Consequently, the record further shows that on September 19, 2005, the Petitioner filed a consent motion for extension of time of ten (10) days, or of such other time deemed appropriate, to file its response to the computation. The Petitioner asserts in its appeal, and the record so supports, that the request was not ruled upon. On October 4, 2005, the Petitioner filed its response. Given the state of the record, the ALJ's determinations that the Petitioner's response was due on August 30, 2005 and that its October 4, 2005 was, therefore, untimely are an error of fact.

Moreover, although the ALJ indicates that the Petitioner's objections were not considered given that its response was untimely filed, it appears that the ALJ, in fact, considered at least one of the objections. The Petitioner objected to the award of a default order due to an asserted entitlement to a credit for unemployment benefits paid to the Respondent. The ALJ recites the objection and indicates that the objection is without merit, citing *Beckwith v. Providence Hospital*, AHD No. 06-139 (July 20, 2006) as support thereof. Regardless of whether the ALJ intended to render a decision on the merits of the Petitioner's credit argument, the decision appearing in the Order Declaring Default is an error as a matter of law.

In this jurisdiction, an employer is entitled to a credit for unemployment benefits, not because the unemployment benefits qualify as an advance payment of compensation, but to prevent an injured employee from receiving a double recovery of monies from an employer. *See Stanford v. Cary International, Inc.*, Dir. Dkt. No. 99-68, OHA No. 99-144, OWC No. 533475 (April 30, 2002); *Flanagan v. Auger Enterprises*, Dir. Dkt. No. 94-65; H&AS No. 92-714; OWC No. 198453 (May 11, 1995). With respect to *Beckwith*, a review of its procedural history reveals that a Compensation Order issued on June 13, 2006 awarding workers' compensation benefits. The employer filed a timely appeal of the decision and also filed a request for reconsideration with the ALJ on the issue of credit for unemployment compensation paid as that issue was not addressed in the Compensation Order. Although the employer raised the issue of failure to address its claim for a credit in its appeal, the Panel determined that the issue was moot given that the ALJ issued a Supplemental Compensation Order on July 20, 2006 disposing of the credit issue. *See Beckwith v. Providence Hospital*, CRB No. 06-68, AHD No. 06-139, OWC No. 615744, fn. 2 (December 8, 2006). The Supplemental Compensation Order was not appealed to test the validity of its holding. Nevertheless, given the law of this jurisdiction, the validity is questionable.

The Order Declaring Default must be vacated and the Respondent's Motion for Order Declaring Default, together with the Petitioner's response, must be considered anew.

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[3] The Panel notes that while this matter was pending resolution, the presiding ALJ left the staff of AHD and this matter was reassigned to the ALJ named below.

CONCLUSION

The Order Declaring Default of February 2, 2007 is not in accordance with the law.

ORDER

The Order Declaring Default of February 2, 2007 is VACATED AND REMANDED for further proceedings consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

May 18, 2007
DATE