

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
Compensation Review Board

(202) 671-1394-Voice
(202) 673-6402-Fax



CRB Nos. 07-103, 07-123

NICHOLAS ENSER,

Claimant – Respondent

v.

CORBETT TECHNOLOGIES, INC. AND ST. PAUL TRAVELERS,

Employer/Carrier - Petitioner.

Appeals from the Orders of
Administrative Law Judge Melissa Klemens and
Claims Examiner Robyn Abrams
AHD No. 04-055D, OWC No. 585940

Roger S. Mackey, Esq., for the Petitioner

Richard W. Galiher, Jr., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, LINDA F. JORY, 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

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

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 May 21, 2007, the Administrative Law Judge (ALJ) dismissed the Employer/Carrier-Petitioner's (Petitioner) Application for Formal Hearing on the basis that AHD lacked jurisdiction to revisit issues resolved via the October 29, 2003 Memorandum of Informal Conference issued by the Office of Workers' Compensation (OWC) as the Memorandum had become a Final Order by operation of law. In that Memorandum, the Claimant-Respondent (Respondent) was awarded temporary total partial disability benefits from June 16, 2002 to January 4, 2003, temporary total disability benefits continuing from September 16, 2003 and causally related medical expenses. On May 23, 2007, the Petitioner filed an Application for Review of this Order and it was assigned CRB No. 07-103.

On May 31, 2007, the Respondent requested that OWC make the October 29, 2003 Memorandum of Informal Conference into a Final Order per the ALJ's indication that it was final by operation of law. Subsequently, on June 1, 2007, the OWC issued an Order wherein the Claims Examiner (CE) adopted the Memorandum of Informal Conference as a Final Order. On June 19, 2007, the Petitioner appealed this Final Order and it was assigned CRB No. 07-123.

As grounds for both appeals, the Petitioner asserts that the both Orders are not in accordance with the law. The Respondent timely filed responses to the Petitioner's appeals.

On August 9, 2007, the Petitioner filed a request to consolidate CRB Nos. 07-103 and 07-123 on the grounds that both cases involved the same issue, same set of facts and the same area of law. In its Memorandum of Points and Authorities related to the appeal of the Order from OWC, the Petitioner asserts that the Respondent does not object to the consolidation. After a review of both files in this case, the Panel grants the Petitioner's Motion.

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 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.

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.

Further, in the review of an appeal from OWC, the Board must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See 6 Stein, Mitchell & Mezones, ADMINISTRATIVE LAW, § 51.93 (2001).

Turning to the cases under review herein, the Petitioner asserts that the ALJ erred in concluding that the AHD November 4, 2003 dismissal of this matter re-instated the October 29, 2003 Memorandum of Informal Conference. The Petitioner asserts that the ALJ failed to take into consideration that the OWC never issued and mailed a Final Order pursuant 7 DCMR § 219.22, that the Petitioner filed the Application for Formal Hearing after the October informal conference and that the December 12, 2003 dismissal Order was specifically without prejudice. The Petitioner argues that the ALJ failed to apply the exception set forth in *Sacko v. Radio Shack*, Dir.Dkt.No. 02-89, OHA No. 02-342A, OWC No. 576377 (August 25, 2003) that where all parties consent to a voluntary dismissal of an Application for Formal Hearing, said dismissal is without prejudice and jurisdiction over a matter is not reinvested in OWC. Finally, the Petitioner argues that OWC was without authority to issue the June 1, 2007 Order as this matter was pending appeal before the CRB.

In response to the first Application for Review (CRB No. 07-103), the Respondent asserts that the real issue on appeal is the ALJ’s failure to address the fact that the December 12, 2003 dismissal was without prejudice. The Respondent argues that a dismissal without prejudice did not re-invest jurisdiction to OWC under the exception in *Sacko* and under the rulings of *Russell v. Vertrans, Inc.*, CRB No. 03-56, OWC No. 579689 (October 7, 2005) and *Gooden v. National Children’s Center*, CRB No. 03-137, OWC No. 529469 (April 14, 2006). The Respondent maintains that the Application for Review should be heard and the matter remanded to the ALJ for further proceedings. In response to the second Application for Review (CRB No. 07-123), the Respondent asserts that the CRB lacks jurisdiction to respond to the appeal of the May 21, 2007 Order as the Order is interlocutory in nature and not appealable, and that jurisdiction over this matter properly rests with OWC. The Respondent further asserts that assuming *arguendo* that the May 21, 2007 Order is not interlocutory, in effect, the Order is a remand to the OWC and jurisdiction is revived “by operation of law”.

In the May 21, 2007 Order dismissing the Application for Formal Hearing, the ALJ relied upon the holding of *Sacko, supra* and consequently, the ALJ ruled that the December 12, 2003 dismissal of the Petitioner's application for formal hearing revived the October 2003 Memorandum of Informal Conference and barred the Petitioner from adjudicating the matters resolved in the Memorandum. *See* Order at p. 3.

In so ruling, the ALJ acknowledged the holdings of *Russell* and *Gooden* that a timely rejection of a Memorandum "renders the Memorandum null and void, such that it cannot be revived and converted into a Final Order following a voluntary dismissal of a subsequently filed Application for Formal Hearing." *Gooden* at p. 6. As both of these cases were issued after the November dismissal, the ALJ applied the four (4) factors set forth in *Reichley v. District of Columbia Department of Employment Services*, 531 A.2d 244, 251 (D.C. 1987) for determining retroactivity of adjudications and ruled that the holdings did not have retroactive effect.

In *Sacko, supra*, the Director held "when a party to an informal workers' compensation proceeding files an Application for Formal Hearing and subsequently voluntarily dismisses that application, the presiding claims examiner in that proceeding is immediately reinvested with jurisdiction over the matter he or she had prior to the filing of the subject Application for Formal Hearing [and] the voluntary dismissal of [the] Application for Formal Hearing may only be made with prejudice." *Sacko* at p. 4. The Director also set out an exception to this rule where all parties to a proceeding consent to a proposed voluntary dismissal of an application. In such circumstances the presiding claims examiner is not immediately reinvested with jurisdiction and the dismissal is without prejudice. The Petitioner maintains that the exception, not the general rule, is applicable to this case.

A review of the official AHD file in this matter reveals that the Petitioner filed an Application for Formal Hearing on or about November 6, 2003 following the informal conference. On or about December 10, 2003, counsel for the Respondent filed an Entry of Appearance and a Consent Motion for Revised Scheduling Order. In the Consent Motion, counsel for the Respondent indicated that he was retained on December 5, 2003, needed more time to prepare his case so that he could properly represent the Respondent, and requested that the scheduled hearing be canceled and rescheduled to a later date. Counsel also indicated that counsel for the Petitioner was contacted and consented to the Motion. In the ensuing December 12, 2003 dismissal Order, the ALJ, after reviewing the official file, the law and the parties' pleadings, specifically stated:

Accordingly, it is hereby ordered that the Application for Formal Hearing of this matter be dismissed without prejudice and remanded to the Office of Workers' Compensation for any further necessary action.

December 12, 2003 Order at p. 2.

In the instant, while the Petitioner was a party to the informal conference held in this matter and was the party who filed the Application for Formal Hearing, the Petitioner did not unilaterally request a voluntary dismissal of that application. Rather, the party who did not file the Application requested that the formal hearing be rescheduled and both parties to this matter consented to the rescheduling. Instead of granting the continuance, the ALJ exercised her discretion and dismissed the Application specifically *without prejudice*. It is clear that the ALJ was granting the request for continuance while, at the same time, removing the matter from the pending docket until such time as the parties were ready to proceed. Indeed, the ALJ's dismissal order expressly allowed either party to "re-file a Formal Hearing Application at such time as the parties are prepared to proceed with litigation of this matter...". December 12, 2003 Order at p. 1. Because the dismissal was without prejudice, without resort to the general rule or the exception set forth in *Sacko*, the Memorandum was not revived. Therefore, the ALJ's ruling that December 12, 2003 dismissal of the Petitioner's Application for Formal Hearing revived the October 2003 Memorandum of Informal Conference was not in accordance with the law; the Memorandum was not revived and jurisdiction over this matter did not immediately vest in the claims examiner. The May 21, 2007 Order is reversed.²

The Panel rejects the Respondent's argument that the ALJ's Order is interlocutory and thereby not appealable. The facts of this case match those presented in *Moore v. Proteus Construction*, CRB No. 07-025, AHD No. 01-291E, OWC No. 560052 (April 25, 2007). In *Moore*, the ALJ, in response to a request for continuance, *sua sponte* dismissed an Application for Formal Hearing which had been filed after a rejection of a Memorandum of Informal Conference. After analyzing the law and the facts, the Panel held that the dismissal order issued in *Moore* was not an interlocutory order because arguably there was a Memorandum of Informal Conference present that could become a final order and that the dismissal was merely a method to accommodate a request for continuance.

With respect to the OWC Order of June 1, 2007, the Panel determines that OWC did not have the requisite jurisdiction over this matter at that time. The Petitioner had properly filed an Application for Review of the Order with the CRB on May 23, 2007, thereby transferring jurisdiction over this matter to the CRB. The Panel notes that the Application for Review was filed before the Respondent submitted its request to OWC for a Final Order on May 31, 2007. The Petitioner's filing precluded OWC from exercising jurisdiction during the pendency of the appeal.

CONCLUSION

The Compensation Order of May 21, 2007 from AHD is not supported by substantial evidence in the record and is not in accordance with the law.

The OWC Order of June 1, 2007 is not in accordance with the law.

² The Panel declines, at this time, to address the issue of whether the ALJ correctly ruled that *Russell* and *Gooden* did not have retroactive effect as that issue is not squarely before us.

ORDER

The Compensation Order of May 21, 2007 is REVERSED AND REMANDED to AHD for such further proceedings as may be warranted.

The OWC Order of June 1, 2007 is VACATED.

FOR THE COMPENSATION REVIEW BOARD:


SHARMAN J. MONROE
Administrative Appeals Judge

October 23, 2007
DATE