

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. 07-82

ROSS BUCHHOLZ,

Claimant - Respondent

v.

D. C. OFFICE OF THE ATTORNEY GENERAL

Employer - Respondent

Appeal from a Compensation Order of
Administrative Law Judge Reva M. Brown
AHD PBL No. 04-027A., DCP No. 761037-0001-20002-0001

Kirk D. Williams, Esquire for the Respondent

Thelma Chichester Brown, Esquire, for the Petitioner

Before LINDA F. JORY, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

LINDA F. JORY, *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 §1-623.28, §32-1521.01, 7 DCMR § 118, Department of Employment Services (DOES) Director's Directive, Administrative Policy Issuance 05-01(February 5, 2005)¹.

¹Pursuant 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, 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. Official Code §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 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.

BACKGROUND

This appeal follows the issuance of a Compensation Order (CO) by the Administrative Hearings Division (AHD) in District of Columbia Department of Employment Services (DOES). In that Order, which was filed on March 16, 2007, the Administrative Law Judge (ALJ) granted Respondent's request for 35% PPD to each of his upper extremities pursuant the stipulation entered into by the parties on April 1, 2005.

Employer-Petitioner (Petitioner) filed an Application for Review (AFR) of the March 16, 2007 Compensation Order requesting that the award be reversed as it was not based upon substantial evidence and the finding that the settlement agreement did not violate the law is erroneous.

Claimant – Respondent (Respondent) filed its response to the AFR asserting the Compensation Order is supported by substantial evidence and should, therefore, be affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (the 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. *See* D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.01, *et seq.*, at §1-623.28 (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 scope of review, the CRB and the Panel are bound 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, Petitioner essentially asserts that the ALJ committed two errors in the Compensation Order. First Petitioner asserts that while there is clear statutory authority in the private sector act with respect to the issue of apportionment of scheduled loss permanent partial disability benefits, but there is no such statutory authority in the public sector act. Petitioner asserts that the ALJ erred in relying on the CRB's decision in *Barron v. District of Columbia Department of Employment Services*, CRB No. 06-054, AHD No. PBL 05-010, DCP Nos. MDMPED-0004151 (September 6, 2006)(*Barron*), asserting that CRB in *Barron* did not address whether there was statutory authority in the public sector that supported non-apportionment.

At the outset, the Panel must reject Petitioner's unconvincing idea that because the public sector act fails to discuss non-apportionment, there is no statutory authority for non-apportionment. As

the ALJ correctly noted "In *Barron*. . . the CRB explicitly narrowed the applicability of apportionment only to cases in which compensation had been paid for previous injuries". CO at 5.

In *Barron* the CRB stated :

We reiterate that it is error to reduce an award from that to which an injured worker would otherwise be entitled, merely because a portion of the total amount of medical impairment in a scheduled member is due to a preexisting injury, condition or disability in that scheduled member, unless such preexisting condition or disability is subject to payment under a prior compensation award.

Until such time as the law as stated in *Barron* is reversed or modified by the Court of Appeals, however, *Barron*, remains the prevailing law governing the Act. Petitioner has pointed us to no authority in support of the proposition that because the Act does not discuss "non-apportionment" *per se*, §1-623.08 does not include the only instance where apportionment is allowed. See *Barron, supra* at 4. Accordingly, we affirm the ALJ's conclusion in the instant case "that the instant public sector claimant, having not been the recipient of a payment under a prior compensation order, for his pre-existing condition, should not have any award granted herein apportioned." CO at 5.

Petitioner further asserts that the ALJ erred by not setting aside the Stipulation Agreement reached by the parties on April 1, 2005 as the agreement is in violation of D.C. Code §1-623.12 which establishes the maximum and minimum compensation rate so the agreement is therefore void. As noted in the findings of fact by the ALJ, the stipulation agreement was duly approved on June 8, 2005 by the Bureau Manager of the Office of Risk Management (ORM). An accompanying cover letter, dated June 15, 2005 from the Disability Compensation Supervisor stated that the SA would be placed in the Respondent's file and the presiding adjuster directed to accept the claim as compensable. The ALJ noted that employer's agents did not raise any objection to the sufficiency of the SA and that it should not now be allowed to disavow said agreement after its approval. Relying on the CRB decision in *Oladukon v. District of Columbia Department of Employment Services*, CRB (Dir. Dkt.) No. 04-009B, OHA No. 02-0088, DCP Nos. LT7-BEDU004702 (September 20, 2006), the ALJ found that "the SA was duly reviewed by the appropriate agency personnel of the ORM, thus no authority lies herein to review its specific terms". CO at 3.

The ALJ found Petitioner as the government/employer was in a unique and well-qualified position to know what the maximum compensation rate was at the time the SA was entered into and according to the ALJ, it knowingly and willingly entered into the SA and is deemed to have waived its statutory right to pay Respondent no more than the maximum compensation rate.

Although not cited to by the ALJ, the public sector act was amended to include the option of lump-sum settlements effective October 1, 1998, in Title XVII - the Establishment of Disability Compensation Efficiencies or the "Disability Compensation Emergency Amendment Act of 1998". Therein §1702(g) stated §2335 (D.C. Code §1-624.35) is amended to read as follows: "§2335 entitled "Lump-sum settlements". §2335 (d) provides that "Lump -sum settlements may

not be reviewed or modified under §2324 or §2328, except in case of fraud or misrepresentation any party". In that Petitioner proffered no statute or case law in support of its position, and no evidence of fraud or misrepresentation has been proffered, the Panel can find no reason to disturb the ALJ's conclusion in this regard.

CONCLUSION

The ALJ's conclusion that Respondent sustained a compensable injury on May 21, 2002; was entitled to an award of 35% PPD for each of his upper extremities; entered into a valid stipulation; was entitled to an award at the compensation rate of \$1212.74; and sanctioned a lump sum award, is supported by substantial evidence and in accordance with the law.

ORDER

The Compensation Order of March 16, 2007 is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:



LINDA F. JORY
Administrative Appeals Judge

June 7, 2007

Date