

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 No. 06-076

SYLVESTER LEE,

Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA GENERAL HOSPITAL,

Employer/Carrier–Respondent.

Appeal from an Order of
Administrative Law Judge Melissa Lin Klemens
AHD No. PBL 05-009, DCP No. LTUNK000450

Pamela L. Smith, Esquire, for the Petitioner

Kirk D. Williams, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judges*, JEFFREY P. RUSSELL, and SHARMAN J. MONROE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* 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 District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia 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

On June 8, 2006, a Compensation Order was issued by Administrative Law Judge (ALJ) Melissa Lin Klemens, in which the ALJ granted an award of disability compensation to Respondent, and in that Compensation Order, the ALJ awarded the compensation in an amount calculated and based upon consideration of an average weekly wage which included earnings from a second, concurrent employment, a method of determining average earnings for disability compensation purposes known as “wage stacking”.

On July 11, 2006, Petitioner (Employer) filed (1) a Petition for Review with the CRB, contesting the legal propriety of the wage stacking award, which appeal was assigned CRB No. 06-067 by the CRB, and (2) a Motion to Vacate with the ALJ in AHD, seeking reconsideration of the wage stacking award contained in the Compensation Order.

On July 18, 2006, Respondent filed, in AHD No. PBL 05-009, an Opposition to Motion to Vacate.

On July 19, 2006, Respondent filed, in CRB No. 06-067, a Motion to Dismiss Untimely Petition for Review, asserting that the Petition for Review was not filed within the statutorily mandated 30 days.

On July 25, 2006, the ALJ denied the Motion To Vacate, which had been opposed by Respondent on multiple grounds, among them being that the Compensation Order of June 8, 2006 had become final upon 30 days from issuance, and hence the Motion to Vacate had been untimely, and that the Compensation Order itself had been appealed to the CRB, thereby divesting AHD (and consequently the ALJ) of jurisdiction to consider the motion in any event. However, in denying the Motion to Vacate, the ALJ ruled that AHD had continuing jurisdiction to consider the motion, and that AHD had the authority to exercise discretion to extend the time within which the motion could be filed, beyond the 30 day appeal period.

On August 9, 2006, the CRB, which had not been provided with copies of the Motion to Vacate, the opposition thereto, or the Order of the ALJ denying that motion, issued a Decision and Order in CRB No. 06-067, dismissing the original appeal of the Compensation Order of June 8, 2006, as untimely. That same day, Petitioner faxed (but did not, so far as the administrative file reveals, file²) a purportedly consensual Stipulation of Dismissal of the appeal in CRB No. 06-067.³

On August 24, 2006, Petitioner filed a Petition for Review of the Order of the ALJ of July 25, 2006, denying the Motion to Vacate. It is that Order which is presently before the CRB, the appeal of the Compensation Order of June 26, 2006 having been dismissed previously by the CRB for lack of timeliness.

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

² Submission of a paper or pleading by fax does not constitute filing with the CRB. See, 7 DCMR 257.3.

³ The dismissal thereof renders Respondent's Motion to Consolidate and Petitioner's opposition thereto moot.

ANALYSIS

As an initial matter, the scope 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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 International 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.

While Petitioner before us addresses the legal merits of the award by the ALJ of wage stacked disability compensation, nowhere does it cite any basis for the matter to be pending before the CRB, and we detect no such proper basis. The ruling of the ALJ, that AHD could properly consider a "Motion to Vacate" or otherwise reconsider a Compensation Order that has become final without being appealed, is unsupported by law. The ALJ cites no authority for the proposition that AHD continued to maintain jurisdiction once the initial Petition for Review of July 11, 2006 had been filed with CRB, and indeed there could be none, given that once the matter had been appealed, the matter rested squarely and solely with the CRB. Further, even had no appeal been filed, the ALJ cites no authority for the proposition that a final Compensation Order is subject to reconsideration or other review by AHD after the time for appeal to the CRB has expired. Indeed, we are aware of no authority that, in the absence of an appeal to CRB accompanied by a Motion to Stay Appeal, any post Compensation Order motions have any effect upon the time within which a Compensation Order becomes final and must be appealed. We decline to countenance an open ended assumption of continuing jurisdiction by AHD over Compensation Orders, given that the Act specifies the time within which such orders become final and must be appealed, and does not provide for extension of appellate time frames by consent or post-Compensation Order motions. The practice of permitting AHD to exercise discretion reconsider or vacate Compensation Orders and issue new orders either affirming or modifying prior Compensation Orders, after the Compensation Orders have become final and the time for appeal thereof has passed, thereby crating a new time frame for appeal with each successive grant or denial of such requested reconsideration, would render existing appeals deadlines pointless and unavailing. Further, permitting continuing jurisdiction to revise such orders beyond the statutory dates merely invites precisely the type of confusion and uncertainty that this case presents.

While we explicitly decline to affirm the Order denying the Motion to Vacate the Compensation Order on its merits⁴, we also are constrained to note that it is itself a nullity, in that the

⁴ We hasten to point out that, in connection with the dispute as to the wage stacking issue, this agency has for many years followed *Credle v. District of Columbia Dep't of Public Works*, ECAB Docket No. 88-015, DDCC No. 318203 (March 13, 1989), in which an exhaustive and compelling analysis was undertaken, of not only *MCM Parking Co. v. District of Columbia Dep't of Employment Serv's.*, 519 A.2d 1041 (D.C. 1986), but also the statute from which our Act

Compensation Order was issued and became final, the appeal thereof was dismissed as untimely, and there is no longer any Compensation Order or other properly issued order pending before us in this matter.

CONCLUSION

The Order of AHD dated July 25, 2006 is vacated as a nullity, having resulted from an untimely Motion to Vacate, which AHD no longer had jurisdiction to consider.

was derived, “almost word for word” [*Credle*, page 5], the Federal Employees Compensation Act (FECA), 5 USC § 8101, *et seq.*, and cases decided thereunder. In *Credle*, ECAB specifically rejected the application of *MCM Parking*, a private sector act case, to cases arising under the public sector Act, but nonetheless held that wage stacking is sometimes permissible and contemplated under the public sector Act, holding as follows:

Given the disability provisions of the Merit Act [the Act] are virtually identical to the provisions of FECA (compare D.C. Code § 1-624.14 (d)(3) with 5 USC § 8114 (d)(3)), and given that at the time the Merit Act was adopted, the FECA Act clearly permitted limited wage stacking, and given the absence of any modified statutory language in the Merit Act which specifically rules out wage stacking, this Board concludes that the Council of the District of Columbia intended to adopt federal ECAB’s interpretation that limited wage stacking be permitted.

For the foregoing reasons, we hold that wages from concurrent non-District government employment may be used in computing average earnings but only when the concurrent employment is similar in nature to the District government employment which occasions the work-related injury. Should this Board have improperly interpreted the intent of the Council of the District of Columbia when the Merit Act was enacted, then the Board will look to future Council enactments for any needed clarification.

We are aware of no relevant intervening action by the Council of the District of Columbia since the issuance of the *Credle* decision, and see no reason to depart from it.

ORDER

The Order of July 25, 2006 is VACATED.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

November 1, 2006 _____
DATE