

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

Office of Hearings and Adjudication
Administrative Hearings Division



(202) 671-2233-Voice
(202) 673-6938-Fax

In the Matter of)
)
ZENaida COBERA)
)
Claimant,)
)
v.)
)
DISTRICT OF COLUMBIA)
DEPARTMENT OF HEALTH,)
)
Employer.)

AHD No. PBL 99-030A
DCP No. 7611010-0001-1999-0017

Appearances

DAVID SCHLOSS, ESQUIRE
For the Claimant

KEVIN TURNER, ESQUIRE
For the Employer

Before:

LAWRENCE D. TARR
ADMINISTRATIVE LAW JUDGE

COMPENSATION ORDER

STATEMENT OF THE CASE

This proceeding arises out of a claim for disability compensation benefits filed pursuant to the provisions of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code §1-623.1 *et seq.* (hereinafter "Act").

After timely notice, a full evidentiary hearing was held on December 18, 2006, before Howard Cummins, Administrative Law Judge. Zenaida

Cobera, (hereinafter "Claimant") appeared in person and by counsel. The District of Columbia Department of Health, (hereinafter "Employer") appeared by counsel.

No witnesses were called. The case was submitted on argument of counsel.

It does not appear that exhibits were formally admitted. However, claimant's exhibits 1-5 and attachments 1 and 2 and exhibits 1 and 2 that were attached to the Employer's Motion to

Dismiss Formal Hearing were referred to during argument. Therefore, they are made a part of the hearing record.

Claimant's counsel was granted leave to submit an affidavit from his firm's office manager. This was received on December 26, 2006.

The record also closed on December 26, 2006, when the hearing transcript was filed with the Administrative Hearings Division (AHD).

Judge Cummins left the AHD after the record closed. On January 24, 2007, AHD issued an Order to Show Cause why this case should not be reassigned to another administrative law judge. The Show Cause Order stated that "Failure to timely respond shall be deemed a consent and will result in the reassignment of this case."

Neither side responded and the case was reassigned to this administrative law judge¹.

BACKGROUND

The claimant injured her back on October 2, 1990, while employed by this employer as a nursing assistant. Her claim was initially accepted and the claimant received temporary total benefits.

Benefits were discontinued on April 16, 1999, after the employer issued a Final Order of Denial. Claimant filed an Application for Formal Hearing. On August 9, 2000, Judge Robert Middleton issued a Recommended Decision rejecting the Final Order of Denial and granting restoration of temporary total benefits. Judge Middleton's Recommended Decision was adopted as the

¹At the hearing Judge Cummins indicated several times how he would rule. (Transcript at 9,14,15,16,19 and 22). We have not considered his pronouncements and have made an independent review of the record in reaching our decision.

Final Compensation Order on August 9, 2000.

PRESENT PROCEEDING

On July 7, 2006, the Office of Risk Management (ORM) issued a Notice of Intent to Terminate Disability Compensation Payments. Claimant's counsel requested a formal hearing on September 14, 2006. AHD scheduled the formal hearing for December 21, 2006. Prior to the formal hearing, the employer filed a Motion to Dismiss the Formal Hearing. This case is before the AHD on that motion.

At the hearing the parties stipulated that the only issue for determination was whether AHD had jurisdiction to hold a formal hearing. The parties further stipulated that if jurisdiction was found, ORM would reinstated benefits on September 26, 2006.

CLAIM FOR RELIEF

The employer seeks dismissal of the formal hearing alleging AHD does not have jurisdiction because claimant's request was not timely filed.

ISSUE

Whether the employer's Motion to Dismiss Formal Hearing should be granted because the claimant's request for formal hearing was not filed within 30 days of the Notice of Intent to Terminate Disability Compensation Payments.

For the reasons stated herein, we deny the employer's Motion to Dismiss the Formal Hearing.

FINDINGS OF FACT

ORM issued the Notice of Intent to Terminate Disability Compensation Benefits on July 7, 2006. The notice stated that benefits would be

terminated as of August 7, 2006, because ORM believed the claimant failed to cooperate and communicate with vocational rehabilitation.

The notice further stated that if the claimant disagreed with the intended termination of benefits, the recipient must either request reconsideration or appeal the notice to the Office of Hearings and Adjudication.

The notice was sent by certified mail, return receipt requested, to the claimant and to his attorney. The receipt from the United States Postal Service showed that the claimant received her copy of the notice on July 12, 2006.

The receipt for claimant's counsel's letter was returned unsigned. The employer searched the Postal Service's "Track and Confirm" system and found that the notice was "delivered" and signed for by a "J Lee" on July 13, 2006.

ORM's claims representative, Kim Vichich of CMI CompManagement, Inc., averred that she sent the notice to claimant's counsel at the address "of record," 2020 K Street, N.W. Washington, D.C. 2008.

The address used by ORM for claimant's counsel's was incorrect. While the number and street were correct, ORM failed to include the suite number (suite 500) and used the wrong zip code; ORM used 2008 when the correct zip code was 2006.

Cynthia Lehman, the bookkeeper and office manager for claimant's counsel's law firm averred by affidavit that in August 2005 the firm moved from 2020 K Street, N.W., Suite 500, Washington, D.C. 20006 to 2001 Pennsylvania Avenue, N.W., Suite 450, Washington, D.C. 20006.

Ms. Lehman further averred that her firm filed a mail forwarding request with the Postal Service and all mail was forwarded to the new address until August 5, 2006. Ms. Lehman stated that the firm never employed anyone named "J Lee" nor had it ever employed a person with the last name of "Lee."

Claimant's counsel stated that neither he, nor anyone at his firm ever received the July 7, 2006, Notice of Intent to Terminate Disability Compensation Benefits. He further stated that ORM knew that he had moved to the Pennsylvania Avenue address because ORM's vocational rehabilitation counselor met with him and the claimant at the Pennsylvania Avenue address.

Claimant's exhibit 4 included a January 16, 2006, letter from the vocational rehabilitation company sent to claimant's counsel at his Pennsylvania Avenue address. A copy of this letter was sent to Ms. Vichich.

Also included in Exhibit 4 is a February 25, 2006, Initial Vocational Assessment Report sent to Ms. Vichich. The report shows that a copy was sent to claimant's counsel at his Pennsylvania Avenue address.

Claimant's counsel did not learn that ORM had issued a notice and stopped his client's disability payments until September 14, 2006, when Ms. Vichich told his assistant during a telephone conversation. He filed the request for a formal hearing that day.

ANALYSIS

We have carefully considered the entire record and deny the employer's Motion to Dismiss Formal Hearing. We find the notice sent on July 7, 2006, was defective because it was mailed to

an incorrect address for claimant's attorney and that claimant's attorney did not receive that notice.

Under Code § 1-623.24 (d), ORM was able to provide written notice that the employer intended to modify the claimant's award of compensation for the alleged refusal of vocational rehabilitation. However, because ORM knew that claimant was represented it had a duty to send the notice to claimant's counsel at his correct address.

ORM was on notice, through its vocational rehabilitation counselor, that claimant's counsel's office was no longer located on K Street. ORM's vocational expert met with the claimant at her counsel's Pennsylvania Avenue office and sent at least two letters to ORM that listed the Pennsylvania Avenue address. Despite this knowledge, ORM send the Notice of Intent to Terminate Disability Compensation Benefits to the K Street address.

Even if we were to find that ORM did not have knowledge of the new address, the evidence does not preponderate in establishing that claimant's counsel received the notice that was sent to the the K Street address.

The address used by ORM failed to include counsel's suite number and incorrectly stated the zip code². ORM could not produce the certified

letter receipt, commonly called the green card, showing that the notice was received by claimant's counsel. The person that the Track and Confirm delivery receipt showed received the notice, "J Lee," was not employed by claimant's counsel's law firm.

The evidence established that claimant's counsel did not receive a copy of the Notice of Intent To Terminate Disability Benefits because ORM mistakenly sent it to the wrong address. It is so well-settled as to not require recitation of authority that the workers' compensation statutes are to be liberally construed to achieve their humanitarian purposes. It would be inconsistent with this principle to penalize the claimant for ORM's mistake.

CONCLUSION OF LAW

Claimant's counsel's request for formal hearing, was filed within 30 days from when he learned that ORM had issued a Notice of Intent To Terminate Disability Benefits to be timely filed. We find it is timely.

Consistent with the stipulations of the parties, we find the claimant's benefits should be reinstated effective September 26, 2006.


²ORM's affidavit stated it used counsel's "address of record." We have no idea to what record ORM refers. AHD's records and the records on official documents sent by AHD to claimant's counsel at his K Street address had the suite number and the correct zip code.

RE: *Cobera v. District of Columbia Public Schools,*
DCP No. LT2-DDT002160, AHD PBL No. No. 02-031

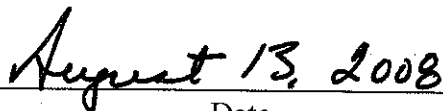
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ORDER

It is **ORDERED** Claimant's claim for relief be and hereby is **GRANTED**.



LAWRENCE D. TARR
ADMINISTRATIVE LAW JUDGE



Date

RE: *Cobera v. District of Columbia Public Schools*
DCP No. LT2-DDT002160, AHD PBL No. No. 02-031

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was sent this 13th day of August, 2008 to:

Eugene Irvin, Esquire
General Counsel
Department of Employment Services
64 New York Ave., N.E., Third Floor
Washington, D.C. 20002

Hand Delivered

Kelly Valentine, Interim Director
Office of Risk Management
Disability Compensation Program
441 4th Street, N.W., Room 800-S
Washington, D.C. 20001

Certified

Kevin Turner, Esquire
Office of the Attorney General
441 4th Street, N.W., Room 1060-N
Washington, D.C. 20001

Certified

Mr. Mohammad R. Sheikh, Assistant Director
Department of Employment Services
64 New York Ave., N.E., Suite 3923
Washington, D.C. 20002

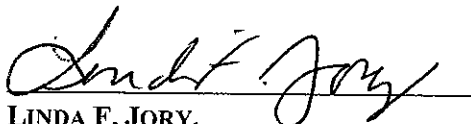
Hand Delivery

David Schloss, Esquire
2001 Pennsylvania Avenue, N.W., Suite 450
Washington, DC 2006

Certified

Zanaida Cobero, Claimant
9602 Caltor Lane
Fort Washington, MD 20744

Certified


LINDA F. JORY,
CHIEF ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE HEARING DIVISION

August 13, 2008
Date

RE: ***Cobera v. District of Columbia Public Schools***
DCP No. LT2-DDT002160, AHD PBL No. No. 02-031

APPEAL RIGHTS

This order is effective upon filing with the Mayor pursuant to Section 2102, Title XXIII of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. Law 2-139, D.C. Code 1981, §§ 1-623.1 *et seq.*). Any party aggrieved by this Order may file an Application for Review with the Chief Administrative Appeals Judge, Compensation Review Board, Labor Standards Bureau, Department of Employment Services.

Send Application for Review to:

Compensation Review Board/Chief Administrative Appeals Judge
Department of Employment Services
Labor Standards Bureau
64 New York Avenue, N.E.
Third Floor
Washington, D.C. 20002

The Petition for Review must be filed with the Compensation Review Board within 30 calendar days of the date of this Order, as provided in Section 2328(a) of the Act, D.C. Official Code, as amended, § 1-623.28. See D.C. Official Code, as amended, §32-1522(a) and §32-1522(b)(2A)(A). Pursuant to 7 DCMR §§ 258.2, 258.3, and 258.6, an Application for Review is perfected by filing with the Compensation Review Board the following:

1. an original and three (3) copies of an Application for Review;
2. an original and three (3) copies of a Memorandum of Points and Authorities in support of the Application for Review; and
3. certification that copies of the Application and Memorandum have been served by mail or delivery upon the opposing party(ies) and the Administrative Hearings Division (AHD).

In addition, pursuant to 7 DCMR §258.4(a) and (c), the Application for Review shall also:

1. Identify the compensation order or final decision from which the petitioner appeals; and
2. Include by way of attachment to the Application for Review, a copy of the compensation order or final decision appealed.