

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-046

**ADRIEN MACK,
Claimant-Petitioner,**

v.

**TGR INC., d/b/a LOOK RESTAURANT AND LOUNGE and
ERIE INSURANCE COMPANY,
Employer and Carrier-Respondents.**

Appeal from a January 29, 2016 Amended Compensation Order
by Administrative Law Judge Gregory P. Lambert
AHD No. 15-410, OWC No. 708971

(Decided August 11, 2016)

Adrian Mack, *pro se*
Julia Z. Haller and Paul Donoghue for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and GENNET PURCELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was injured at Look Restaurant and Lounge on September 8, 2013. Claimant was employed by Grant & Associates, a company which provided security for Look Lounge.

Because of Claimant's failure to participate in discovery, assist in the preparation of the Joint Pre-Hearing Statement, or submit exhibits timely pursuant to the scheduling order, an *ex parte* hearing was held on December 18, 2015. Claimant sought temporary total disability benefits from September 8, 2013 to the present and continuing as well as payment of causally related medical bills and authorization for reasonable and necessary medical treatment. Employer argued Claimant was not an employee of Look Restaurant and Lounge. An Amended

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Compensation Order (CO) was issued on January 29, 2016 which denied Claimant's claim for relief.

Claimant appealed the January 29, 2016 CO, which was received by the Compensation Review Board (CRB) on March 30, 2016. Claimant's Application for Review (AFR) requests reconsideration of his claim and reversal of the CO. Employer opposes the appeal arguing first that it was filed untimely, and second, that the CO is supported by the substantial evidence in the record and in accordance with the law and should be affirmed.

ANALYSIS¹

Prior to addressing Claimant's arguments, we must address whether or not Claimant's appeal was timely. As a matter of law, if an application for review is not timely filed, the CRB does not have the authority to consider an application for review. Employer argues that as the CRB did not receive the appeal until March 30, 2016, Claimant's appeal was untimely.

D.C. Official Code § 32-1522(a) states in pertinent part:

A party aggrieved by a compensation order may file an application for review with the Board within 30 days of the issuance of the compensation order.

In addition, 7 DCMR 258.2 states:

An Application for Review must be filed within thirty (30) calendar days from the date shown on the certificate of service of the compensation order or final decision from which appeal is taken.

An Application for Review had to be filed within 30 calendar days of the date of the Certificate of Service. Pursuant to the foregoing provisions, an Application for Review should have been filed with the CRB on or before Monday, February 29, 2016 to be timely.² The CRB did not receive Claimant's AFR until March 30, 2016.

However, a review of the administrative file reveals that the Office of Worker's Compensation received Claimant's AFR on Monday, February 29, 2016. Thus, Claimant's AFR was misfiled with another division of the Department of Employment Services (DOES). The very same fact pattern was considered by the CRB in denying the employer's motion to dismiss in *Covington v. Metro Pets Pals, LLC*, CRB No. 03-097, (March 18, 2005). In *Covington*, the Application for Review was misfiled with the wrong division in the DOES within 30 days of the underlying CO but was not filed with the Director until 150 days later. The CRB noted:

¹ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code § 32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

² Thirty calendar days from January 29, 2016 fell on Sunday, February 28, 2016. Thus, Claimant had until Monday, February 29, 2016 to timely file an Application for Review.

In *White v. American Elevator Services*, Dir. Dkt. No. 89-140, H&AS No. 88-431 (March 2, 1995), the Director held that an Application for Review that had been mis-filed with the Hearing and Adjudication Section would nevertheless be accepted as timely for purposes of appeal to the Office of the Director, as long as the Application was timely filed with Hearings & Adjudication within the required 30-day period. The Director's holding in *White* is consistent with the more recent decision of the Director in which he accepted as timely an appeal filed beyond the 30-day period where petitioner detrimentally relied upon erroneous information issued by an agency official concerning the requirements for filing. See *West v. Washington Hospital Center*, Dir. Dkt. No. 99-97, OHA No. 99-276 (March 30, 2000). The Director's decision in both instances is a recognition that the filing of a timely appeal is not a jurisdictional prerequisite to an intra-agency appellate review, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling when equity so requires. See, e.g., *Terry Kidwell v. District of Columbia*, 670 A.2d 349, 353 (D.C. 1996). The Board sees no reason to diverge from the Director on this subject. By holding compliance with the filing period to be not a jurisdictional prerequisite but a requirement subject to waiver, as well as tolling when equity so requires, the Board honors the remedial purpose of the D.C. Workers' Compensation Act as a whole, without negating the particular purpose of the filing requirement. See *Zipe v. TWA*, 455 U.S. 385, 393, 398 (1982).

Covington, supra at 3-4.

We see no reason to diverge from the rationale in *Covington*, and find that Claimant's AFR was timely filed and will be considered by the CRB.

Turning to Claimant's appeal, Claimant does not argue the CO's findings of fact are not supported by substantial evidence in the record nor that the conclusions of law, notably the ALJ's conclusion that he was not an employee of Look Lounge and Restaurant (Employer in the case *sub judice*), are erroneous, but rather contends the managers at Look Lounge and Restaurant asked Claimant to perform the tasks that led to his injury.

After reviewing the CO, we affirm the ALJ's conclusion that Claimant was not an employee of Look Lounge and Restaurant. The ALJ stated:

Look argues that Mr. Mack was not an employee of Look Lounge and was, instead, an employee of Grant & Associates. See Joint Pre-Hearing Statement filed Nov. 6, 2015 at unnumbered 2 (Employer/Insurer's contested issues of fact and law: "Claimant was not an employee, contractor, or agent of Look Restaurant."). The evidence supports that conclusion.

An employee is defined as any "person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, in the District of Columbia." D.C. Code § 32-1501(9). In order to determine whether an employer/employee relationship existed, the "relative nature of the work" test and

the "right to control" test are used. The relative nature of the work test has two parts:

First, one must examine the nature and character of the claimant's work or business. There are three factors to consider under this first prong: 1) the degree of skill involved; 2) the degree to which it is a separate calling or business; and 3) the extent to which it can be expected to carry its own accident burden. The second prong focuses on the relationship of the claimant's work to the purported employer's business and looks at three factors as well: 1) the extent to which claimant's work is a regular part of the employer's regular work; 2) whether claimant's work is continuous or intermittent; and 3) whether the duration is sufficient to amount to the hiring of continuing services, as distinguished from contracting for the completion of a particular job.

Gross v. District of Columbia Dep't of Employment Servs., 826 A.2d 393, 396 n.5 (D.C. 2003). The relative nature of the work test does not apply in the instant case because Mr. Mack is an employee of Grant & Associates. Even were that unclear, the first prong of the relative nature of the work test is unsatisfied: Mr. Mack worked security, which was not always needed by Look Lounge and was provided by a separate business. *See* HT at 26. The second prong is also unmet, particularly when the third factor is considered: in this case, the duration of work was intermittent and dependent upon the needs of managers on any given night. HT at 21, 25. Although some bars might retain in-house security personnel as part of their staff, the evidence demonstrated that Look Lounge did not do so. *See Id.* Instead, it contracted with a third party for security services: Grant & Associates. *Id.*

Under the "right to control" test, the factors to be considered in determining whether an employment relationship existed are: "(1) the selection and engagement of the individual hired, (2) the payment of wages, (3) the power of the one who hires over the other whom he has hired, and (4) whether the service performed by the person hired is a part of the regular business of the one who hired." *Spackman v. District of Columbia Dep't of Emp't Servs.*, 590 A.2d 515,516 (D.C. 1991).

Mr. Mack did not satisfy the requirements of the right to control test. Under the first factor, Grant & Associates hired Mr. Mack, not Look Lounge. *See* HT at 30: 19-31: 1. With regard to the second factor, only Grant & Associates paid Mr. Mack's wages. HT at 22 (payments were made to Grant & Associates, not Mr. Mack); EE 7 (financial records). At the formal hearing, Mr. Kosmides testified that all payments for security were made payable to Grant & Associates. HT at 22; EE 7. Under the third factor, Grant & Associates was "100 percent responsible for all security personnel" and decided which personnel would arrive after Look

Lounge requested security services. HT 21. Finally, under the fourth factor, the services performed by Mr. Mack, including at the time of the incident when he was addressing an altercation outside Look Restaurant was a regular part of the work of Grant & Associates, a security company. HT at 21.

I conclude by a preponderance of the evidence that Mr. Mack was the employee of Grant & Associates, not Look Lounge, at the time of the accident.

CO at 3-4.

Indeed, Claimant concedes in argument that while he was *previously* employed by Look Lounge and Restaurant, on September 8, 2013, he was scheduled to work for Grant and Associates.

We determine the CO conclusion that Claimant failed to show that an employer/employee relationship existed with Employer is supported by the substantial evidence in the record and in accordance with the law.

CONCLUSION AND ORDER

The January 29, 2016 Amended Compensation Order is **AFFIRMED**.

So ordered.