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 (Dir. Dkt.) **No. 04-51**

RUPERT D. BAREFOOT,

Claimant – Respondent,

v.

D.C. WATER AND SEWER AUTHORITY AND PMA MANAGEMENT CORPORATION,[1]

Employer/Carrier – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Amelia G. Govan
OHA No. 04-008, OWC No. 589875

Douglas A. Datt, Esq., for the Petitioner

Allen J. Lowe, Esq., for the Respondent

Before: LINDA F. JORY, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *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 §§ 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).[2]

[1] At the formal hearing, the named Carrier was Gallagher Bassett Services, Inc. Via its Opposition to Claimant's Motion to Dismiss and Cross-Motion for Costs, the Respondent indicated that the Gallagher Bassett was replaced by PMA Management Corporation.

[2] 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

BACKGROUND

This appeal follows the issuance of a Compensation 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 Compensation Order, which was filed on April 14, 2004, the Administrative Law Judge (ALJ) granted temporary total disability benefits continuing from March 11, 2003 and medical expenses reasonably related to lumbar symptoms. The Employer/Carrier-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the decision below is arbitrary, capricious, not in accordance with the law and not supported by substantial evidence. Along with its appeal, the Petitioner also filed a Consent Motion to Extend Time Within Which to File Memorandum of Points and Authorities in Support of Employer's Application for Review. In response, the Claimant-Respondent (Respondent) filed a Motion to Dismiss. The Respondent's Motion was followed by the Petitioner's Opposition to Motion and Cross-Motion for Costs, and the Respondent's Amended Motion to Dismiss.

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 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.

Before addressing the merits of the Petitioner's appeal, the timeliness issue raised by the Respondent must be addressed. If the Application for Review is untimely, then the Board is without authority to address the Petitioner's appeal. *See Hughes-Smith v. D.C. Department of Fire and Emergency Services*, Dir. Dkt. No. 01-04, OHA No. PBL 00-043B, OBA No. 002120 (March 23, 2004).

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and disposition of workers' and disability 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.

Pursuant to D.C. Official Code § 32-1522(a), an appeal of a compensation order must be made within 30 days after it is filed with Mayor. In this jurisdiction, AHD has been designated as the agent for the filing and receipt of compensation orders in satisfaction of the term "filed with the Mayor" thereby deeming a compensation order filed as of the date the compensation order is certified as mailed to the parties. *See Williams v. Town Center Management*, Dir. Dkt. No. 97-39, H&AS No. 96-408, OWC No. 296619 (August 27, 1997). Day is defined in the implementing regulations as a calendar day, unless otherwise specified. *See* 7 DCMR § 299.

The Respondent argues that since the Petitioner's Application for Review was filed on May 19, 2004, six (6) days after the statutory thirty (30) day time period had lapsed and since the Petitioner's Memorandum was not filed until five (5) months after the filing of the Application, then the Petitioner's Application should be dismissed. Further, the Respondent argues that as the CRB did not render a decision on the Application with 45 days, pursuant to D.C. Official Code § 32-1522(b)(2), the Compensation is final and, pursuant to D.C. Official Code § 32-1522(b)(3), jurisdiction over this matter has passed to the D.C. Court of Appeals. The Respondent's arguments are rejected.

A review of the record shows that the April 14, 2004 Compensation Order in this case was certified as mailed to the parties on April 14, 2004**.** The Petitioner's Application for Review was filed on May 14, 2004, on the last day of the 30-day time period, and is timely. The record shows that the Respondent consented to the Petitioner's Motion to Extend Time Within Which to File Memorandum of Points and Authorities in Support of Employer's Application for Review. Absent a showing of prejudice, the Respondent's argument is specious.[3] With respect to the application of D.C. Official Code §§ 32-1522(b)(2) and (b)(3), pursuant to D.C. Law 15-205, The Fiscal Year 2005 Budget Support Act of 2004, (December 7, 2004), D.C. Official Code § 32-1522(b)(2) was repealed and D.C. Official Code § 32-1522(b)(3) was amended to strike the language providing for appeal to the D.C. Court of Appeals if the Mayor declines to review a compensation order. Moreover, before D.C. Official Code § 32-1522(b)(2) was repealed, it was well-settled in this jurisdiction that the 45-day timeframe is directory, not mandatory. *Washington Hospital Center v. D.C. Department of Employment Services*, 712 A.2d 1018, 1020 (D.C. 1998).[4] The merits of the Petitioner's appeal will be addressed.

[3] As indicated, the Petitioner requested additional time to submit a Memorandum in support thereof. Although the regulations previously governing appeals required that the memorandum be filed with the Application for Review, it was the policy of the Director, Department of Employment Services to routinely grant requests for extension of time to file a memorandum. However, the policy was abolished with the institution of the CRB, which assumed the appellate responsibilities of the Director, in light of the new statutorily imposed time constraints for issuing decisions. Nevertheless, as the Petitioner's Memorandum was received before this matter was assigned for review, the Petitioner's request is granted and its Memorandum is accepted on its merits.

[4] In his Motion to Dismiss and Cross-Motion for Costs, the Petitioner requested costs pursuant to D.C. SCR-Civil Rule 11 since the Respondent's Motion to Dismiss contained numerous misrepresentations of law and fact. 7 DCMR § 261.4 provides the CRB with authority to utilize the Rules of the D.C. Court of Appeals and the Superior Court Rules of Civil Procedure to resolve procedural issues not addressed in its governing regulations. This authority, however, is not mandatory. Given that the Respondent retracted statements in his Amended Motion to Dismiss, that no prejudice has inured to the Petitioner and that no beneficial purpose would inure to the administrative process as a whole, the request for costs is denied.

Turning to the case under review herein, the Petitioner alleges that the ALJ erred in finding that the Respondent provided timely notice of his injury. The Petitioner asserts that the Respondent's written notice of July 7, 2003 was filed more than thirty (30) days of March 11, 2003, the date on which his injury allegedly manifested itself. As to the Respondent's verbal notice, upon which the ALJ relied in finding that notice was timely, the Petitioner argues that it did not constitute actual notice under D.C. Official Code § 32-1513(d) because (1) when the Respondent informed Ms. Tanya DeLeon that he was unable to come to work due to his back, he indicated that it was due to his earlier July 12, 1994 injury and not due to his recent work activities in 2003; (2) Ms. DeLeon is not the Respondent's supervisor, and (3) that it has been prejudiced in that it was unable to perform an adequate investigation and potentially completing an independent medical examination shortly after the accident was reported. Moreover, the Petitioner asserts that the ALJ committed a legal error by imposing a standard of "significant prejudice" on it, whereas the Act requires only standard of "prejudice."

D.C. Official Code § 32-1513 states:

> (a) Notice of any injury or death in respect of which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death, or 30 days after the employee or beneficiary is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury or death and the employment. Such notice shall be given to the Mayor and to the employer.
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> (b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or, in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.
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> (c) Notice shall be given to the Mayor by delivering it to him or sending it by mail to him, and to the employer by delivering to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or, if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.
>
> (d) Failure to give such notice shall not bar any claim under this chapter:
>
> (1) If the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and its relationship to the employment and the Mayor determines that the employer or carrier has not been prejudiced by failure to give such notice; or

> (2) If the Mayor excuses such failure on the ground that for some satisfactory reason such notice could not be given; or unless objection to such failure is raised before the Mayor at the 1st hearing of a claim for compensation in respect of such injury or death.

Thus, under the Act, an injured employee is required, first and foremost, to provide the employer with written notice of a work injury, said notice containing certain required information, within 30 days of the injury's occurrence or of when the injured employee knew or should have known of the work-connectedness of the injury. The Act further provides that if an injured worker fails to provide written notice then, secondarily, actual notice to the employer will be accepted. Therefore, in analyzing a notice issue, the first question to be answered is whether the injured worker provided written notice within the requisite timeframe.

Herein, the ALJ found that by June 17, 2003, the Respondent knew or should have known that his back problems were related to his recent work activities. The record shows that on June 17, 2003, Dr. Mark Klein, the Respondent's treating physician, opined that the Respondent's March 2003 back problems were in the nature of a repetitive injury and that they were related to his work activities. Claimant Exhibit No. 1. The ALJ further found that the Respondent's written notice of July 7, 2003 was filed within thirty (30) days thereof on July 7, 2003 and was timely. The finding of timely notice is based upon substantial evidence and Panel, accordingly, rejects the Petitioner's arguments on the issue.[5]

On the issue of causality, the Petitioner argues that it presented sufficient evidence to rebut the presumption of compensability via its evidence showing that the Respondent's current back problems are a natural progression of his July 12, 1994 work injury unaffected by any intervening work-related cause. The Petitioner further argues that the evidence shows that the Respondent is not disabled and is able to return to work.

The ALJ found, and her finding is supported by substantial evidence, that the Petitioner rebutted the statutory presumption of compensability via the medical opinion of Dr. Herbert Joseph. The ALJ then continued the inquiry into causality by weighing the evidence in the record as required under the statutory scheme. *See Georgetown University v. D.C. Department of Employment Services*, 830 A.2d 865, 870-871 (D.C. 2003). The ALJ accepted the medical opinions of Dr. Mark Klein, the treating physician, over the opinion of Dr. Joseph, the independent medical examiner because Dr. Klein was familiar with the Respondent's physical condition, his symptoms and his actual work conditions since 1994. *See Lincoln Hockey, LLC v. D.C. Department of Employment Services*, 831 A.2d 913, 919 (D.C. 2003). The Panel discerns no error in the ALJ's action. The Petitioner's argument that Mr. Bastian's testimony on the Respondent's work duties rebutted the presumption is without merit. A review of the Compensation Order shows that the ALJ accepted the Respondent's testimony on his work

[5] Given that the written notice was timely filed in this case, the question of whether the Petitioner received actual notice is moot.

duties, necessarily not accepting Mr. Bastian's testimony, and relied upon it to invoke the presumption in his favor.[6]

Similarly, the ALJ's findings that the Respondent is temporarily totally disabled from March 11, 2003 are supported by substantial evidence in the record and are in accordance with the law in this jurisdiction. The record fully supports the ALJ's thorough, well reasoned decision, and the Panel, therefore, adopts the reasoning and legal analysis expressed by the ALJ in that decision in affirming the Compensation Order in all respects.

CONCLUSION

The Compensation Order of April 14, 2004 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of April 14, 2004 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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SHARMAN J. MONROE
Administrative Appeals Judge

April 18, 2006
DATE

[6] *See e.g. Teal v. D.C. Department of Employment Services*, 580 A.2d 647, 651 (D.C. 1990) (credibility determinations of a hearing examiner are accorded special deference by this court).