GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-055

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2011 SEP 8 AM 10 47

CHUKWUMANYA E. UNIGWE,
Claimant–Respondent,

v.

DOMINION ENTERPRISES and ST. PAUL TRAVELERS,
Employer/Insurer–Petitioner.

Appeal from an Order by
The Honorable Heather C. Leslie
AHD No. 10-387A, OWC No. 659883

Kathryn Lee Harman, Esquire for Petitioner
Matthew J. Peffer, Esquire for Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and JEFFREY P. RUSSELL,[1] *Administrative Appeals Judges.*

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the CRB pursuant to D.C. Code §§32-1521.01 and 32-1522 (2004), 7 DCMR §250, *et seq.*, and the Department of Employment Services (DOES) Director's Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On March 10, 2007,[2] Mr. Chukwumanya E. Unigwe injured his left shoulder on the job. Mr. Unigwe was a manager for Dominion Enterprises ("Dominion").

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[1] Judge Russell has been appointed by the Director of the DOES as a Compensation Review Board ("CRB") Member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

[2] The stipulations listed in the Compensation Order misidentify the date of Mr. Unigwe's accident as September 28, 2008.

Initially, Mr. Unigwe sought treatment with his primary care physician, Dr. Michael Lieberman. Dr. Lieberman referred Mr. Unigwe to Dr. Stephen C. Saddler.

Dr. Saddler treated Mr. Unigwe both before and after Mr. Unigwe's November 21, 2007 arthroscopic surgery. Mr. Unigwe grew dissatisfied with Dr. Saddler's treatment and began authorized treatment with Dr. John J. Klimkiewicz for bilateral shoulder conditions.

Dr. Klimkiewicz intended to treat Mr. Unigwe's right shoulder before reassessing the status of the left shoulder injury. In October 2010, Dr. Klimkiewicz completed a fill-in-the-blank letter indicating Mr. Unigwe's left shoulder would improve with further treatment and was not at maximum medical improvement.

Mr. Unigwe has been assessed by multiple independent medical examination doctors. On March 9, 2010, Dr. Jeffrey H. Phillips opined Mr. Unigwe had reached maximum medical improvement and had sustained a 29% permanent partial impairment of his left arm; Dr. Frank L. Barnes opined Mr. Unigwe had sustained a 15% permanent partial impairment of his left arm.

The parties disagreed as to the extent of Mr. Unigwe's permanent partial disability and proceeded to a formal hearing. In a Compensation Order dated March 10, 2011, an administrative law judge ("ALJ") awarded Mr. Unigwe a 25% permanent partial disability to his left arm.

Mr. Unigwe filed a motion for penalties pursuant to §32-1515(f) of the Act.[3] On May 13, 2011, the ALJ awarded Mr. Unigwe penalties for Dominion's failure to timely pay pursuant to the March 10, 2011 Compensation Order.

In an Application for Review filed on June 15, 2011, Dominion asserts that it mistakenly had stipulated to an incorrect average weekly wage at the formal hearing and that it had attempted to pay permanent partial disability benefits based upon the compensation rate yielded by the "correct" average weekly wage. Dominion also contends Mr. Unigwe is not entitled to permanent partial disability benefits at the same time he is receiving temporary total disability benefits for a different work-related injury.

Mr. Unigwe contests Dominion's appeal on the grounds that it is not timely.

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[3] Section 32-1515(f) of the Act states

> If any compensation, payable under the terms of an award, is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20% thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in §32-1522 and an order staying payments has been issued by the Mayor or court. The Mayor may waive payment of the additional compensation after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

ISSUES ON APPEAL

1. Was Dominion's Application for Review filed timely?

2. Is the May 13, 2011 Order granting penalties for untimely payment pursuant to §32-1515(f) of the Act arbitrary, capricious, an abuse or discretion or otherwise not in accordance with the law?

ANALYSIS

Because the Order on review is not one based on an evidentiary record produced at a formal hearing, the applicable standard of review is whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[4]

Mr. Unigwe has raised the issue of timely appeal. As a matter of law, if an Application for Review is not filed timely, the CRB does not have not have authority to consider the merits of the appeal.

Section 32-1522(2A)(A) of the Act, in pertinent part, provides

> [a] party aggrieved by a compensation order may file an application for review with the [CRB] within 30 days of the issuance of the compensation order. A party adverse to the review may file an opposition answer within 15 days of the filing of an application for review.

Also, 7 DCMR §258.2 provides

> [a]n 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.

7 DCMR §257.1 states

> [f]ilings with the Board of any permitted pleading, including the Application for Review, shall be deemed effective upon actual receipt by the Office of the Clerk.

Finally, 7 DCMR §299 defines the word "day" as a "calendar day, unless otherwise specified in the Act or this chapter;" however, pursuant to 7 DCMR §256.3,

> [t]he Office of the Clerk of the Board shall be open from 8:30 a.m. to 5:00 p.m. on all days except Saturdays, Sundays, and legal holidays, for the purpose of receiving Applications for Review and such other pleadings, motions and papers as are pertinent to any matter before the Board.

Thus, when the thirtieth (30th) calendar day falls on a Saturday, Sunday, or legal holiday, the

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[4] *See* 6 Stein, Mitchell & Mezines, *Administrative Law,* § 51.03 (2001).

deadline is extended to the next business day. *See Jackson v. ECAB,* 537 A.2d 576, 578 (D.C. 1988).

The Order on appeal issued on May 13, 2011. The thirty (30) calendar day period beginning on that date ended on June 12, 2011, a Sunday. Thus, in order to meet the statutory timeframe and to be a timely filing, Dominion's Application for Review must have been filed by the close of business on June 13, 2011. The Application for Review was filed on June 15, 2011 and is not timely.

CONCLUSION AND ORDER

Dominion's Application for Review is **DISMISSED** as untimely filed. Any remaining issues are moot.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

September 8, 2011
DATE