

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. 03-139,

CHARLES DORCHY,

Claimant – Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Jeffrey P. Russell
OHA No. 03-528, OWC No. Unknown

Steven H. Kaminski, Esq., for the Respondent

Eugene I. Kane, Jr., Esq., for the Petitioner

Before LINDA F. JORY, FLOYD LEWIS AND SHARMAN J. MONROE, *Administrative Appeals Judges.*

LINDA F. JORY, *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).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 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 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.

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 October 14, 2003, the Administrative Law Judge (ALJ) awarded Petitioner temporary total disability benefits from June 13, 2002 to July 19, 2002, and from August 19, 2002 to the present and continuing and causally related medical expenses. The ALJ denied an award for retaliatory discharge pursuant to D.C. Code §32-1542 and penalties pursuant to §32-1528. The Self-Insured Employer-Petitioner (Petitioner) now seeks review of that Compensation Order.

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. App. 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.

Petitioner asserts at least ten errors believed to have been made by the ALJ. Inasmuch as Petitioner has failed to file a Memorandum of Points and Authorities to support and explain each allegation, the panel finds no justification to list all ten allegations.

Respondent filed a Memorandum of Points and Authorities in support of its Opposition to Employer’s Petition for Review with the Director on November 16, 2003. On November 24, 2003, Respondent filed a Motion to Dismiss Employer’s Petitioner for Director’s Review asserting that the Petition for Review was not timely filed. In a letter to the Director on February 3, 2004, Respondent noted Petitioner had not opposed Respondent’s motion to dismiss nor had Petitioner filed its Memorandum of Points and Authorities. Respondent again asked that Petitioner’s Petition for Review be dismissed.

The question before the Panel at this juncture is whether the Petitioner’s letter to the Director of the Department of Employment Services (the Director) sent and received via facsimile on March 5, 2004 constitutes a timely filed Application for Review.

7 D.C.M.R § 230.2 states:

Within thirty days (30) days from the date shown on the Certificate of Service of the Compensation Order, any party may seek the Director's review by filing with the Director two (2) copies of an Application for Review, any memorandum of points and authorities in support of the application which the party desires to have considered, and a certification that copies of the application and memorandum have been served, by mail or personal delivery, upon the opposing party. The party shall also file a copy of the Application for Review with the Office of Hearings and Adjudication.

The Compensation Order in this case was issued on October 14, 2003. The certificate of service attached to the Compensation Order shows that it was sent, via certified mail, to Petitioner at the same address Petitioner has listed as the return address. Pursuant to the regulations promulgated to administer the Act, Petitioner should have filed an Application for Review with the Director within 30 days of October 14, 2003 or by November 13, 2003.

Petitioner's Petition for Director's Review was received by the Director's office on November 14, 2003. The certificate of service attached to Petitioner's Petition for Director's Review demonstrates Petitioner did not attempt to file its appeal before November 14, 2003 as the service sheet shows a date of November 14, 2003.

Upon consideration of the timeliness of Petitioner's initial filing, the Panel is mindful that the filing of a statute of limitations is subject to waiver, estoppel and equitable tolling when equity so requires. *See Solomon Negussie v. Florida Market Chevron*, CRB No. 05-18, AHD No. 03-500, OWC No. 578967, *citing Covington v. Metro Pet Pals LLC*, CRB No. 03-965, AHD No. 02-448A, OWC No. 583242 (March 18, 2005).

Petitioner in the instant matter has not only failed to submit its Memorandum of Points and Authority in support of its appeal, it has failed to respond to Respondent's Motion to Dismiss for an untimely filing. Accordingly, the Panel has no knowledge as to why the Petition for Director Review was filed outside the 30 day time limit for filing under the Act. Accordingly, the Panel cannot make a determination that equity would require a waiver of the 30 day time limit pursuant to 7 D.C.M.R §230.2.

In that Petitioner's Application for Review is untimely, the Panel is without authority to address the merits of Petitioner's appeal or Respondent's reply or review the record before the ALJ. *See Gooden v. The Washington Post*, CRB (Dir. Dkt.) No. 04-44, OHA No. 97-25A; OWC No. 279073 (March 14, 2005).

CONCLUSION

Petitioner's Application for Review was not timely filed pursuant to the Act. The Board is, therefore, without authority to address the Petitioner's appeal or review the record created by the ALJ. *See Gooden, supra.*

ORDER

The November 14, 2003 Application for Review is hereby DISMISSED, as untimely filed.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

November 29, 2005
DATE