

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-026 (R)

FRANCES JOHNSON,
Claimant,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS,
SELF-INSURED EMPLOYER.

Upon Remand from the District of Columbia Court of Appeals
DCCA No. 12-AA-9

Regarding an Appeal from a Compensation Order by
Administrative Law Judge Fred D, Carney, Jr.
AHD No. PBL10-029A, DCP No. 30081118088-0001

Robert J. Magovern, Esquire, for the Claimant
Justin Zimmerman, Esquire, for Self-Insured Employer

Before: LAWRENCE D. TARR, HENRY M. MCCOY, and HEATHER C. LESLIE,¹ *Administrative Appeals Judges*

LAWRENCE D. TARR, *Administrative Law Judge*, for the Review Panel:

DECISION AND REMAND ORDER

This case is before the Compensation Review Board (CRB) on the Order entered by the District of Columbia Court of Appeals (DCCA), *Johnson v. District of Columbia Department of Employment Services (DOES)*, No. 12-AA-9 (August 14, 2012). That Order granted DOES's consent motion to remand this case for further consideration of the CRB's in *Johnson v. District of Columbia Department of Public Works (DCPW)*, CRB No. 11-026 (December 2, 2011) and remanded this case "for further proceedings consistent with the statement made in (DOES's) motion."

For the reasons stated below, we REMAND this matter to the Hearings and Adjudication Section, Office of Hearings and Adjudication.

¹ Judge Leslie is appointed by the Director of the Department of Employment Services as a CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

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BACKGROUND FACTS AND PROCEDURAL HISTORY

The claimant, Frances Johnson, worked for the District of Columbia Department of Public Works. Ms. Johnson alleged she sustained multiple work-related injuries on November 17, 2008, when she was struck by a street sweeper. On November 24, 2008, she filed a claim for benefits that was denied by the employer on December 18, 2008 because the claimant abandoned her claim because she failed to file supporting documentation.² The notice denying the claim advised the claimant that she could request reconsideration within 30 days.

The claimant disputed that she failed to file the documentation but did not request reconsideration until November 13, 2009, 11 months later. The employer denied the claimant's reconsideration request on December 16, 2009, because it was untimely filed. The employer's denial, titled "Final Decision on Reconsideration," advised the claimant that she had 30 days from December 16, 2009, to request a formal hearing with the Office of Hearings and Adjudication (OHA).

The claimant did not file a request for hearing with the OHA. Instead, on January 5, 2010, the claimant filed her Application for Hearing (AFH) with the Office of Workers' Compensation (OWC). OWC sent the AFH to the employer which, in turn, sent the AFH to OHA. The AFH was received by OHA on January 20, 2010, more than 30 days after the Final Decision on Reconsideration issued.

On January 25, 2010, OHA sent the claimant a letter telling her that OHA "received an incomplete Application for Formal Hearing from you on January 20, 2010" but that the Application was incomplete because it failed to include certain required documentation. The claimant re-filed her Application with the proper documentation on January 27, 2010.

ALJ Fred D. Carney, Jr. held two hearings.³ The first hearing involved extensive discussions between counsel and the ALJ. No evidence was taken. Towards the end of the first hearing, the claimant advised the ALJ that she wanted to withdraw her application for formal hearing. The next day, September 9, 2010, the ALJ entered the following Order:

On September 8, 2010, Frances Johnson, [sic] verbally requested to withdraw her application for formal hearing to allow her adequate time to prepare. Based on Claimant's request the application for formal hearing is hereby DISMISSED without prejudice. Claimant may re-file her application at a later date.

The claimant re-filed her AFH and an evidentiary hearing was held on December 13, 2010 before the same ALJ.

² In 2008, the employer's workers' compensation claims program was administered by the District of Columbia Disability Compensation Program. In 2010, the program changed its name to the Public Sector Workers' Compensation Program. For this decision, we shall use "employer" to refer to both the employer and the Program.

³ At both hearings, the claimant was represented by William Howard, Esquire.

Consistent with the discussions at the beginning of the second hearing, the ALJ's March 15, 2011, CO listed the following issues for determination:

- 1 Whether Claimant is barred from seeking a formal hearing for untimely application for formal hearing.
2. Whether Claimant's current impairments if any, are causally related to her employment.
3. Whether Claimant filed a timely claim for benefits.
4. Determine the nature and extent of Claimant's disability if any.

The ALJ determined that the claimant did not file her AFH within the requisite time:

The evidence of record indicates that Claimant filed an earlier request for a formal hearing on the December 16, 2009 denial. The administrative file indicates that on January 20, 2010, a Staff Assistant, with AHD wrote a letter to Claimant in which she informed Claimant that her application for formal hearing was received on January 20, 2010 and it was incomplete. The administrative file further indicates that on January 27, 2010, AHD received a facsimile with the December 16, 2009 Final Decision of Reconsideration attached to complete Claimant's Application for Formal Hearing. Claimant's application for formal hearing is marked received January 27, 2010, which is beyond thirty days of the December 16, 2009 decision.

CO at 3.

Therefore, the ALJ dismissed the claimant's AFH:

Based upon a review of the record evidence as a whole, I find and conclude that Claimant's application for formal Hearing was received out side of the statutory timeframe allotted to request a formal hearing. Therefore Claimant's Claimant's [sic] Application for Formal Hearing was untimely and Employer's motion to dismiss must be **GRANTED**.

Id. at 4.

The CRB affirmed. *Johnson v. District of Columbia Department of Public Works (DCPW)*, CRB No. 11-026. CRB No. 11-026 (December 12, 2011). The claimant appealed the CRB's decision to the DCCA.

During the pendency of the appeal, the parties submitted a Consent Motion, in which they asked that the matter be remanded and:

Following the remand from this Court, the CRB is to remand the case to the Administrative Law Judge for further proceedings, Respondent [employer] intends to request that the Administrative Law Judge make findings and render a decision

concerning the timeliness of [claimant's] November 13, 2009 Request for Reconsideration. It is [claimant's] position that the issue of the timeliness of petitioner's November 13, 2009 Request for Reconsideration has been waived by [employer], litigated and decided both by the Administrative Law Judge and the CRB. [Claimant] therefore believes that this issue can no longer be raised before the Administrative Law Judge. [Employer] disagrees. If this issue is resolved favorably to [claimant], the Administrative Law Judge will then address the merits of petitioner's claim for public sector workers' compensation. If it is not, the case will be concluded.

The Consent Motion was accepted by the DCCA. The CRB's decision was vacated and "the case remanded to the administrative agency for further proceedings consistent with the statements made in respondent's motion."

DISCUSSION

The effect of the DCCA's Order is to reverse the ALJ's decision, affirmed by the CRB, that the claimant's AFH was not timely filed. The remaining issue for determination relate to an issue that was talked about at both hearings but not decided; whether the claimant's was barred from seeking a formal hearing because she did not request within 30 days, pursuant to D.C. Code §1-623.24 (a-4), reconsideration of the employer's December 18, 2008 decision denying her claim.

The Consent Motion identified certain legal positions presented by the claimant that are appropriate for determination by the CRB now and others for which we must remand this case to the Hearings and Adjudication Section, Office of Hearings and Adjudication. We shall discuss them in the order that they were stated in the Consent Motion.

The CRB first determines that the employer has not waived the issue of whether claimant's reconsideration request was timely. Throughout the evidentiary hearing counsel for the employer asserted that the claim was not timely because the claimant did not ask for reconsideration within 30 days.

We further determine hold that this issue was not litigated and decided. Neither the ALJ's CO nor the CRB's Decision and Order state any decision on this issue. Although the sequence of events regarding the filing of the claimant's reconsideration request is identified in the CO and in that sense was litigated, the ALJ did not make any legal findings as to the legal effect of the claimant's filing a reconsideration request 11 months after her claim was denied nor did the ALJ analyze this issue with respect to the legal precedent.⁴ The CO only decided whether the AFH was timely, an issue no longer contested by the employer.

⁴ See, for example, *Marsden v. DCPS*, CRB 10-023, AHD PBL09-057, DCP 30081237224-0001 (June 27, 2011), *Felder v. DCPS*, CRB 10-011, AHD No. PBL09-037, DCP 200712352288-0001 (May 20, 2011), *Lee v. DCDOC*, ECAB No. 95-15 (October 2, 1996) *Shabazz v. DCPS*, CRB 11-015, AHD No. PBL 06-019C, DCP M7-BOEDU002611 (March 8, 2012) and *Williams v. DCPR*, CRB 08-125, AHD No. PBL 07-029, DCP No. 761013-0001-2005-0007 (July 31, 2008). These cases are identified for illustrative purposes only and should not be considered a complete list of all cases that involved this issue.

Therefore, we must remand this case to the Office of Hearings and Adjudication for a determination as to whether the claim is barred because the claimant did not timely file a reconsideration request.

Lastly, we must also note that during the hearing, the employer raised another issue regarding the ALJ's authority to hear the claim that must be decided by the ALJ.

At the evidentiary hearing, the employer pointed out that it never issued a final determination with respect to the claim - it denied the claim because it believed the claimant had failed to file certain necessary documents. The employer argued that even if the ALJ found that the claimant's reconsideration request and her AFH were timely, AHD did not have jurisdiction to hear the claim because the employer had not issued a final determination.

After the ALJ's CO, the CRB's decision, and the DCCA's Order, the CRB decided *Sisney v. DCPS*, CRB No. 08-200, AHD No. PBL08-066, DCP No. DCP007970 (July 2, 2012). On remand, the ALJ shall also consider the applicability of the *Sisney* decision to this case, if he determines that the claim is not barred because the claimant did not timely file a reconsideration request.

ORDER

This case is remanded to the Office of Hearings and Adjudication for such further proceedings that are consistent with this decision and the Order of the DCCA.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Lawrence D Tarr
LAWRENCE D. TARR
Administrative Appeals Judge

October 2, 2012
DATE