

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 No. 07-119,

JOYCE A. MORTON,

Claimant – Petitioner

v.

DISTRICT OF COLUMBIA FIRE AND EMERGENCY SERVICES,

Employer-Respondent.

Appeal from an Order Dismissing an Application for Formal Hearing of
Administrative Law Judge Terri Thompson Mallett
AHD No. PBL 05-030A, DCP No. DMPSJ006983

Heather C. Leslie, Esq., for the Petitioner

Pamela L. Smith, Esq., for the Respondent

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

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §1-623.28, 32-1521.01, 7 DCMR § 118, and the Department of Employment Services (DOES) 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 an Order of Dismissal of an Application for Formal Hearing (AFR) 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 Order, which was filed on May 11, 2007, the Administrative Law Judge (ALJ) dismissed Claimant-Petitioner's (Petitioner) Application for Formal Hearing for lack of jurisdiction. Petitioner now seeks review of that Order pursuant to the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. Official Code §1-623.1 (2001)(the Act) .

Specifically, Petitioner asserts the dismissal of the AFR is contrary to the prior ruling of the CRB in *Tellish v. D. C. Public Schools*, CRB No. 07-001, AHD No. PBL No. 05-028A, DCP No. DCPS 007013 (February 16, 2007) (*Tellish 1*), in that a fact pattern virtually identical to that in *Tellish 1* is presented here, and that the ALJ's dismissal was erroneous and made in knowing contravention of the rule in *Tellish 1*.²

Respondent has filed a response which asserts that the matter ought to be remanded to DCP for such further action as may be appropriate under applicable provisions of the D.C. Comprehensive Merit Personnel Act, and echoing the ALJ's theory that AHD lacks jurisdiction to conduct a formal hearing in the absence of a written determination from the Office of Risk Management (ORM).

Because the dismissal of the AFR is contrary to law, we vacate it, and remand the matter to AHD for further proceedings, including the conduct of a formal hearing.

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 to determine whether the factual findings in a 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 §§ 1-633.28(a) and 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 an 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.

² Similarly, the ALJ in *Tellish 1* refused to follow the instructions of the CRB relating to AHD's having jurisdiction to entertain an AFR in these circumstances, and that erroneous decision has again been reversed in *Tellish v. Dist. of Columbia Public Schools*, CRB No. 07-111 (Decision and Remand Order June 28, 2007)(*Tellish 2*). In neither of these cases has either of the ALJs identified any basis or authority under which they can properly ignore the decisions of the CRB and the Directive of the Director discussed in footnote 1 hereof.

We have reviewed the order and the transcript³ of the proceedings that led to the dismissal of the AFR, and it is evident that the Petitioner accurately describes the actions of the ALJ in this case. That is, despite being apprised and aware of the substance of the CRB decision in *Tellish 1*, the ALJ expressed her view that *Tellish 1* was wrongly decided and that she would therefore not follow it, concluding that AHD lacks jurisdiction to entertain an AFR in the absence of a written determination from ORM. The ALJ recited a portion of the language of the Act, notwithstanding that the CRB had determined in *Tellish 1* that AHD does in fact have the necessary jurisdiction to conduct a formal hearing where, as here, ORM has failed either to issue a written determination or provide a notice advising that extenuating circumstances prevent the issuance of such a written determination, within 30 days of the filing of a claim.

Putting aside that the ALJ's improperly ignored the decision of the CRB in *Tellish 1*, the ALJ is wrong regarding the assertion that the statute in question fails to authorize the formal hearing process to commence prior to a written determination.

While the Act contemplates a written determination prior to a formal hearing, the Act was recently amended, and those amendments provide that the failure of the Mayor, in this case meaning ORM, to make a written determination accepting or rejecting a claim within a specified 30 day period, results in the claim being "deemed accepted". In other words, the failure to issue a written decision within that period, or to send the required statutory notice of "extenuating circumstances", is a statutorily created exception to the requirement of an actual written determination. That is the meaning of the usage "deemed accepted"; it is a statutory instruction that the claim be treated *as if* a written determination has been made. Of course, there are complicating factors, such as the fact that the "deemed acceptance" means not only that the matter be treated "as if" a written determination has been issued, but also that it be treated "as if" that written determination was a written acceptance of the claim. The ramifications that such a written determination would have on a case and its outcome will depend upon the facts of the case, and are for the ALJ to decide in the first instance; however, to the extent that a written determination is needed to invoke AHD jurisdiction, the Act instructs, commands and requires that a failure to issue that decision or a notice of extenuating circumstances within the 30 day period be treated "as if" a written determination has been issued. The Act specifies the

³ In that transcript there is some reference to the possibility that ORM issued a document that might amount to the statutorily contemplated notice of extenuating circumstances, which if issued would have rendered moot the question of whether there is jurisdiction to conduct a formal hearing based upon the "deemed acceptance" language of the Act. Presumably, such a notice is all that is required to obviate the "deemed acceptance" of a claim, and hence, the jurisdiction to conduct a formal hearing, and, given that the Act contains no standards setting forth what circumstances may exist that are "extenuating", a determination as to what constitutes such an extenuating circumstance presumably rests solely with ORM. That is because DOES continues to exercise the authority to adjudicate claims under the Act, the statutory and practical responsibility for administration of the disability compensation system for District of Columbia employees rests with ORM, not DOES, which originally but no longer had that responsibility. However, no such document is referenced in the ALJ's order, and it is not sufficiently described in the transcript for us to reach a conclusion as to whether it constitutes such a notice.

consequences of ORM's failure to issue the determination or notice within 30 days, and neither we nor the ALJ are free to ignore that specified consequence.⁴

As the CRB explained in *Robert Rovinski v. American Combustion Industries*, CRB No. 07-91, AHD No. OWC No. 576295 (June 5, 2007)(*Rovinski*), "While an ALJ may disagree with a decision of the CRB, detecting and correcting errors as it may commit is the province of the DCCA, not AHD", citing, *Providence Hospital v. District of Columbia Department of Employment Services*, 855 A.2d 1108, 1111 (D.C. 2004); *UPS v. District of Columbia Dept. of Employment Services*, 834 A.2d 868, 871 (D.C. 2003). The Panel in *Rovinski* further explained, "Disregarding the clear instructions of the CRB on remand serves only to delay the adjudication of claims and ultimately the correction of any error the CRB may have committed". *Rovinski, supra* at 5. Cf. *Washington Metropolitan Area Transit Authority v. DOES (Juni Browne, Intervenor)* ___ A. 2d ___ (June 14, 2007) (The CRB is constrained to remand matters to AHD with instructions to enter an order consistent with its opinion but cannot issue and award of compensation). We also repeat that our authority in connection with the review of decisions concerning adjudication of claims under the Act derives from a written policy directive from the Director of the agency as set forth in footnote 1 above, and in every decision and order that we issue under the Act.

CONCLUSION

AHD has the necessary jurisdiction to hear Petitioner's Application for Formal Hearing, and the dismissal of the AFR is contrary to the law.

ORDER

The Order of May 11 2007 herein appealed is **VACATED** and this matter is remanded to AHD for further proceedings consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

June 28, 2007
DATE

⁴ In contradistinction, the Act similarly requires that AHD issue a decision within 30 days of a formal hearing; however, unlike the provisions relating to the written notice of determination, the Act specifies no consequence for a failure by AHD to issue a decision in a timely manner. See, D.C. Code § 1-623.24 (b)(1).