

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. 05-18

SOLOMON NEGUSSIE,

Claimant – Petitioner

v.

FLORIDA MARKET CHEVRON AND UTICA NATIONAL INSURANCE GROUP,

Employer/Carrier – Respondent

Appeal from a Compensation Order of
Administrative Law Judge E. Cooper Brown
OHA No. 03-500, OWC No. 578967

Raymond M. Hertz, Esq., for the Petitioner

Michael T. O'Bryant, Esq., for the Respondent

Before SHARMAN J. MONROE and LINDA F. JORY, *Administrative Appeals Judges* and FLOYD LEWIS, *Acting Administrative Appeals Judge*.

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).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

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 November 26, 2003, the Administrative Law Judge (ALJ) awarded the Claimant-Petitioner (Petitioner) permanent partial disability based upon a 6% permanent partial disability to his left arm. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the ALJ failed to consider the opinion of Dr. Harvey Mininberg in its entirety or, in the alternative, to render an independent determination on the Petitioner's disability rating, in making the disability award to the Petitioner's his left arm.

In his Memorandum in Support of Application for Review, the Petitioner avers, in a footnote, that although the Certificate of Service attached to the Compensation Order indicates that it was sent via certified mail to the counsel for the Petitioner, counsel for the Respondent and the Petitioner on November 26, 2003, the AHD file contains no evidence that the Compensation Order was sent and none of the forenamed individuals received the Compensation Order. The Petitioner asserts that his counsel first learned that the Compensation Order was issued on November 1, 2004 and that it was mailed to him by regular mail on that date. Memorandum in Support of Application for Review at p. 2.

Before addressing the merits of the Petitioner's Application for Review, the question of whether the Petitioner's Application for Review was timely filed must be addressed. While the Respondent did not raise the question, if the Application for Review is untimely, then the Panel is without authority to address the Petitioner's appeal. *See Gooden v. The Washington Post*, CRB (Dir.Dkt) No. 04-44, OHA No. 97-25A; OWC No. 279073 (March 14, 2003).

Under the Act, an Application for Review must be filed within thirty (30) days from the date that the compensation order is certified as having been 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. D.C. Official Code § 32-1520 (e) states that a compensation order shall be sent by registered or certified mail to the claimant and to the employer at the last known address of each.

The Compensation Order in this case was certified as having been mailed on November 26, 2003. Thus, the parties had until December 26, 2003 to file an Application for Review. The Petitioner's Application for Review was filed on December 1, 2004, clearly outside of the statutory timeframe.

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.

In deciding this issue of timeliness, the Panel takes administrative notice of the contents of the AHD official file and records in this case. While the address shown on the Certificate of Service for the counsel for the Petitioner is “7307 ‘A’ Hanover Parkway, Greenbelt, MD 20770”, his last known address of record, the address shown in U.S. Postal Service certified mail registry bearing the official postal mark of November 26, 2003, which is maintained by AHD, reveals that the Compensation Order² for 03-500 was sent, via certified mail, to counsel for the Petitioner at “6401 Golden Triangle Drive, Suite 120, Greenbelt, Maryland 20770”.

It is clear that the address for the Petitioner’s counsel to which the Compensation Order was sent was not his “last known address”. Under these circumstances, the service of the Compensation Order was ineffective and the 30-day timeframe for filing an application for review was tolled until service was effected, *i.e.*, the Compensation Order was mailed to the Petitioner’s counsel. *See Allen v. District of Columbia Department of Employment Services*, 578 A.2d 687 (D.C. 1990).³

The Petitioner’s counsel alleges that the Compensation Order was sent to him via regular mail, *i.e.*, served, on November 1, 2004 after he called AHD to inquire into the status of the case. The Panel, in this instance, accepts the representation of the counsel for the Petitioner that the Compensation Order was mailed on November 1, 2004 given that he is an officer of the court and, more importantly, given that the Respondent has not challenged the veracity of the representation.⁴ The Application for Review was filed on December 1, 2004, within the statutory 30-day timeframe.⁵

As to the merits of the Petitioner’s appeal, the record was thoroughly reviewed and the Panel finds that the ALJ’s factual findings are supported by substantial evidence on the record as a whole, and are, therefore, conclusive. *Marriott Int’l. v. Dist. of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003); D.C. Workers’ Compensation Act of 1979, as amended, D.C. Code Ann. § 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Further, the ALJ’s conclusions of law are in accordance with the law. We defer to and accept the ALJ’s credibility determinations as well. *See Nasser v. Moran Limousine Services*, Dir. Dkt. No. 91-80, H&AS No. 90-818 (September 9, 1992). The record fully supports the ALJ’s thorough, well

² Although the registry does not indicate what type of correspondence was sent, it is reasonable to assume that the Compensation Order in this case was sent because the postmarked date matches the date on the Certificate of Service.

³ Although an argument may be made that the 30-day period begins to run on the date the Compensation Order is received by a party or the party’s representative, to begin the 30-day period at that time would be contrary to the Act and its regulations. *See Thompson v. District of Columbia Department of Employment Services*, 848 A.2d 593 (D.C. 2004).

⁴ The filing of a timely appeal is not a jurisdictional prerequisite to appellate review, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling when equity so requires. *See Covington v. Metro Pet Pals LLC*, CRB (Dir.Dkt.) No. 03-96, OHA No. 02-448A, OWC No. 583242 (March 18, 2005).

⁵ The position that the Panel has taken on the question of when the Compensation Order was mailed to the Petitioner’s counsel, thus causing the 30-day period to run anew, is reserved for this case and is in no manner a practice, procedure or policy of the CRB.

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.⁶

ORDER

The Compensation Order of November 26, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD

SHARMAN J. MONROE
Administrative Appeals Judge

July 25, 2005
DATE

⁶ D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(B) requires a more detailed and thorough written order than the instant Decision and Order where there is a reversal of the Compensation Order.