

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. 04-19

WESLEY OZIER,

Claimant – Petitioner,

v.

MONARC CONSTRUCTION AND HARTFORD INSURANCE GROUP,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
OHA No. 02-085, OWC No. 545383

Kirk. D. Williams, Esq., for the Petitioner¹

Matthew Devries, Esq. and Francis H. Foley, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

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).²

¹ At the formal hearing, the Petitioner was represented by Marshall F. Berman, Esq. When this matter was remanded for further proceedings, the Petitioner was without legal representation and appeared *pro se*. Via his Application for Review of the Compensation Order on Remand, the Petitioner is now represented by Kirk D. Williams, Esq.

² 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

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 on Remand, which was filed on December 22, 2003, the Administrative Law Judge (ALJ) denied the requested relief for temporary total disability benefits from May 5, 2001 to September 30, 2001. The Petitioner now seeks review of that Compensation Order on Remand.

As grounds for this appeal, the Petitioner alleges that the decision below is contrary to the law and not supported by substantial evidence. The Petitioner also requested leave for additional time to file his Memorandum of Points and Authorities in support of his Application. In response, the Employer-Respondent (Respondent) filed an Opposition to the Claimant's Request for Leave. Therein, the Respondent asserts that the Application for Review is untimely filed and moves that it be dismissed. In his Reply, the Petitioner maintains that his Application is timely filed.

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.

Before addressing the merits of the Petitioner's appeal, the timeliness issue raised by the Respondent must be addressed. If the Application for Review is untimely, then the Board is without authority to address the Petitioner's appeal. See *Hughes-Smith v. D.C. Department of Fire and Emergency Services*, Dir. Dkt. No. 01-04, OHA No. PBL 00-043B, OBA No. 002120 (March 23, 2004).

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.

The Respondent asserts that the Compensation Order on Remand was issued on December 22, 2003 and that, pursuant to D.C. Official Code § 32-1522 (a), the Petitioner was required to file an Application for Review within thirty (30) days of December 22, 2003. The Petitioner argues that he received the Compensation Order on Remand on or around January 16, 2004 and that the thirty (30) day period for filing an application began to run on January 16, 2004.³ He cites 7 DCMR § 228.4 as support for his argument that his February 13, 2004 application is timely filed.

7 DCMR § 228.4 states:

Whenever the Act or this chapter provides a time period during which an action is to be taken, unless otherwise expressly provided, the time period shall run from the actual receipt of a document.

At the time the Petitioner's appeal was filed in 2004, the regulations governing administrative and judicial review of compensation orders under the Act were found at 7 DCMR §§ 230.1 through 230.13.⁴ 7 DCMR § 230.2, in pertinent part, stated:

Within thirty (30) days from the date that a compensation order is filed as provided in § 21(e) of the Act (D.C. Code § 36-320(e), (1981), any party may seek the Director's review . . .

D.C. Official Code § 32-1520(e), formerly D.C. Code § 36-320(e), states:

The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed with the Mayor, and a copy thereof shall be sent by registered or certified mail to the claimant and to the employer at the last known address of each.

In this jurisdiction, AHD has been designated as the agent for the filing and receipt of compensation orders in satisfaction of the term "filed with the Mayor" thereby deeming a compensation order filed as of the date the compensation order is certified as 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.

The record shows that the Compensation Order on Remand was certified as being mailed on December 22, 2003. The Petitioner was accorded thirty (30) calendar days therefrom within which to file an Application for Review. In other words, the Petitioner had until January 21, 2004 to file an Application for Review. His Application, however, was not filed until February 13, 2004.

³ The Petitioner's assertion is not supported by any evidence nor is any explanation proffered for the alleged 25-day delay between the mailing date on the certificate of service and the Petitioner's receipt date.

⁴ With the establishment of the CRB, 7 DCMR § 230 was repealed and replaced by 7 DCMR §§ 250 through 271 which became effective as emergency rulemaking on September 9, 2005 and as final rulemaking on December 8, 2005.

The Panel rejects the Petitioner's assertion, in reliance on 7 DCMR § 228.4, that the 30-day period began to run on January 16, 2004 because he received the Compensation Order on Remand on or around January 16, 2004. The actual receipt language of 7 DCMR § 228.4 is not applicable if there is other language in the Act or regulations providing otherwise. In case of an appeal, the language "otherwise expressly provided" is found in former 7 DCMR § 230.2 and current D.C. Official Code § 32-1520(e), which jointly indicate that an application for review is to be filed within thirty (30) days from the date that a compensation order is filed with the Mayor. The record herein shows, via the Certificate of Service, that the Compensation Order on Remand was "filed with the Mayor" on December 22, 2003.⁵ *See Williams, supra.*

The Petitioner's Application for Review is not timely filed and must be dismissed. *See Washington Hospital Center v. D.C. Department of Employment Services*, 743 A.2d 1208 (D.C. 1999). The merits of his appeal will not be addressed.

CONCLUSION

The Petitioner's Application for Review was not timely filed pursuant to the Act. The Board is, therefore, without authority to address the merits of the Petitioner's appeal of the December 22, 2003 Compensation Order on Remand.

ORDER

The Petitioner's February 13, 2004 Application for Review is hereby DISMISSED, as untimely filed.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

March 23, 2006
DATE

⁵ Assuming *arguendo* that 7 DCMR § 258.2 is applicable to this case given that the appeal is being addressed by the CRB and not the Director, the Petitioner's Application for Review is, nevertheless, untimely. 7 DCMR § 258.2 provides that an application for review must be filed within thirty (30) calendar days from the date shown on the certificate of service. The Certificate of Services attached to the Compensation Order on Remand shows a date of December 22, 2003.