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. 07-020

ROBERT ROVINSKI,

Claimant–Respondent,

v.

AMERICAN COMBUSTION INDUSTRIES AND AIG CLAIMS SERVICES, INC.,

Employer/Carrier–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Terri Thompson Mallett
AHD No. 06-341, OWC No. 576295

Michael S. Levin, Esquire, for the Petitioner

Danny Seidman, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND REMAND 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia 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 28, 2006, the Administrative Law Judge (ALJ) granted Respondent's claim for temporary total disability benefits. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ improperly found that Petitioner had waived the defense of lack of jurisdiction under the Act.

ANALYSIS

As an initial matter, the scope 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. *See* 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). "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 International v. District of Columbia Dep't. of Employment Serv's.*, 834 A.2d 882 (D.C. 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.

Turning to the case under review herein, the fact that Respondent sustained an accidental injury arising out of and occurring in the course of Respondent's employment with Petitioner, and the fact that said accidental injury occurred while Respondent was working for Petitioner in the District of Columbia, were stipulated and are not disputed. It was further stipulated and is not disputed that Petitioner voluntarily paid temporary total disability benefits in connection with this injury from September 17, 2002 through August 10, 2003, and from November 17, 2004 through April 8, 2006, a total of approximately 30 months over a period of more than 3 ½ years. It was not until April 8, 2006 that Petitioner filed a Notice of Final Payment in which, for the first time, it raised lack of jurisdiction as a defense to the claim.

The ALJ determined that, because the Act provides, at D.C. Code § 32-1515 (d) (2001), that an employer file a Notice of Controversion within 14 days after it "has knowledge of the alleged injury or death and its relationship to the employment", Petitioner was barred from raising the instant defense at a later time absent a showing that filing such a notice within the statutory 14 days was not possible. There being no evidence presented by Petitioner to the ALJ that it could not have filed

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administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

such a notice within that time, the ALJ determined that Petitioner had waived the defense. In the words of the ALJ, "[o]nce an employer reviews the facts and determines that there is no dispute that a claimant is covered by the Act pursuant to § 32-1503, and does not file a Notice of Controversion in accordance with § 32-1515 (d), it is forever barred from raising such issue." Compensation Order, page 4.

Petitioner objects to this ruling, arguing in this appeal that, as a general principal, "absent an express provision allowing for waiver of subject matter jurisdiction, jurisdiction cannot be waived", and that given that there is no statutory provision for such a waiver under the Act, there can be none. Petitioner also argues that the ALJ's analysis is facially invalid in that the under 7 DCMR 209.5, an employer or its insurer "shall file a Notice of Controversion with the Office [the Office of Workers' Compensation, in the Department of Employment Services] upon stopping payment for any reason". Memorandum of Points and Authorities in Support of Employer/Carrier's Application for Review, at page 1 and page 2 – 3. Petitioner also asserts that the Act itself provides for cessation of payments that have commenced, requiring that an employer file a notice of final payment within 16 days after a final payment has been made (see, D.C. Code § 32-1515 (g)), as well as providing for "suspension of payment for any cause" and the filing of a notice of such suspension "immediately" upon such suspension (D.C. Code § 32-1515 (c)).

While the Act specifies certain adverse consequences for failing to file a timely Notice of Controversion (i.e., a 10% penalty pursuant to § 32-1515 (e), in the absence of an order to pay such compensation), or for failure to file a notice of final payment (a $100.00 civil penalty pursuant to § 32-1515 (g)), it does not provide for the preclusion or waiver of the defense of lack of jurisdiction, or any other defense, for such failures. Nor does it provide for the imposition of any additional evidentiary burden upon an employer that is late in filing such notices. That the legislature could have provided for such a consequence for such a failure is evident by the terms of D.C. Code § 32-1514 (b), in which the defense of untimely filing of claim is waived by an employer's failure to raise such a defense "at the 1st hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard". The failure of the legislature to enact a similar provision for late filing of a Notice of Controversion or notices of final payment and/or cessation of benefits, renders the creation of such a rule by the ALJ an impermissible usurpation of legislative power, which we reject.[2]

However, as Respondent notes in its opposition to the application for review, Petitioner's blanket assertion that "absent an express provision allowing for waiver of subject matter jurisdiction, jurisdiction cannot be waived" is not entirely accurate, as is apparent upon review of the Court of Appeals decision in *B.J.P. v. R.W.P.*, 637 A.2d 74 (1994), which appears to us to be the most exhaustive discussion to date from the Court of Appeals on the subject of estoppel or waiver, and subject matter jurisdiction.

[2] While not directly relevant to the disposition of this case, we note that the regulations appear to refer to the required filing in the case of a "suspension" or "cessation" of payments as a "Notice of Controversion", while apparently distinguishing between those types of notices on the one hand, and the notice required when a payment represents the final payment to which a claimant is entitled because the entitlement has run its course, as for instance, where a series of payments for a schedule award has come to an end. *Cf.*, 7 DCMR 209.5, 209.6, 209.7, and 209.8.

In that case, the Court held that a litigant in a child custody dispute had in fact waived raising any objection to the jurisdiction of the courts of the District of Columbia, after having initially invoked that jurisdiction at a time when it was to her convenience, but later changing her position, for the first time on appeal, in light of a change in her residence. The court stated that:

> [I]n light of the position taken by the mother below, counsel for the father had no idea, at the time of the motions hearing [at which the mother sought the jurisdiction of the D.C. Courts] that the jurisdiction of the Superior Court would eventually be challenged. Given the convenience of the forum to the mother and its inconvenience to the father, counsel had no reason to anticipate that such an issue would be raised. The father therefore had no occasion to pursue or present the kind of evidence upon which he would have concentrated if jurisdiction had been a contested issue. The mother likewise failed to make any cohesive record on what she now presents as a jurisdictional issue. As a result, she largely relies in her brief on allegedly "undisputed facts" for which no record support is cited and for which it may be that none exists. The appeal therefore comes to us on a record which contains sparse information suggesting any meaningful New York connections. If we were now to reverse the judgment, as the mother suggests, we would surely be required to allow the father to develop an evidentiary record in the trial court, and the mother would receive a brand new opportunity to make a factual presentation which she could have made, but did not make, in the initial proceedings.

Id., at 78. After commenting that "the kind of barristerial about-face which characterizes this case finds little favor in the courts", the Court continued:

> We recognize that, as a general rule, subject matter jurisdiction may not be waived. [citations omitted]. But as the court recognized in *Stewart v. United States*, 199 F.2d 517 (7th Cir. 1952) – a case in which subject matter jurisdiction was at issue – "the word 'jurisdiction' is an elusive and uncertain characterization, depending upon the environment in which it is employed". *Id. at 519*. A consideration of the "environment" in which the jurisdictional issue arises in this case persuades us that the mother's objections to the trial court's authority may be (and here have been) waived, and that it would be inequitable to permit her to raise them for the first time on appeal.
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> The purported lack of subject matter jurisdiction based on territorial considerations – a fair characterization of the asserted defect here – has been held to be analytically similar to improper venue; it does not go to the *power* of the court to adjudicate the case, and may be waived if not asserted in a timely fashion.

Id., (emphasis in original). The Court's discussion of the subject makes clear that it analyzed the matter as both a question of practicality and of equity or fairness. While administrative agencies lack the inherent equitable powers of the courts (see, *Ramos v. District of Columbia Dep't. of Consumer and Regulatory Affairs*, 601 A.2d 1069 (1992)), the primary concern that we discern in the Court's discussion in *B.J.P.* is practical, with emphasis being given to the problems posed by first raising the matter on appeal after the record had been made, necessitating further proceedings

and delay if the party was permitted to raise a new issue on appeal which could easily have been raised previously, and which the passage of time has made more difficult.

Such concerns are shared by this agency in administering the Act, and in cases such as this, where a delay in raising a defense which is "territorial in nature"[3] places a claimant at risk of losing benefits not only in this jurisdiction, but also in other jurisdictions which no doubt have time limits upon bringing workers' compensation claims, there are implications relevant to the humanitarian purposes of the workers' compensation statute to consider.

We hold that neither the failure to file a Notice of Controversion within the statutory 14 days, nor the failure to file the other notices required upon cessation or suspension of payments already commenced, within the specific times set forth for said filing, results in either the waiver of any defenses otherwise available under the Act or the imposition of any additional evidentiary burdens upon an employer that seeks to raise them[4].

Nevertheless, an unreasonable delay in raising the particular venue-based jurisdictional defense that has herein been raised (which, as discussed in footnote 3, *infra*, does not implicate the underlying authority of the agency to adjudicate the subject of the case, a workers' compensation claim arising from an injury occurring in the District of Columbia) may in certain instances preclude its being raised at all. To be taken into consideration in resolving the question of whether an employer should be estopped from raising this defense, consistent with the humanitarian purposes of the Act and taking into consideration the Court of Appeals decision in *B.J.P. v. R.W.P., supra*, are such factors as whether the employer had a prior opportunity to raise the issue in informal or formal settings, the potential for hardships imposed upon the claimant in obtaining evidence to support bringing the claim under the Act because of the delay, the potential for additional delays in bringing the claim to resolution, the impact that raising the issue at the later time may have upon a claimant's continuing to obtain needed ongoing medical care, and the effect that the delay might have upon the chances of securing benefits under the laws of some other jurisdiction.

Because the parties do not appear to have been afforded an opportunity to have presented their respective positions on this issue in light of these principles, and because the ALJ decided the issue

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[3] It is apparent from the Compensation Order that the defense sought to be raised is pursuant to D.C. Code § 32-1503 (a-3), on the theory that Respondent's injury, although occurring in the District of Columbia, is excluded from coverage under the Act because the parties are non-residents whose employment relationship exists outside the District of Columbia and whose presence in the District of Columbia at the time of the injury is merely temporary or intermittent. It is notable that a requirement of this exclusion is the availability of insurance in some other jurisdiction covering the injury. Thus, this case presents a venue-based issue, not one of the authority to adjudicate the claim as a proper subject of agency power.

[4] This is not to say that the failure to file a Notice of Controversion might not have some practical impact upon adjudicating the merits of a particular issue. For example, it has been held that the failure to file such a notice at all, or within some reasonable time frame, may assist a claimant in demonstrating entitlement to the imposition of a penalty for the bad faith denial or delay in making payment of compensation. This rule exists because, in the absence of the unlikely admission by an employer's agent that such a delay was "animus-based", proving the required animus by direct evidence is next to impossible, and the failure to file a required notice setting forth the purported reason for the denial or delay creates a permissible inference that no good reason for the delay existed, subject to the employer's still being permitted to establish such a good faith reason by additional evidence. See, *Settles v. Payless Shoe Stores*, Dir. Dkt. No. 99-075, OHA No. 97-096A, OWC No. 503522 (March 8, 2000).

on erroneous grounds, we remand for further proceedings in conformance with the aforegoing discussion.

CONCLUSION

The ruling that a failure to file a Notice of Controversion within 14 days of Petitioner's having knowledge of the work injury herein and its relationship to Respondent's employment created a bar to Petitioner's raising the defense of lack of coverage under D.C. Code § 32-1503 (a-3), or created an obligation upon Petitioner to demonstrate that such notice could not have been filed or such defense could not have been raised within that time frame, is not in accordance with the law and is hereby reversed. The matter must be remanded to AHD for further proceedings and consideration of the question of whether the delay in raising the defense was nonetheless a waiver thereof, in light of the aforegoing considerations as set forth in this Decision and Remand Order, and for such further consideration of such other issues as may be required in light of the outcome of the waiver issue.

ORDER

The Compensation Order of November 28, 2006 is reversed, and the matter is remanded to AHD for further proceedings and consideration in light of the aforegoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

_____January 25, 2007_____
DATE