

**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. 07-91

ROBERT ROVINSKI,

Claimant – Respondent

v.

AMERICAN COMBUSTION INDUSTRIES AND AIG CLAIM 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, Esq., for the Petitioner

Danny R. Seidman, Esq., for the Respondent

Before FLOYD LEWIS, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

SHARMAN J. MONROE, *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 §§ 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

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 April 10, 2007, the Administrative Law Judge (ALJ) granted the relief requested by the Claimant-Respondent (Respondent) after finding that the Employer/Carrier-Petitioner (Petitioner) did not timely file its Notice of Controversion and was, therefore, barred from raising the issue lack of jurisdiction. The Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the decision below is erroneous as a matter of law and must be reversed.

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.

Turning to the case under review herein, the Petitioner asserts that the ALJ failed to comply with the Decision and Remand Order. The Petitioner asserts that the ALJ, while acknowledging the criteria set forth in the aforementioned decision to be considered, failed to make findings of fact on each specific criterion and re-issued the appealed Compensation Order. The Petitioner sets forth its arguments on each of the criterion and requests that the CRB make findings of fact on the issue of jurisdiction.

As it is significant, the history of this case will be set out before the merits of the Petitioner’s appeal are addressed. On November 28, 2006, a Compensation Order issued wherein the ALJ

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.

found that the Petitioner did not timely file its Notice of Controversion and was, consequently, forever barred from raising the issue of lack of jurisdiction under D.C. Official Code § 32-1503(a-3). The ALJ also noted that the Petitioner did not provide any evidence showing it did not know and could not have known that an issue of coverage existed during the four years it paid benefits. The Petitioner timely filed an appeal and on January 25, 2007, the CRB issued a Decision and Remand Order. Therein, the Panel for the CRB, after reviewing the Act, its attendant regulations and case law from the D.C. Court of Appeals (DCCA), stated:

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.

Decision and Remand Order at p. 5.

The Panel went on to state that an unreasonable delay in raising a venue-based jurisdictional defense may, in certain circumstances, preclude jurisdiction from being raised and set forth factors to be examined to determine whether an employer should be so precluded. The Panel stated:

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*,² 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.

Decision and Remand Order at p. 5.

Thus, the Panel attached to the general rule of no waiver, an exception based upon the equitable theory of laches, which is to be analyzed on a case by case basis. The Panel concluded that the ruling in the Compensation Order was not in accordance with the law and reversed it. The Panel remanded this matter for consideration of factors set forth therein to determine whether the Petitioner's delay in raising the defense was unreasonable and thereby precluded.

At this juncture, it is helpful to review the adjudicatory roles assigned to the AHD and the CRB by the provisions of the Act and its regulations.³ Initially, an ALJ in AHD investigates and

² *B.J.P. v. R.W.P.*, 637 A.2d 74 (1994).

³ Under the Act, as written, the appellate role in the workers' compensation administrative process is assigned to the Director, DOES. However, pursuant D.C. Official Code § 32-1521.01 and Administrative Policy Issuance No. 05-01, dated February 5, 2005, the appellate role was reassigned to the CRB. *See* Fn 1, *supra*.

rules on the case, makes findings of fact on each materially contested issue and conclusions of law which follow rationally from the findings, and issues a compensation order granting or denying the claim. *See Dell v. District of Columbia Department of Employment Services*, 499 A.2d 102, 105-06 (D.C. 1985); *Jimenez v. District of Columbia Department of Employment Services*, 701 A.2d 837, 838-839 (D.C. 1997). The CRB then reviews the compensation order by applying the law to the facts and must affirm the compensation order if it is supported by substantial evidence in the record. *Id*; *Marriott*, 834 A.2d at 885. The CRB is bound by an ALJ's findings of fact if supported by substantial record evidence. *See Dell*, 499 A.2d at 107. If an ALJ fails to make factual findings on a materially contested issue, the CRB, as appellate reviewer, is not permitted to make its own finding on the issue but must remand for the proper factual finding. *See Jimenez*, 701 A.2d at 840.

With respect to the conclusions of law, however, the CRB, like the Director previously, has ultimate responsibility within the agency for interpreting the statute the agency administers. Therefore, the CRB reviews the ALJ's conclusions of law *de novo*. *See Harris v. District of Columbia Office of Worker's Compensation*, 660 A.2d 404, 407 (D.C. 1995); *St. Clair v. District of Columbia Department of Employment Services*, 658 A.2d 1040, 1042-44 (D.C. 1995) (per curiam) (sustaining Director's rejection of hearing examiner's interpretation of statute); *KOH Systems v. District of Columbia Department of Employment Services*, 683 A.2d 446, 449 (1996); *Vieira v. District of Columbia Department of Employment Services*, 721 A.2d 579, 582 (D.C. 1998).

In the instant matter, the previous Panel reviewed *de novo*, which was in its province to do, the legal conclusion reached by the ALJ and rejected it as not in accord with the Act.⁴ The previous Panel then held that under the Act, the failure of an employer to file a Notice of Controversion within the 14 days or the failure to file the other notices required upon cessation or suspension of payments within the specific times did not result 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.*” *See* Decision and Remand Order at p. 5 [emphasis added]. The previous Panel also held that an *unreasonable* delay in raising the venue-based jurisdictional defense at issue in this case, *i.e.*, jurisdiction pursuant to D.C. Official Code § 32-1503, may preclude an employer from raising it and set forth five (5) factors which must be considered and weighed to determine whether a delay is unreasonable thereby precluding an employer from raising it.

Thus, the previous Panel established the general rule of law and its exception to be followed with respect to an employer's Notice of Controversion and other required notices on cessation or

⁴ On further *de novo* review, the legislative history of the Act does not reveal any constraints, or penalties aside from the assessment of additional compensation, on an employer's late filing of a Notice of Controversion. *See* COMMITTEE ON HOUSING AND ECONOMIC DEVELOPMENT, REPORT ON THE DISTRICT OF COLUMBIA WORKERS' COMPENSATION ACT OF 1979, Bill 3-106 (Jan. 29, 1980). Moreover, under the Longshore and Harbor Workers' Compensation Act (LHWCA), the predecessor to the instant Act, there are no constraints, or penalties aside from the assessment of additional compensation, on an employer's late filing of a Notice of Controversion. *See Foster v. Davison Sand & Gravel Company*, 31 BRBS 191 (December 23, 1997) (Claimant sustained a work-related injury in 1988 and employer voluntarily paid benefits until 1994 when it controverted coverage. Claimant's argument that that employer waived the right to contest coverage by paying benefits was rejected. The BRB stated that an employer's payments may not be viewed as a stipulation of coverage as the parties may not stipulate to coverage under the Act and held that the Act “specifically provides for voluntary payments by employer, without requiring employer to waive its ability to contest issues in the future”.)

suspension of payments in this jurisdiction, until such time as either is, or both are, overturned by the CRB or the DCCA. The general rule and its exception then necessarily became part of the legal analysis of the issue presented for resolution in this case, whether the Petitioner timely controverted the claim, requiring findings of fact applicable thereto.

As the Petitioner asserts, in the Compensation Order on appeal, the ALJ acknowledged the previous Panel's statement of the law in this jurisdiction and rejected it, stating that it "may be appropriate where an employer filed a notice of injury in more than one jurisdiction and now seeks to remove coverage from the District of Columbia." Compensation Order at pp. 4-5. 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. See *Providence Hospital v. District of Columbia Department of Employment Services*, 855 A.2d 1108, 1111 (D.C. 2004); *UPS v. District of Columbia Department of Employment Services*, 834 A.2d 868, 871 (D.C. 2003); *KOH Systems*, 683 A.2d at 449. 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. The ALJ's action in this case is inappropriate particularly given that the previous Panel was aware of that fact since it appeared as a finding in the earlier Compensation Order and given that the Petitioner's lack of filing notice in another jurisdiction would be weighed in an analysis of the announced five (5) factors.⁵

The ALJ did not make findings of fact on the five (5) factors, placed a burden on the Petitioner, again, to show that it did not know or could not have known that coverage was at issue during the period it paid benefits and concluded as a matter of law that the Petitioner was precluded from raising jurisdiction. Without findings of fact, this Panel is unable to determine whether the Compensation Order on appeal is supported by substantial evidence in the record and whether the conclusion reached follows rationally from the findings. Further, this Panel cannot sustain the additional burden the ALJ placed on the Petitioner as it was an error as a matter of law. Therefore, this matter must be remanded.

Pursuant to the holding in the January 25, 2007 Decision and Remand Order, the Petitioner's failure to file its Notice of Controversion within fourteen (14) days of acquiring knowledge of the Respondent's injury did not result in a waiver of its defenses available under the Act or an imposition of any additional evidentiary burdens associated with raising its defenses. The general rule having been applied, it is now necessary to determine whether the Petitioner's delay is unreasonable, thereby precluding it from raising the issue of jurisdiction in this case. Therefore, on remand, the ALJ must reopen the record for further proceedings to afford the parties an opportunity to present evidence addressing the five (5) factors. The ALJ then must make findings of fact based upon that evidence presented and conclusions of law which flow from those findings. If the ALJ concludes, after proper analysis, that the Petitioner is not precluded, the ALJ shall make findings of fact and conclusions of law on the second issue presented for resolution in this case, whether jurisdiction pursuant to D.C. Official Code § 32-1503 is vested in the District of Columbia.

⁵ For example, the Petitioner's failure to file a notice of injury may be considered under the fifth factor which is the effect that the delay might have upon the chances of securing benefits under the laws of some other jurisdiction. In the District of Columbia, an employer's failure to file a Notice of Accidental or Occupational Injury (Form 8) causes the one (1) year time statute of limitations of D.C. Official Code § 32-1514(a) to be held in abeyance, a fact that works in the favor of an injured worker. See D.C. Official Code § 32-1532(f); 7 DCMR § 203.3.

CONCLUSION

The Compensation Order of April 10, 2007 is not supported by substantial evidence in the record and is not in accordance with the law.

ORDER

The Compensation Order of April 10, 2007 is VACATED AND REMANDED for further proceedings consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

June 5, 2007

DATE