

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-026

ALMA ATKINS,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS
Employer-Petitioner.

Appeal from a January 31, 2014 Order of
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL12-012, DCP No. 76103-20001-1999-0057

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 APR 30 PM 12 04

Harold Levi for the Respondent
Frank Mc Dougald for the Petitioner¹

Before HEATHER C. LESLIE and MELISSA LIN JONES, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the January 31, 2014, Order issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that Order, the ALJ granted Claimant's request for reinstatement of disability and medical benefits. We VACATE and REMAND.

BACKGROUND AND FACTS OF RECORD

The Claimant suffered a work related injury to her back, neck and knees on November 19, 1993. Claimant was injured when she was thrown to the floor while a passenger in a van. The Employer accepted the claim and Claimant received medical benefits as a result of her work injury. Claimant returned to work.

¹ Ross Buchholtz represented the Employer at the Formal Hearing.

On or about June 14, 1994, Claimant suffered another injury when a van in which she was a passenger backed into a brick wall. Claimant alleges this injury aggravated her earlier injury.

Many documents surrounding the two injuries, including initial claim forms and medical treatment between 1993 through 2001 have been lost or destroyed.

Claimant has been treating with Dr. Daniel Ignacio since 1999. Dr. Ignacio has recommended conservative treatment, including therapy, rest, a Tens unit, injections and pain medication. Dr. Ignacio has opined the Claimant cannot return to work. Claimant has not returned to work since 1994.

Employer sent Claimant for an additional medical evaluation (AME) with Dr. Marc Danziger on September 6, 2011. Dr. Danziger had examined the Claimant twice prior to this AME. Dr. Danziger opined Claimant had reached maximum medical improvement and that any symptoms Claimant experiences are not related to the work injury. Dr. Danziger further opined Claimant could return to work full duty without restrictions. Dr. Danziger reiterated this opinion in a December 13, 2011 addendum.

Based on this AME, the Employer terminated Claimant's benefits in an October 19, 2011 Notice of Determination (NOD). This NOD referenced the November 19, 1993 injury. Claimant timely requested reconsideration which was denied on December 14, 2011. Claimant filed for a Formal Hearing.

A full evidentiary hearing was held on April 17, 2012. Claimant requested reinstatement of disability and medical benefits from the date of termination to the present and continuing. The sole issue raised was the nature and extent of Claimant's disability. On January 31, 2014, a CO was issued granting Claimant's claim for relief.

Employer appealed on March 4, 2014 and filed the Application for Review with Hearings and Adjudications. On March 11, 2014, Employer filed with the CRB a Motion to Transfer its Application for Review to the Compensation Review Board from the Office of Hearings and Adjudications (OHA).

Employer argues that the CO is not supported by the substantial evidence in the record as the ALJ lacked jurisdiction to award benefits for the June 14, 1994 injury. Furthermore, Claimant argues the ALJ erred in according Dr. Ignacio's reports more weight over that of Dr. Danziger.

Claimant argues that the Application for Review should be dismissed as it was not properly filed with the CRB within the statutory time period. Even if the Application for Review was filed timely, Claimant argues the CO should be affirmed as it is supported by the substantial evidence in the record and is in accordance with the law.

THE STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is limited to making a determination 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (the “Act”) at § 1-623.28(a), and *Marriott International v. DOES*.²

Consistent with this standard of review, the CRB is 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*.³

DISCUSSION AND ANALYSIS

Preliminarily, we must address Employer’s Motion to Transfer the Application for Review to the CRB and Claimant’s opposition. The Employer, in support of said motion, avers that the Application for Review was misfiled at OHA and requests a transfer of the misfiled Application to the CRB. Claimant opposes, arguing that as Employer did not properly file an Application for Review with the CRB within the statutory 30 days, the application must be dismissed. We disagree with Claimant.

In *Covington v. Metro Pets Pals, LLC*, CRB No. 03-97, OHA No. 02-448A (March 18, 2005), this very fact pattern was considered by the CRB. In *Covington*, the Application for Review was misfiled with OHA within 30 days of the underlying CO but was not filed with the Director until 150 days later. The CRB noted:

In *White v. American Elevator Services*, Dir. Dkt. No. 89-140, H&AS No. 88-431 (March 2, 1995), the Director held that an Application for Review that had been mis-filed with the Hearing and Adjudication Section would nevertheless be accepted as timely for purposes of appeal to the Office of the Director, as long as the Application was timely filed with Hearings & Adjudication within the required 30-day period. The Director’s holding in *White* is consistent with the more recent decision of the Director in which he accepted as timely an appeal filed beyond the 30-day period where petitioner detrimentally relied upon erroneous information issued by an agency official concerning the requirements for filing. See *West v. Washington Hospital Center*, Dir. Dkt. No. 99-97, OHA No. 99-276 (March 30, 2000). The Director’s decision in both instances is a recognition that the filing of a timely appeal is not a jurisdictional prerequisite to an intra-agency appellate review, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling when equity so requires. See, e.g., *Terry Kidwell v. District of Columbia*, 670 A.2d 349, 353 (D.C. 1996). The Board sees no reason to diverge from the Director on this

² 834 A.2d 882 (D.C. 2003).

³ *Id.*, at 885.

subject. By holding compliance with the filing period to be not a jurisdictional prerequisite but a requirement subject to waiver, as well as tolling when equity so requires, the Board honors the remedial purpose of the D.C. Workers' Compensation Act as a whole, without negating the particular purpose of the filing requirement. *See Zipe v. TWA*, 455 U.S. 385, 393, 398 (1982).

Covington, *supra* at 3-4.

We see no reason to diverge from the rationale in *Covington* above and find that Employer's Application for Review was timely filed and will be considered by the CRB.

Turning to Employer's arguments, Employer first argues that the CO is not supported by the substantial evidence in the record or is in accordance with the law as the award is based in part on the June 14, 1994 injury which was not properly before the ALJ. Specifically, Employer argues the NOD which conferred jurisdiction to the ALJ was based on the November 19, 1993 accident. No NOD was issued denying benefits based upon the June 14, 1994 injury and as such, the ALJ did not have jurisdiction to consider the claim. We agree with the Employer.

As we have held previously, the plain language of §1-623.24(b)(1) of the Act requires "the issuance of a decision" by the Employer before an injured worker may request a formal hearing:

The authority of this Agency to review disputes arising out of the Public Sector Workers' Compensation Act is wholly governed by the terms of that Act. D.C. Code §1-623.24(b)(1) provides for an appeal or review of a final decision of [DCP] Determinations by an ALJ in [the Department of Employment Services ("DOES")]. As a general principle, the only matters that DOES has authority to review are matters upon which [DCP] has rendered a decision, and it is that decision that is reviewed by DOES. In the absence of an operative decision, there is nothing for DOES to review and rule upon

In other words, the Act is clear that the actual issuance of a Final Determination, as opposed to a constructive denial, is a prerequisite to AHD's adjudication of the request for benefits:

While the courts have broad grants of authority to adjudicate matters, the adjudicatory authority of an administrative agency is limited by an enabling act. Under the Act governing this matter, a claim for benefits for a work-related injury must first be made to the Public Sector Division of the Office of Workers' Compensation, that is, the OBA. See D.C. Official Code §1-623.24(a); 7 DCMR §§104, 105, 106, 199. The OBA, now the TPA, is responsible for conducting necessary investigations into an injured worker's claim and then making an initial determination either to award or deny disability compensation benefits for that claim. It is only if the injured worker is dissatisfied with the determination the worker can request a hearing before the

ALJ. *See* D.C. Official Code §1-623.24(b)(1). Thus, an ALJ is without ancillary authority to adjudicate claims for compensation that have not been first presented to the OBA, or the TPA, for investigation and resolution.”⁴

Consistent with the language enacted by the City Council in §1-623.24(b)(1), the Employer’s issuance of a Final Determination is a condition precedent to AHD obtaining jurisdiction. The Employer’s failure to issue a Final Determination, therefore, prevents AHD from obtaining the authority to conduct a formal hearing to adjudicate any claim for benefits regarding the June 14, 1994 work injury.⁵

In support of the argument that the ALJ erroneously considered the June 14, 1994 injury, Employer relies upon the ALJ’s conclusion that,

Having found the reports of Dr. Ignacio the most persuasive, I rely on those to conclude that Claimant continues with remaining impairment to her lumbar and cervical spine and both knees as result wholly or in part of her November 19, 1993, accepted work injury and her subsequent injury at work on June 14, 1994. I do not find or conclude that the June 14, 1994 injury was claim [sic], accepted or rejected. I decline to make findings or adjudications of whether the June 14, 1994 injury was compensable or whether claims or whether Claimant continues to suffer as a result thereof since there no NOD on the subject and therefore no basis for adjudicatory jurisdiction. The CRB has recently held in HUNTER V. DEPT OF YOUTH REHABILITATIVE SERVICES, CRB No. 13-128, PBL 10-092, DCP No. 30100852406-0001 (January 28, 2014).

CO at 10.

Thus, while the ALJ does acknowledge that an NOD has not been issued regarding the June 14, 1994 injury, the ALJ concludes “that Claimant continues with remaining impairment to her lumbar and cervical spine and both knees as result wholly or in part of her November 19, 1993, accepted work injury and her subsequent injury at work on June 14, 1994.” Moreover, a review of the CO does reveal that the ALJ did take into consideration Dr. Ignacio’s reports referencing a June 12, 1994 injury. CO at 7.⁶ Thus, based upon the ALJ’s analysis and conclusion, the CO awarded benefits based in part on an accident not properly before OHA. This is in error requiring remand to allow the ALJ to reconsider the evidence in the record surrounding the November 19, 1993 injury only and award or deny benefits accordingly.

⁴ *Sisney v. D.C. Public Schools*, CRB No. 08-200, AHD No. PBL 08-066 (July 2, 2012) (emphasis in original), citing *Minter v. D.C. Office of the Chief Medical Examiner*, CRB Nos. 11-024 and 11-035, AHD No. PBL073A, DCP No. 761035-0001-2006-0014 (December 15, 2011), *Burney v. D.C. Public Service Commission*, CRB No. 05-220, OHA No. PBL97-016A, DCP No. 345126 (June 1, 2005).

⁵ *See Dorsey v. District of Columbia*, 917 A.2d 639, 641 (D.C. 2007), *Sisney, supra* at 5

⁶ The CO actually refers to an August 12, 1994 injury. CO at 7. A review of Claimant’s exhibit 5, however, reveals the doctor referenced a June 12, 1994 injury. We will assume for purposes of this order that the June 14th and June 12th 1994 injuries are one and the same and that any reference to an August 1994 injury is a typographical error.

Until such time as the ALJ considers only the injury properly before OHA, the November 19, 1993 injury, we cannot say the CO is supported by the substantial evidence in the record and in accordance with the law. We decline to address Claimant's remaining arguments until the ALJ analyzes the evidence surrounding the solely November 19, 1993 claim.

ORDER

The January 31, 2014 Compensation Order is not supported by the substantial evidence in the record nor in accordance with the law. It is VACATED and REMANDED consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE

Administrative Appeals Judge

April 30, 2014

DATE