

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-140

**GEORGE KOSTALAS,
Claimant-Respondent,**

v.

**PEPCO and
SPECIALTY CLAIMS SERVICES,
Employer/Third-Party Administrator-Petitioner.**

Appeal from an October 29, 2014 Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. 10-062B, OWC No. 618413

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 APR 30 AM 9 17

Eric M. May for Claimant
Shawn M. Nolan for Employer

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

MELISSA LIN JONES for the Compensation Review Board.

DISMISSAL ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On April 23, 2005, Mr. George Kostalas was employed as a lineman for PEPCO. On that day, as Mr. Kostalas was climbing a pole, a climber attached to his leg failed to catch, and he slid more than two feet down the pole before his body jolted to a stop. Mr. Kostalas injured his back.

On November 9, 2010, Mr. Kostalas was awarded 7% permanent partial disability to his right leg. On September 26, 2012, Mr. Kostalas was awarded permanent total disability benefits from August 31, 2009 to the present and continuing. *Kostalas v. PEPCO*, AHD No. 10-062A, OWC No. 618413 (September 26, 2012).

Almost one year after the September 26, 2012 Compensation Order issued PEPCO filed an application for formal hearing. Upon receipt of a motion to dismiss filed by Mr. Kostalas, the

matter was scheduled for a *Snipes* hearing. An administrative law judge (“ALJ”) dismissed the application for formal hearing in an order dated January 17, 2014.

PEPCO appealed the dismissal to the Compensation Review Board (“CRB”), and on May 29, 2014, the CRB remanded the matter because PEPCO was entitled to a formal hearing. *Kostas v. PEPCO*, CRB No. 14-014, AHD No. 10-062B, OWC No. 618413 (May 29, 2014). In response, the ALJ conducted a formal hearing.

In a compensation order dated and served on October 29, 2014, the ALJ ruled Mr. Kostas had not failed to cooperate with vocational rehabilitation. The ALJ denied PEPCO’s request to suspend Mr. Kostas’ permanent total disability benefits. *Kostas v. PEPCO*, AHD No. 10-062B, OWC No. 618413 (October 29, 2014).

On December 1, 2014, PEPCO filed an Application for Review and the accompanying Memorandum of Points and Authorities of Employer PEPCO in Support of Application for Review, and one week later, Mr. Kostas filed Claimant’s Motion to Dismiss Employer’s Untimely Appeal. In that motion, Mr. Kostas asserts PEPCO’s application for review was filed more than 30 days after issuance of the October 29, 2014 Compensation Order.

In response to Mr. Kostas’ motion PEPCO concedes its application for review was due no later than November 28, 2014. PEPCO argues the CRB should accept its application for review out of time.

In Claimant’s Response to Employer’s Opposition to Claimant’s Motion to Dismiss, Mr. Kostas argues

The evidence presented does not demonstrate that the Employer acted with the requisite due diligence for an application of equitable tolling, but that the Employer was neglectful by failing to take any of the opportunities available to ensure timely filing. Employer states that it had expected the Application for Review to arrive at the CRB on Wednesday, November 26, 2014. If the Employer had simply done a search on FedEx’s tracking system, readily accessible on FedEx’s website, the Employer would have had [sic] learned that the Application was never delivered on Wednesday, but picked up on that day. Employer’s Exhibit C (“EE”). On the day the Application for Review was due, Employer had yet another opportunity to ensure timely filing via FedEx’s tracking service, yet again the employer neglected to take advantage of this service. If the Employer had exercised due diligence, the Employer would have known that as of 9:43 a.m. FedEx was not going to be delivering the Application for Review that day at all. *Id.* Furthermore, on both of those days the Employer also had ample opportunity to make a simple phone call to the CRB to ensure timely filing, but, again the Employer failed to do so.

Claimant’s Response to Employer’s Opposition to Claimant’s Motion to Dismiss, p. 2. Mr. Kostas requests the CRB dismiss this appeal. In the alternative, on March 31, 2015, Mr. Kostas filed Respondent’s Motion for Consent to File an Opposition Out of Time and

Claimant's Memorandum of Points and Authorities in Opposition to Employer's Application for Review on April 2, 2014.

ISSUE ON APPEAL

Was PEPCO's application for review filed timely?

ANALYSIS¹

As a matter of law, if an application for review is not filed timely, the CRB does not have authority to consider the merits of the appeal.

Section 32-1522(2A)(A) of the Act, in pertinent part, provides

[a] party aggrieved by a compensation order may file an application for review with the [CRB] within 30 days of the issuance of the compensation order. A party adverse to the review may file an opposition answer within 15 days of the filing of an application for review.

Also, 7 DCMR § 258.2 provides

[a]n Application for Review must be filed within thirty (30) calendar days from the date shown on the certificate of service of the compensation order or final decision from which appeal is taken.

7 DCMR § 257.1 states

[f]ilings with the Board of any permitted pleading, including the Application for Review, shall be deemed effective upon actual receipt by the Office of the Clerk.

Finally, 7 DCMR § 299 defines the word "day" as a "calendar day, unless otherwise specified in the Act or this chapter;" however, pursuant to 7 DCMR § 256.3,

[t]he Office of the Clerk of the Board shall be open from 8:30 a.m. to 5:00 p.m. on all days except Saturdays, Sundays, and legal holidays, for the purpose of receiving Applications for Review and such other pleadings, motions and papers as are pertinent to any matter before the Board.

¹ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501 *et seq.* ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a compensation order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

Thus, when the thirtieth (30th) calendar day falls on a Saturday, Sunday, or legal holiday, the deadline is extended to the next business day. *See Jackson v. ECAB*, 537 A.2d 576, 578 (D.C. 1988).

The Compensation Order on appeal issued on October 29, 2014. The thirty calendar day period beginning on that date ended on November 28, 2014, a Friday. Thus, in order to meet the statutory timeframe and to be a timely filing, PEPCO's application for review must have been filed by the close of business on November 28, 2014. As evidenced by the date stamp on the application for review, it was filed on December 1, 2014 and is not timely.

PEPCO asserts that because it deposited its application for review in a FedEx drop box on November 25, 2014 its untimely filing should be excused. The CRB disagrees. An application for review must be received by the CRB within the time requirement, *Hill v. Greyhound Lines, Inc.*, CRB . No. 07-113, AHD No. 01-329B, OWC No. 590459 (July 17, 2007), and "the time requirement is not satisfied by mailing the appeal within 30 days." *See West v. Washington Hospital Center*, Dir. Dkt. No. 99-97, OHA No. 99-276, OWC No. 281706 (March 30, 2000). Although PEPCO may have anticipated delivery of its application for review to the CRB on November 25, 2014, due diligence would have confirmed that actual filing did not take place on that date.

Next, PEPCO contends FedEx attempted delivery to the CRB on November 28, 2014, but FedEx indicated "the destination address was closed on Friday, November 28, 2014." Employer's Opposition to Claimant's Motion to Dismiss Application for Review and Motion to File Application for Review Nunc Pro Tunc or Out of Time, p. 2. The District of Columbia government and specifically the CRB was open on November 28, 2014. PEPCO's failure to file its application for review by that date renders it untimely.

PEPCO's reliance upon *Covington v. Metro Pets Pals, LLC*, CRB-No. 03-097, OHA No. 02-448A, OWC No. 583242 (March 18, 2005) is misplaced. In *Covington*, a petitioner filed an application for review within thirty days of issuance of the compensation order; however, the application for review was filed in the Office of Hearings and Adjudication. In this case, PEPCO didn't timely file an application for review in the wrong office of the Department of Employment Services; therefore, *Covington* is distinguishable and does not excuse the untimely filing.

Finally, PEPCO's reliance on *West v. Washington Hospital Center*, Dir. Dkt. No. 99-097, OHA No. 99-276 (March 30, 2000) also is misplaced. Pursuant to *West*, although an application for review must be received within thirty days of issuance of the compensation order in order to be timely, detrimental reliance on inaccurate information from an employee of the body responsible for administrative appellate review of compensation orders may excuse a delay. There is no indication that PEPCO detrimentally relied on inaccurate information from any CRB employee; therefore, PEPCO cannot rely upon *West* to excuse its untimely filing.

CONCLUSION AND ORDER

PEPCO's application for review was not filed timely and is DISMISSED. Any remaining issues, including ruling on Mr. Kostalas' Motion for Consent to File an Opposition Out of Time, are moot.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

April 30, 2015
DATE