

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 10-122

HENRY LOPEZ,

Claimant - Respondent,

v.

DISTRICT OF COLUMBIA FIRE & EMERGENCY MEDICAL SERVICES DEPARTMENT,

Employer - Petitioner.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2011 DEC 23 AM 11 04

Appeal from a Compensation Order of
Administrative Law Belva Newsome
AHD No. PBL 04-015F, DCP No. LT5-EMS004227

Lloyd J. Eisenberg, Esquire, for the Claimant
Pamela Smith, Esquire, for the Employer

Before HEATHER C. LESLIE,¹ LAWRENCE D. TARR, and HENRY MCCOY, *Administrative Appeals Judges.*

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 April 23, 2010, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section² (OHA) of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted in part the Claimant's request for a recalculation of temporary total disability benefits. We VACATE AND REMAND.

¹ Judge Heather C. Leslie is appointed by the Director of the DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

² Formerly known as the Administrative Hearings Division.

BACKGROUND AND FACTS OF RECORD

On January 1, 2003, the Claimant suffered an injury while at work. The Employer accepted the claim and paid temporary total disability from the date of the injury through and including the date of the Formal Hearing on February 2, 2010. At various times disputes arose over the exact amount to be paid. The Claimant made numerous attempts to have his concerns addressed regarding an alleged underpayment by the Office of Risk Management (ORM). There is record of several applications for Formal Hearings being filed and dismissed.

On October 21, 2009, the Claimant filed an application for another Formal Hearing which was scheduled for February 2, 2010. The testimony at the Formal Hearing indicates that the issues to be adjudicated at that hearing included whether or not the Claimant was being paid correctly and whether or not the right shoulder injury was causally related to the January 1, 2003 injury. The Employer argued that DOES lacked jurisdiction to hear the case as a notice of determination (NOD) had not been issued regarding the above issues and concurrently submitted a Motion to Dismiss arguing the same.³

The ALJ cited numerous attempts over several years by the Claimant to obtain an answer regarding the amount paid from the ORM without success. Hearing Transcript at 21. As such, the ALJ assumed jurisdiction. Hearing Transcript at 12 & 23. The ALJ then proceeded to continue the hearing to a later date to allow for the parties to resolve the outstanding issues as well as to allow the Employer time to issue a NOD.

For reasons unclear to us, the Claimant filed a statement of his case in lieu of a hearing on March 25, 2010. The Employer did not respond to the Claimant's statement. On April 23, 2010, a CO was issued granting the Claimant's request for recalculation of his temporary total disability payments.⁴

The Employer appealed. On appeal, the Employer alleges OHA lacked jurisdiction to hear the case as a NOD had not been issued. The Employer also argues that even if OHA did have jurisdiction, the CO was not based upon the substantial evidence in the record and was not in accordance with the law. The Claimant in opposition argues that the Employer did indeed issue a NOD and that the CO correctly interpreted and applied D.C. Official Code Ann. §1-623.12(b).

THE STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et*

³ The Claimant filed an opposition to the Motion to Dismiss as well as a Request for Attorney's Fees. The Employer opposed the request for fees. The ALJ dismissed the request for an attorney's fee as untimely.

⁴ *Lopez v. District of Columbia Department of Fire & Emergency Services*, AHD No. PLB 04-015F, AHD No. LT5-EMS004227 (April 23, 2010).

seq., at § 1-623.28(a), and *Marriott International v. D. C. Department of Employment Services*, 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.

DISCUSSION AND ANALYSIS

We first address the question of whether or not OHA had jurisdiction to hear the case. At the Formal Hearing, the Employer argued that as an NOD had not been issued, OHA did not have jurisdiction to hold a hearing. The Employer also concurrently filed a Motion to Dismiss which the ALJ noted. Specifically,

ALJ: I received your Employer's motion to Dismiss this morning at 10:15, which would have been 15 minutes after the hearing started. According to the CRB, I have to give Mr. Eisenberg eight calendar days – five business and three business – to respond to your Motion to Dismiss; therefore, that isn't going.

Hearing Transcript at 16.

Subsequently, the Claimant opposed the Employer's Motion to Dismiss on February 12, 2010.

In the CO issued on April 23, 2010, the ALJ made reference to the above procedural posture and indicated that "a formal ruling on the motion to dismiss" would be discussed "below." *Lopez, supra* at 2. A review of the CO reveals that no "formal ruling" was made nor was the Employer's Motion to Dismiss referenced or discussed any further. We find this in error.

The ALJ, prior to any decision on the merits of the case, must determine whether or not the Employer's Motion to Dismiss has merit, or not. Without a formal ruling, the CRB is constrained to remand this case back to the ALJ to discuss whether or not OHA has jurisdiction to hear the case, and if so, issue a CO on the merits.

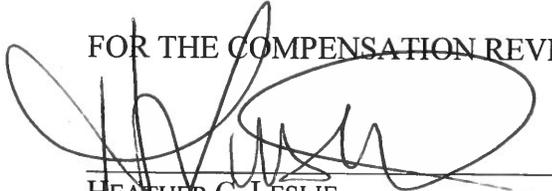
CONCLUSION

The ALJ was in error in issuing a CO without first addressing the Employer's Motion to Dismiss.

ORDER

Consistent with the above discussion, the April 23, 2010 Compensation Order is VACATED and REMANDED.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE
Administrative Appeals Judge

December 23, 2011

DATE