

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402 - Fax

CRB No. 06-016

JAMES YATES, III,

Claimant – Respondent

v.

AGGREGATE INDUSTRIES AND GALLAGHER BASSETT SERVICES,

Employer/Carrier – Petitioner.

Appeal from a Final Order of
Claims Examiner Edith Tyler
OWC No. 601655

John F. Ward, Esq., for the Petitioner

Heather Leslie, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, SHARMAN J. MONROE and
JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND 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 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

BACKGROUND

This appeal follows the issuance of a Final Order from the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES). In that Final Order, which was filed on November 8, 2005, the Claims Examiner (CE) granted the Claimant-Respondent's (Respondent) request for temporary total disability benefits from March 14, 2005 to the present and continuing and reimbursement for prescription medication in the amount of \$75.00. The Employer-Petitioner (Petitioner) now seeks review of that Final Order.

As grounds for this appeal, the Petitioner alleges as error that the Final Order is not in accordance with the law.

ANALYSIS

In its review of an appeal from the Office of Workers' Compensation, the Board must affirm the compensation order or final order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, § 51.03 (2001).

Turning to the case under review herein, the Petitioner alleges that the issuance of the Final Order was improper and not in accordance with the Act's regulations. The Petitioner argues that service of the Notice of Informal Conference and the ensuing Memorandum of Informal Conference were defective in that the OWC failed to serve all the interested parties and their representatives. The Petitioner maintains that it apprised the Respondent's counsel of the name and address of its counsel via telephone on October 8, 2004 and so apprised the OWC via correspondence dated October 12, 2004. It asserts that while Gallagher Bassett Services was served with the Notice of Informal Conference and with the Memorandum of Informal Conference, neither Aggregate Industries nor its counsel of record was served. The Petitioner cites 7 DCMR §§ 219.10, 219.12 and 219.19 as support for its position.

7 DCMR § 219.10 states:

To the extent practicable, informal conferences shall be held with all interested parties present or represented.

7 DCMR § 219.12 states:

Informal conferences may be scheduled by the Office upon not less than ten (10) working days notice to all interested parties, unless the parties agree to meet at an earlier date.

7 DCMR § 219.19 states:

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.

Copies of the Memorandum of Informal Conference shall be sent by certified mail to the parties and their representatives.

The term “interested party” is defined in 7 DCMR § 299 as:

[the] District of Columbia, and an employer, a carrier, an employee, or a beneficiary whose rights or obligations pursuant to a claim under the Act shall be determined in a particular proceeding, including a mediation conference. Any person appearing at the mediation conference who does not have authority to settle is not an interested party.

The record in the case shows that on May 12, 2005 the Respondent, through counsel, filed an Application for Informal Conference. Therein, the Respondent provided the names, addresses, and telephone numbers for both the Aggregate Industries, as Employer and Gallagher Bassett Services, as Carrier. The space for the name of the Petitioner’s representative was blank. In response, the OWC issued a Notice of Informal Conference on May 17, 2005 and served, via certified mail, the Respondent, Respondent’s counsel and Gallagher Bassett Services. The green card receipts indicated that the Respondent’s counsel received the Notice on May 19, 2005 and Gallagher Bassett Services received the Notice on May 25, 2005. The informal conference convened as scheduled, but the neither the Employer nor the Carrier appeared. The Memorandum of Informal Conference recommending that the Respondent be paid temporary total disability and medical benefits and setting forth the applicable appeal rights thereafter issued. Although there was no certificate of service or other document indicating who was served a copy of the Memorandum, the record contained green card receipts addressed to the Respondent’s counsel and Gallagher Bassett Services showing that both parties received the Memorandum on July 13, 2005. On November 2, 2005, counsel for the Petitioner sent a letter to the CE requesting that the Memorandum not be incorporated into a Final Order because counsel was not served Notice of the Informal Conference. The CE converted the Memorandum to a Final Order on or about November 8, 2005. The certificate of service attached to the Final Order indicated that it was served on the Respondent, Respondent’s counsel and the Petitioner’s counsel.

In this action, the interested parties are the Respondent, Aggregate Industries and Gallagher Bassett Services. The OWC served the Notice of Informal Conference on the Respondent, Respondent’s counsel and Gallagher Bassett Services. It did not serve Aggregate Industries as required by 7 DCMR § 219.12. While the Panel recognizes that an employer and an insurance carrier generally will have a common interest, due to a shared liability, in defending against an employee’s claim for benefits under the Act, and thus are treated as one party for purposes of claims processing, nevertheless this is not always the case. In a proceeding before OWC, until the informal conference, or the parties’ appearances individually, or through the appearance of counsel, indicating that the employer and the carrier are of like interest and should be considered as one party, the employer and insurance carrier must be treated as two separate and distinct interested parties within the meaning of 7 DCMR § 299. Thus, where both have been identified in the Application for Informal Conference, as occurred in this case, both must be served with the Notice of Informal Conference pursuant to 7 DCMR § 219.12. Accordingly, the service of

the Notice of Informal Conference was defective and deprived Aggregate Industries of its due process rights. The service of the Notice being defective, the ensuing Memorandum of Informal Conference and Final Order were invalid and both must be vacated.

CONCLUSION

The Final Order of November 8, 2005 is arbitrary, capricious, an abuse of discretion and not in accordance with the law. This matter must be remanded for further proceedings beginning with proper service of process of the Notice of Informal Conference to both Aggregate Industries and Gallagher Bassett Services in accordance with 7 DCMR § 219.12.

ORDER

The Final Order of November 8, 2005 is hereby VACATED and this matter is REMANDED for further proceedings consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

January 27, 2006
DATE

