

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 (Dir. Dkt.) No. 04-090

LILLIE MCGREW,

Claimant-Petitioner,

v.

HOWARD UNIVERSITY,

Self-Insured Employer-Respondent.

Appeal from a Compensation Order of
Claims Examiner Charles Watson
OWC No. 591339

Matthew Pepper, Esquire, for the Petitioner

Melissa Klemens, Esquire, for the Respondent

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

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) 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 Pursuant

¹Pursuant 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for

to § 230.04, the authority of the CRB extends over appeals from compensation orders, including final decisions or orders granting or denying benefits, by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC), under public and private sector Acts.

BACKGROUND

On October 13, 2004, Respondent filed with this Agency a document entitled "Employer/Insurer's Response to Claimant's Application for Review" (Employer's Response) and "Employer/Insurer's Memorandum of Points and Authorities in Support of Its Response to Claimant's Application For Review", a date stamped copy of which is in the file originally created and maintained by the Office of General Counsel within the Office of the Director of the Department of Employment Services (the file of the Director), where appeals from OWC and AHD were previously handled. That document, "Employer's Response", refers to an "Application for Review" of a Compensation Order issued August 16, 2004 by Senior Hearings Examiner Charles Watson (Claims Examiner), of the Office of Workers' Compensation (OWC).

The file of the Director, which has been transferred to CRB and is presently CRB's administrative file in connection with this appeal, contains no original of the referenced Claimant's Application for Review. However, the Director's file does contain a letter from counsel for Petitioner dated March 15, 2006, in an envelope bearing a post mark of March 17, 2006, filed and date stamped March 21, 2006, attached to which is a copy of a document entitled "Claimant's Application for Review and Stay of Proceedings" (AFR and Stay Request), which bears a Certificate of Service attesting to having been mailed to counsel for Respondent on August 24, 2004.

The letter attached thereto states as follows; "A Petition for Review of the Compensation Order entered by the Administrative Hearings Department was filed on 8/25/2004. The briefs in support of and in opposition to the Petition for Review have all been filed. Please advise what, if any, additional information is required in order for you to assign a panel to dispose of this appeal". This letter appears to be inaccurate in two respects: first, there is no Compensation Order in this case of which we are aware that was issued by AHD, and second, it makes no reference to there having been a stay of proceedings requested in connection therewith, nor does it state any circumstance which would indicate that the stay request was mooted or withdrawn.

In the copy of the AFR and Stay Request that is attached to that letter, it is asserted that a Compensation Order had been entered (by whom it does not state) on August 16, 2004, and that as basis for the requested stay, a Motion For Reconsideration of said Compensation Order had been filed on August 24, 2004.

Nothing in the file of Director indicates that any action was taken regarding the requested stay.

On April 3, 2006, in apparent response to the letter from Petitioner's counsel of March 15, 2006, the CRB, through its clerk's office, issued "Request for Evidence Record" to OWC.

administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

On a date that is not apparent in either the file of the Director or the OWC file, the OWC file itself was transmitted by OWC to CRB. On or about September 13, 2006, the clerk's office in CRB issued a "Certification of Perfection of Appeal", in which it was stated that an Application for Review dated March 21, 2006 (the date that the copy thereof was received by CRB) and an opposition thereto dated October 13, 2004 had been received by CRB. The box wherein the CRB staff was to indicate, by check mark and date of order, that the order under appeal has been provided, remained unchecked. On that same date, the clerk's office issued a Notice of Assignment to CRB Review Panel, bearing CRB No. 04-90, assigning this matter to a panel, of which the undersigned is chairperson.

Review of the OWC file by this panel revealed that it does not contain any order, recommendation, memorandum of informal conference or other similar document issued by the Claims Examiner on August 16 or 24, 2004 or any "Motion for Reconsideration" thereof. However, it does contain a non-original duplicated copy of an "Order Denying Reconsideration" issued under the Claims Examiner's signature dated February 22, 2005, in which reference is made to "the Order, dated August 16, 2004, denying his petition for an attorney's fee award assessed against the employer-insurer". Further, the OWC file does not contain any filing or other written request by Petitioner to OWC for an assessment against Respondent of an attorney's fee. It does, however, contain a letter from counsel for Respondent, addressed to the Claims Examiner, dated March 9, 2004, and date stamped by OWC March 11, 2004, objecting to the assessment of a request attorney's fee against Respondent.

In addition, the OWC file contains a non-original photocopy of a document entitled "Final Compensation Order", signed by "Robyn Abrams, Claims Examiner", and "Mohammed Shiekh, Supervisor CRD", their respective signatures bearing the dates of June 22 and June 23, 2006, in which it is recited that an informal conference was held on December 5, 2005, a Memorandum of Informal Conference was issued on January 25, 2006, no formal hearing request following therefrom had been filed, and adopting said Memorandum as a Final Order. No such Memorandum of Informal Conference is included in the OWC file.

Because of the incomplete nature of the files, the undersigned contacted Petitioner's counsel's office, and requested that the order being appealed and the motion for reconsideration be provided, via fax, on September 19, 2006. The results of that request were received by the undersigned, were initialed and dated, and made part of the OWC file. Copies thereof were also entered into the file of the Director, which now comprises the administrative file before the CRB as well. The items received included (1) a copy of the Notice of Application for Review Filed issued by the office of the General Counsel of the Director on September 28, 2004, confirming filing of the Application for Review and Stay of Proceedings on August 25, 2004, (2) the "Order" issued by the Claims Examiner, dated August 16, 2004 and bearing a Certificate of Service of that same date, (3) the "Order Denying Reconsideration" issued by the Claims Examiner dated February 22, 2005, and bearing a Certificate of Service of that same date, (4) a letter dated August 16, 2004, from Matthew Pfeffer, Petitioner's counsel, to the Claims Examiner, in which reconsideration of the "Order" of August 16, 2004 was requested, and (5) another copy of the "Application for Review and Stay of Proceedings" and accompanying memorandum.

From the above noted documents received, either as they existed in the OWC file, the Director's and CRB file, or transmitted at the undersigned's request, it appears that the only item or order that is before the CRB at this time, having been appealed by either party within 30 days of issuance, is the "Order" issued by the Claims Examiner, Mr. Watson, dated August 16, 2004. Neither the "Order Denying Reconsideration", the missing "Final Compensation Order", signed by Robyn Abrams, Claims Examiner, and Mohammed Shiekh, Supervisor, in which the still missing "Memorandum of Informal Conference", said to have been issued on January 25, 2006, is referenced, were appealed to the CRB, and they are therefore not before us.

As grounds for this appeal of the "Order" of August 16, 2004, Petitioner alleges as error that the order "is not in accordance with the law and should therefore be reversed", because, Petitioner asserts, under the Director's decision in *Tucker v. Baltimore American Ice Company*, Dir. Dkt. No. 03-043A (Director's Decision July 23, 2003), an employer's obligation to pay compensation under the Act "begins with the filing of the employee's claim form and notice of injury", which rule, Petitioner asserts, was not followed by the Claims Examiner in reaching his decision as set forth in the "Order". In the memorandum in support of the AFR, Petitioner amplifies this argument, and recites numerous "facts" which Petitioner contends are established relating to the date that Respondent received notice of the claim (asserting among other things that said notice is shown as of the filing by Petitioner of her claim with the agency).

Respondent has opposed this appeal, and has filed an "Employer/Insurer's Response to Claimant's Application for Review" and "Employer/Insurer's Memorandum of Points and Authorities in Support of Its Response to Claimant's Application for Review", dated October 12, 2004. In those pleadings, Respondent urges the affirmance of the "Order" issued by the Claims Examiner, asserting that it is supported by substantial evidence and is in accordance with the law.

ANALYSIS

In review of an appeal from OWC, the Board must affirm the 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*, § 51.93 (2001).

This case involves a request by Petitioner that OWC make an award of attorney's fees against Respondent, based upon Petitioner's assertion that such an award is mandated by the terms of D.C. Code § 32-1530 (a), which provides:

If the employer or carrier declines to pay any compensation on or before the 30th day after receiving written notice from the Mayor that a claim for compensation has been filed, on the grounds that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits thereafter utilizes the services of an attorney-at-law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the Mayor, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

The parties in this case have conflicting views as to the meaning of this provision, with Petitioner asserting that the provision equates any failure to pay within 30 days after notice of claim with a trigger for an attorney's fee award, while Respondent contends that only certain failures to pay, such as failures to pay premised upon a general denial of compensability, act as such a trigger, while failures or delays premised upon other reasons (such as those it posits in this case, a failure by a claimant to provide documentation of an inability to work) which are followed by a voluntary commencement of payment prior to the issuance of an order to pay, are insufficient to trigger entitlement by a claimant to an award of attorney's fees against an employer.

However, the denial of the requested attorney's fee award in this case did not turn on either party's view of what triggers entitlement to such an award under the Act.

The "Order" issued by the Claims Examiner, although consisting of three pages, appears to rest upon a single premise, which is found in the following portion thereof:

[T]he record in this case clearly shows that OWC sent its first notification of the claim for compensation benefits to the employer and its insurer in a Notice of Informal Conference dated December 11, 2003. However, the record in this case does not show the date when employer-insurer authorized payment of compensation benefits to claimant. Moreover, neither counsel nor employer-insurer has identified the date when the insurer commenced paying compensation benefits to claimant. ... The outcome of this case turns on whether the employer-insurer refused to pay "any compensation" for a work related injury within thirty days of receiving written notice from the Mayor of "a claim for compensation". The record in this case clearly shows that OWC sent the employer-insurer "written notice" of the claim in a Notice of Informal Conference dated December 11, 2003. The record in this matter, however, does not show the date employer-insurer began paying compensation benefits to claimant. Accordingly, counsel's petition for an order awarding an attorney's fee against employer-insurer is DENIED.

Order, page 2 – 3. Without citing it, the Claims Examiner properly recognized that a claimant has the burden of establishing entitlement to the specific benefits sought, in this case, an award against Respondent of an attorney's fee, a principal enunciated in many cases, most frequently in *Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109 (D.C. 1986). Despite Petitioner's assertion in the Memorandum in Support of the AFR that it is "unarguable" that Respondent had received written notice of a claim upon filing of the initial claim form with the agency, that is not "unarguable", and the Claims Examiner noted that he had no evidence before him of any such notice prior to the issuance of the Notice of Informal Conference, which he noted (without contradiction by Petitioner) was issued December 11, 2003. While Petitioner asserts elsewhere in his filing that Respondent commenced payment "on or about December 17, 2003" (Memorandum, page 3), Petitioner cites no evidence or other document provided to the Claims Examiner at the informal conference which led to the issuance of the "Order", in support of this date (or any other date) as the date of such commencement. Simply put, the Claims Examiner determined that Petitioner had failed to establish a date of written notice to Respondent of a claim for compensation prior to December 11, 2003, a date of commencement of benefits by Respondent

(an obvious requirement if one is to assess whether said payments had commenced within thirty days), that both such dates are required to determine if there has been a "trigger" to the attorney's fee provision, and that failure to establish these dates renders a claim for such an award insufficient.

We see no error in the logic of the Claims Examiner in this instance, nor has Petitioner shown that he was provided with evidence of some earlier date of written notice, or of a specific date of commencement of payment by Respondent.


CONCLUSION

The Order of August 16, 2004 is not arbitrary or capricious, and is in accordance with the law.

ORDER

The Order of August 16, 2004 is hereby affirmed.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

September 26, 2006
DATE