

DEPARTMENT OF EMPLOYMENT SERVICES

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Employment Services (DOES), pursuant to the authority set forth in section 3 (a) of the District of Columbia Workers' Compensation Act of 1979, effective July 1, 1980, D.C. Law 3-77, D.C. Official Code § 32-1502 (a) (2001) (WCA); section 2344 of the District of Columbia Comprehensive Merit Personnel Act of 1978 (CMPA), effective March 3, 1979, D.C. Law 2-139, D.C. Official Code § 1-623.44 (2001) (collectively, the Acts); Part C of Reorganization Plan No. 3 of 1980 (effective January 10, 1981); and Mayor's Order 82-126 (effective June 24, 1982), hereby gives notice of the adoption, on an emergency basis, of amendments to 7 DCMR sections 118 and 230 and of the publication of the same as proposed rules for public comment. Title 7 DCMR sections 118 and 230 prescribe the rules of practice and procedure for administrative appeals before the Compensation Order Review Board (Board) established by the Director in implementation of the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004 (2004 Act), effective December 7, 2004, D.C. Law 15-205, D.C. Official Code §§ 32-1521.01 and 32-1522 (2001).

Under both the CMPA and the WCA (collectively, the Acts), the Director is vested with the authority and responsibility for determining questions of liability for the payment of benefits, including the provision of administrative review following the hearing and disposition of a claimant's claims for benefits. In implementation of the 2004 Act, the Director issued Administrative Policy Issuance No. 05-01 (February 5, 2005) by which the Director realigned the claims adjudication process of the DOES under the Acts to afford agency administrative review before the Board following a formal hearing and an initial determination of liability for the payment of benefits under the Acts by the Administrative Hearings Division (formerly the Office of Hearings and Adjudications).

The emergency rulemaking is necessary for the immediate preservation of the public peace and welfare and to assure that the newly established Board is afforded necessary rules of practice and procedure to insure continued adjudication of compensation appeals and in order to assure compliance with the requirements of *Lightfoot, et al. v. District of Columbia, et al.*, 338 F. Supp. 2d 78 (DC 2004), to the extent that the DOES has lawful jurisdiction over public sector appeals. (The procedural rules for requesting a formal hearing before the Administrative Hearings Division (formerly the Office of Hearings and Adjudication) following a determination of the claim under the CMPA by the Office of Risk Management are found at 7 DCMR sections 106 and 107. The appeal of cases under the CMPA from the Administrative Hearings Division to the Board (formerly the Office of the Director) are found at 7 DCMR section 118.)

The emergency rules were adopted on August 19, 2005, and became effective immediately. The emergency rules will expire on December 17, 2005 or upon publication of a Notice of Final Rulemaking in the D.C. Register, whichever first occurs.

The Director further gives notice of his intent to take final rulemaking action no less than thirty (30) days from the date of publication of this notice in the D.C. Register.

Chapter 1, 7 DCMR, Section 118, Appeal to the Director, is amended to read as follows:

118 ADMINISTRATIVE AND JUDICIAL REVIEW

- 118.1 The provisions of sections 250 to 271 of Chapter 2, 7 DCMR sections 250 to 271 concerning administrative appeals to the Compensation Order Review Board (sometimes referred to in these regulations as the Board) established pursuant to the Directive of the Director of the Department of Employment Services (Director), Administrative Policy Issuance No. 05-01 (February 5, 2005), are incorporated herein by reference as fully as if stated and set forth in their entirety in this section 118.
- 118.2 Any party adversely affected or aggrieved by a compensation order or final decision issued by the Administrative Hearings Division with respect to a claim for disability benefits pursuant to Title XXIII of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. Official Code § 1-623.1 *et seq.* (2001)) may appeal said compensation order or final decision to the Board by filing an Application for Review with the Board within thirty (30) calendar days from the date shown on the certificate of service of the compensation order or final decision in accordance with and pursuant to the provisions of 7 DCMR section 258.2.

Chapter 2, 7 DCMR, Section 230, Administrative and Judicial Review is repealed.

Chapter 2, 7 DCMR, Sections 250 to 271, are amended to read as follows:

250 COMPENSATION ORDER REVIEW BOARD; ADMINISTRATIVE AND JUDICIAL REVIEW

- 250.1 Sections 250 to 260 describe the establishment and organizational structure of the Compensation Order Review Board (Board), sections 261 to 264 set forth general rules applicable to the operation of the Board, and, sections 265 through 271, provide the Board's rules of practice and procedure.
- 250.2 These regulations supersede and replace 7 DCMR section 118, governing administrative appeals under the CMPA (Public Sector Act) and 7 DCMR section 230 governing administrative appeals under the District of Columbia Workers' Compensation Act of 1979 (WCA), effective July 1, 1980, D.C. Law 3-77, D.C. Official Code § 32-1501 *et seq.* (2001) (Private Sector Act) (collectively, the Acts).
- 250.3 Except as otherwise specified herein, the definitions set forth at 7 DCMR section 199 shall apply to all Public Sector Act appeals, and the definitions set forth at 7 DCMR section 299 shall apply to all Private Sector Act appeals.

251 ESTABLISHMENT OF THE COMPENSATION ORDER REVIEW BOARD

- 251.1 Pursuant to Administrative Policy Issuance No. 05-01 (February 5, 2005), the Director established the Compensation Order Review Board to which the Director delegated and assigned the administrative review authority formerly vested in the Office of the Director under the Public Sector and Private Sector Acts.
- 251.2 The authority of the Board is quasi-judicial in nature, involving the review and determination of appeals from compensation orders (including final decisions or orders granting or denying benefits) by the Administrative Hearings Division and/or the Office of Workers' Compensation under the Public Sector and Private Sector Acts, consistent with statutory authority.
- 251.3 The Board is established within the Office of Hearings and Adjudication (OHA), within the Office of the Assistant Director/Labor Standards Bureau, Department of Employment Services.

252 COMPOSITION OF THE COMPENSATION ORDER REVIEW BOARD

- 252.1 The Board shall be composed of five members, consisting of the Chairperson/Chief Administrative Appeals Judge (hereinafter, Chief Administrative Appeals Judge), and four Associate Administrative Law/Appeals Judges (hereinafter, Administrative Appeals Judges).
- 252.2 In the event of necessity, the Director may additionally designate an Administrative Law Judge with the Administrative Hearings Division, or similarly qualified individual, to serve as an alternate Board member, for a term not to exceed one year from the date of appointment.
- 252.3 The Chief Administrative Appeals Judge and Associate Administrative Appeals Judges shall be Administrative Law Judges in good standing with the OHA.
- 252.4 With the concurrence of the Director, the Chief Administrative Appeals Judge may assign an Administrative Appeals Judge serving on the Board to simultaneously serve for a fixed period of time as an Administrative Law Judge with the Administrative Hearings Division, provided that the individual so assigned shall not participate as an Administrative Appeals Judge in the review of any appeal from a compensation order issued by that Judge while acting in his or her capacity as an Administrative Law Judge with the Administrative Hearings Division.

253 INTERIM APPOINTMENTS

- 253.1 Disability of the Chief Administrative Appeals Judge:

- (a) In the event the Chief Administrative Appeals Judge is temporarily disabled or unavailable to perform his or her duties, the Chief Administrative Appeals Judge shall designate a member of the Board to serve as Acting Chief Administrative Appeals Judge until such time as the Director designates an Acting Chief Administrative Appeals Judge.
 - (b) In the event that the Chief Administrative Appeals Judge is physically unable to make such designation, the next senior member of the Board shall serve as Acting Chief Administrative Appeals Judge until such time as the Director designates an Acting Chief Administrative Appeals Judge.
- 253.2 In the event that an Administrative Appeals Judge is temporarily unable to carry out his or her responsibilities because of disqualification, illness, or for any other reason, the Chief Administrative Appeals Judge, with the concurrence of the Director, may appoint a qualified individual to serve in the place of such member for the duration of that member's inability to serve.
- 254 CONFLICT OF INTEREST
- 254.1 During any period in which the Chief Administrative Appeals Judge and other members serve on the Board, they shall be subject to conflict of interest and other appropriate ethical restraints.
- 254.2 Notice of any objection which a party may have to any Board member participating in a proceeding governing the disposition of the party's appeal shall be made by such party at the earliest opportunity but in no event later than the date that the case is assigned to a Review Panel under section 262.1 of this Chapter.
- 254.3 The Board member shall consider such objection and shall, in his or her discretion, either proceed with the case or withdraw.
- 255 REVIEW PANELS
- 255.1 Subject to and consistent with the provisions of D.C. Official Code § 32-1521.01, subsections (b), (c) and (d), the Board shall sit, review appeals, render decisions, and perform all other delegated and related functions in Review Panels of three members.
- 255.2 The Chief Administrative Appeals Judge shall make appointment to Review Panels from the sitting Members of the Board in a manner best suited to insure impartiality.
- 255.3 The Chief Administrative Appeals Judge may also direct that an appeal or review be decided by the full membership of the Board as specified in section 255.8.

- 255.4 Each assigned Review Panel shall be chaired by one member thereof, designated by the Chief Administrative Appeals Judge. The Chief Administrative Appeals Judge may also serve as a Panel member in the deliberation and disposition of appeals.
- 255.5 For purposes of carrying out its official functions, a Review Panel may only act with the concurrence of two members of the Review Panel unless and except as otherwise specified in these regulations.
- 255.6 A Review Panel decision with respect to an issue constitutes persuasive authority for and with respect to any subsequent Review Panel decision rendered addressing the same issue.
- 255.7 Decisions issued by the Director prior to establishment of the Board shall be accorded persuasive authority by the Board.
- 255.8 Where two or more Review Panels disagree concerning the resolution of an issue, the Chief Administrative Appeals Judge may direct that the issue be reviewed and resolved by the full Board sitting *en banc*. In such instance, official action of the full Board can be taken only on the concurring vote of at least three Board members.
- 256 OFFICE OF THE CLERK
- 256.1 Except as otherwise provided by these regulations, the filing and submission of Applications for Review, pleadings, motions and all other written communications with the Board shall be addressed to Clerk of the Board.
- 256.2 *Ex parte* communications between any party and a Member of the Board regarding an Application for Review are strictly prohibited.
- 256.3 The 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.
- 256.4 All requests to visit the Clerk's Office, for purposes other than the submission of documents as outlined in section 256.3, shall be submitted in writing. The Clerk of the Board shall schedule an appointment to be held at a mutually convenient time no later than five (5) working days from the date of receipt of the party's written request.
- 256.5 A docket of all proceedings shall be maintained by the Board. A party to an appeal (and his or her representative) shall have access to the Board's case file pertaining to such appeal after making an appointment with the Office of the Clerk.

256.6 A party to an appeal, after contacting the Clerk of the Board in accordance with section 256.4, may make one copy of the documents contained in the Board's case file (excluding the hearing transcript) at the party's expense, at a reasonable rate set by the Board.

257 FILINGS WITH THE BOARD

257.1 Filings 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.

257.2 Filings will be accepted by U.S. mail, commercial overnight delivery, inter-governmental mail, or personal delivery.

257.3 Submission of documents, including the Application for Review, by facsimile (fax) transmission or e-mail does not constitute filing and shall not be accepted for filing.

258 APPLICATION FOR REVIEW

258.1 Any party adversely affected or aggrieved by a compensation order or final decision issued by the Administrative Hearings Division or the Office of Workers' Compensation may appeal the compensation order or final decision to the Board by filing an Application for Review pursuant to this section. The party filing the Application for Review shall be designated as the "petitioner" for purposes of proceedings before the Board on appeal.

258.2 An 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.

258.3 An Application for Review must include the following:

- (a) An original and three (3) copies of the Application for Review, and
- (b) an original and three (3) copies of a supporting memorandum of points and authorities setting forth the legal and factual basis for requesting review.

258.4 The Application for Review shall also:

- (a) Identify the compensation order or final decision from which the petitioner appeals;
- (b) state whether the compensation order or final decision was issued by the Office of Workers' Compensation or the Administrative Hearings Division; and
- (c) include, by way of attachment to the Application for Review, a copy of the

compensation order or final decision appealed.

- 258.5 When the petitioner files the Application for Review with the Clerk of the Board the Clerk shall issue a Notice of Application for Review and serve it on all parties. This Notice shall inform the parties of the filing of the Application, of the time period prescribed for filing pleadings in response thereto, and of such additional information as the Clerk may deem warranted.
- 258.6 At the same time that the petitioners files the Application for Review and supporting memorandum with the Board, the petitioner shall:
- (a) serve a copy, by mail or personal delivery, copies of same upon the opposing party(ies), who shall be designated the "respondent(s)" for purposes of proceedings before the Board on appeal;
 - (b) serve a copy on either the Administrative Hearings Division or the Office of Workers' Compensation, depending upon which office issued the compensation order or final decision from which the appeal is taken; and,
 - (c) file with the Board certification that such service required by this section was effected.
- 258.7 A party adverse to the Application for Review may file a response in opposition. The party filing the opposition shall be designated as the "respondent" for purposes of proceedings before the Board on appeal.
- 258.8 Any response in opposition must be filed with the Clerk of the Board within fifteen (15) calendar days from the date of filing of the Application for Review.
- 258.9 The response in opposition to the Application for Review must include an original and three (3) copies. An additional copy of the response shall be served, by mail or personal delivery, upon the petitioner.
- 258.10 Within five (5) calendar days of receipt of a memorandum filed in opposition to an Application for Review, the petitioner may file a reply memorandum (original and three copies) with the Board, and serve copy of same upon the respondent. No further submissions by the parties shall be permitted, unless requested by the Review Panel to which the appeal is assigned or as provided under section 258.11 dealing with a cross-appeal.
- 258.11 If the Board receives a timely Application for Review, any other party may initiate a cross-appeal by filing, with the Clerk of the Board, a Notice of Cross-Appeal within seven (7) calendar days of the receipt of the Application for Review, or within the time

prescribed by section 258.8, whichever period last expires.

258.12 The Notice of Cross-Appeal shall include an original and three copies of an accompanying memorandum of points and authorities in support of the Cross-Appeal and shall be served upon the petitioner.

258.13 The petitioner shall have five (5) calendar days from the date of service to file with the Clerk of the Board, a memorandum of points and authorities in opposition thereto.

258.14 No further pleadings or other submissions with regard to the cross-appeal shall be allowed.

259 TRANSMISSION OF THE OFFICIAL RECORD

259.1 Simultaneously with the issuance of the Notice of Application for Review under section 258.5 of these rules, the Clerk of the Board shall direct the custodian of the record to immediately forward to the Board the official evidentiary record of the case.

259.2 The official record shall include the compensation order, the transcripts of all formal proceedings, exhibits, and other evidence of record, and any other such matters as shall be indicated.

259.3 The "custodian of the record" is the individual responsible for the official records in the Administrative Hearings Division or the Office of Workers' Compensation, depending on which entity issued the compensation order or final decision under appeal.

259.4 The custodian of the record shall certify and deliver to the Clerk of the Board the official record of the case within seven (7) working days of the date of issuance of the Notice of Application for Review.

259.5 "Working days" is defined by 7 DCMR 299 as "the District of Columbia Government business days, excluding Saturdays, Sundays and legal holidays."

259.6 When the Clerk has received the official record of the case and the response from the party(ies) opposing the Application for Review, but in no event later than fifteen (15) working days from the date of receipt of the Application for Review, the Clerk of the Board shall certify to the Chief Administrative Appeals Judge that the appeal is perfected.

260 STAYS OF COMPENSATION

260.1 The filing of an Application for Review shall not stay the effectiveness of a compensation order nor the payment of any amount ordered by it pending review by the Board.

- 260.2 Upon application by the employer the Board may stay a compensation order.
- 260.3 The Board shall only stay a compensation order on the grounds that the employer would suffer irreparable injury by complying with it.
- 261 COMPENSATION ORDER REVIEW BOARD RULES OF GENERAL APPLICATION
- 261.1 These Rules shall not be construed to extend or limit the jurisdiction or authority of the Board.
- 261.2 Chapter 7 DCMR sections 265 to 271 sets forth the Compensation Review Board Rules of Practice and Procedure. Those rules are fully applicable to this section
- 261.3 Except as otherwise provided, the rules promulgated in section 258, dealing with Applications for Review, apply to all appeals of any compensation orders and final decisions issued by the Administrative Hearings Division or Office of Workers' Compensation with respect to claims for compensation or benefits under the Private Sector and Public Sector Acts.
- 261.4 Where a procedural issue coming before the Board is not specifically addressed herein or by section 258, the Board may rely upon the Rules of the District of Columbia Court of Appeals, and the Rules of Civil Procedure of the D.C. Superior Court where appropriate.
- 261.5 The Board shall have power to preserve and enforce order during any proceedings for determination or adjudication of entitlement to compensation or benefits or for liability for payment thereof, and to do all things in accordance with law which may be necessary to enable the Board to effectively discharge its duties.
- 261.6 If a party in proceedings before the Board disobeys or resists any lawful order or process, or otherwise acts to obstruct the same, the Board may certify the facts to the District of Columbia Superior Court which shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and if the evidence so warrants, punish such party in the same manner and to the same extent as for a contempt committed before the court, or commit such party upon the same conditions as if the doing of the forbidden act had occurred with reference to the process or in the presence of the court.
- 261.7 A timely motion for reconsideration of a compensation order filed with the Administrative Hearings Division shall not stay the running of the thirty (30) day period for filing an Application for Review with the Board prescribed in section 258.2 of these regulations. Where, however, a motion for reconsideration is not ruled upon prior to the filing of an Application for Review, the pendency of the motion may serve as a basis for a stay of proceedings on a timely appeal before the Board until the motion is ruled upon

by the Administrative Hearings Division.

- 261.8 The time periods specified for submitting any filing described in section 258, except that for the filing of an Application for Review, may be enlarged for a reasonable period when, in the judgment of the Board, and upon a showing of exceptional circumstances by the requesting party, an enlargement is warranted.
- 261.9 A request for an enlargement of time shall be submitted in writing in the form of a motion, specifying the reasons for the request, and shall be directed to the Clerk of the Board.
- 261.10 The request must be received by the Clerk on or prior to the date on which the filing is due.
- 261.11 The parties to an appeal before the Board shall use the requirements of Rule 28 of the Rules of the D.C. Court of Appeals, to the extent practicable, as guidelines in the preparation and formatting of memorandum of points and authorities and other legal memorandum required to be filed with the Board.
- 261.12 Cases may, in the sole discretion of the Board, be consolidated for purposes of an appeal upon the motion of any party or upon the Board's own motion where there exist common parties, common questions of law or fact or both, or for such other circumstances as justice and the administration of the Acts requires.
- 261.13 Upon its own motion, or upon motion of any party, the Board may, for good cause, order any proceeding severed with respect to some or all issues or parties.
- 261.14 No Administrative Law/Appeals Judge shall maintain standing, chamber or other individual rules.
- 261.15 Nothing in these rules, however, shall be construed to limit the authority of the Chief Administrative Appeals Judge to approve the use of forms, documents and practices not inconsistent with these rules that shall assist in managing appeals coming before the Board, nor shall these rules limit the authority of an Administrative Law/Appeals Judge to issue any lawful order for purposes of case management or any other matter in particular cases.
- 262 COMPENSATION REVIEW BOARD RULES OF PRACTICE AND PROCEDURE
- 262.1 Within seven (7) working days of the filing of the Application for Review, the Chief Administrative Appeals Judge shall assign the appeal to a Compensation Review Panel (hereinafter Review Panel), which may include the Chief Administrative Appeals Judge, to review and determine the legal sufficiency of the compensation order or final decision

appealed.

- 262.2 The Review Panel may not include the Administrative Law Judge that issued the compensation order under review or was otherwise substantially involved in the conduct of proceedings resulting in the appeal before the Board.
- 262.3 Within thirty (30) working days of perfection of an appeal, the Review Panel shall decide the matter under review, including the case in chief and any cross-appeal, as well as any necessary orders, by majority vote of at least two concurring Review Panel Members.
- 262.4 The Board, in its sole discretion, may at any time order oral argument with respect to a pending appeal.

263 ORAL ARGUMENT

- 263.1 Where oral argument is ordered, the parties shall be provided a minimum of ten (10) calendar days notice, in writing, of the scope of argument, including the issues to be addressed, and of the time when, and place where, oral argument will be held.
- 263.2 Once oral argument is scheduled it shall not be continued except for good cause shown, upon motion received by the Board at least five (5) calendar days in advance of the scheduled date of oral argument and served that same date upon the opposing party.
- 263.3 Oral argument shall be conducted under the supervision of the Chief Administrative Appeals Judge or, if the Chief Administrative Appeals Judge is not a Member of the Review Panel, by the Chair of the Review Panel, who shall regulate all procedural matters arising during the course of argument.
- 263.4 The Chief Administrative Appeals Judge or the Chair of the Review Panel shall, in his or her discretion, determine the amount of time allotted to each party for argument and rebuttal. The presiding Administrative Appeals Judge shall also have the discretion to open the oral argument to the public and permit any party, representative, or duly authorized attorney to present the oral argument.

264 SUBMISSION OF ADDITIONAL EVIDENCE

- 264.1 Where a party requests leave to adduce additional evidence the party must establish:
- (a) that the additional evidence is material and
 - (b) that there existed reasonable grounds for the failure to present the evidence while the case was before the Administrative Hearings Division or the Office of Workers' Compensation (depending on which authority issued the compensation

order from which appeal was taken).

- 264.2 Where a party satisfies the requirements of subsections 264.1(a) and (b), the Review Panel to which the appeal is assigned, at its sole discretion, may remand the case to Administrative Hearings Division or the Office of Workers' Compensation for such further proceedings as the presiding Administrative Law Judge or claims examiner deems necessary.
- 264.3 Upon remand pursuant to subsection 264.2 of this Chapter, and receipt of the additional evidence, the presiding Administrative Law Judge or claims examiner may make such modification to the original compensation order as the additional evidence warrants.
- 264.4 Where an Administrative Law Judge or claims examiner issues a new or modified compensation order following remand under subsection 264.2, the Review Panel may reject the compensation order.
- 264.5 A party may either apply to the Board for review of the new or modified compensation order (or the Panel's decision to reject the compensation order) or request reinstatement of the party's originally-filed Application for Review.
- 264.6 Any request for reinstatement must be filed within thirty (30) calendar days of the Administrative Law Judge's or claims examiner's decision on remand, in the manner provided by section 258 for the review of an initial compensation order.

264 MOTIONS

- 265.1 An application to the Board for an order (other than a final decision and order) shall be by motion in writing (original and three copies).
- 265.2 A motion shall state with particularity the grounds therefore, including any legal support, and shall set forth the relief or order sought, and shall be accompanied by a certification showing that the opposing party(ies) have been served with the motion. If there is no objection to a motion by the other party(ies) in the case, the absence of objection shall be stated in the motion.
- 265.3 A motion, and any accompanying statement in support of the motion, shall be a separate document and shall not be incorporated in the text of any other paper filed with the Board.
- 265.4 Within five (5) calendar days of the receipt of a copy of a motion, an opposing party may file a written response (original and three copies) with the Board.
- 265.5 Except as otherwise provided in these Rules, motions shall be determined and disposed of

by the Board as follows:

- (a) Where a Review Panel has not been assigned to the case, the Chief Administrative Appeals Judge, or the Clerk of the Board where designated by the Chief Administrative Appeals Judge, may enter orders on behalf of the Board with respect to all non-dispositive motions, including motions for stays and for extensions of time for filing supporting and responding memorandum and briefs.
- (b) Where a Review Panel has been assigned to the case, the designated Chair of the Review Panel shall review and decide all non-dispositive motions, including motions for stays and for extensions of time, and enter orders on behalf of the Board with respect thereto.
- (c) All dispositive motions, including but not limited to motions to dismiss, whether opposed or unopposed, shall be reviewed and decided by the Review Panel assigned to the case, unless no Review Panel has been assigned in which event a panel of three Board Members shall be assigned to the case by the Chief Administrative Appeals Judge for the purpose of deciding the motion.

266 STANDARDS OF REVIEW

- 266.1 The Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, and is limited in its review to the record on appeal.
- 266.2 In reviewing the compensation orders issued by the Administrative Hearings Division the Board is authorized to review the findings of fact and conclusions of law upon which the compensation order is based, however:
- (a) the Board shall not disturb findings of fact contained in the compensation order under review that are supported by substantial evidence, and
 - (b) shall affirm a compensation order that is based upon substantial evidence and is in accordance with the governing Act and other applicable laws and regulations
- 266.3 In reviewing any other final order, other than a compensation order, issued by the Administrative Hearings Division from which appeal may be taken, the Board may set aside the final order where the Board determines that it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.
- 266.4 In the review of final decisions issued by the Office of Workers' Compensation, the Board may set aside any decision that the Board determines is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

267 DECISION OF THE REVIEW PANEL

267.1 The designated Review Panel shall dispose of the matter under review, utilizing the standards of review contain in section 266 of this Chapter, by issuing a decision:

- (a) affirming the compensation order or final decision;
- (b) reversing it in whole or in part;
- (c) amending the compensation order or final decision based on the Review Panel's findings; or
- (d) remanding the case to the issuing Administrative Law Judge or claims examiner for further action as is warranted including, *inter alia*, further hearing and evidentiary development, additional findings of fact or conclusions of law, and the issuance of a new compensation order on remand.

267.2 If a substantial question of law or fact prevents the Review Panel from affirming the compensation order, decision or award under review, the Review Panel may order that it be set aside and remand the case for additional proceedings based upon specific findings of deficiencies in the compensation order, decision or award.

267.3 In appropriate cases, such as where the issues raised on appeal have been thoroughly discussed and disposed of in prior cases by the Board or the courts, or where the findings of fact and conclusions of law are both correct and adequately discussed in the compensation order under review, the Board in its discretion may issue a brief, summary written decision disposing of the appeal and/or adopting the compensation order under review.

267.4 In cases which cannot be disposed of in a summary manner, the Review Panel shall issue a written order which shall fully discuss the legal and factual basis for the decision.

267.5 the Review Panel shall only issue an amended compensation order where a remand to the Administrative Hearings Division or the Office of Workers' Compensation would be unnecessary (*e.g.* where there is but one action that the Review Panel decision would permit), and thus remand would be superfluous.

267.6 The Decision and Order of the Review Panel shall be final upon its issuance and shall constitute the final decision of the Board.

268 RECONSIDERATION

268.1 Any party may, within ten (10) calendar days from the date shown on the certificate of

service of the Decision and Order of the Board or of any order issued by the Board, file a request for reconsideration thereof with the Clerk of the Board.

- 268.2 A reconsideration request shall be in writing, in the form of a motion, and
- (a) shall state the supporting rationale for the request;
 - (b) include any material pertinent to the request;
 - (c) include an original and three copies of the request; and,
 - (d) shall be served on all other parties.
- 268.3 Any opposition to the motion for reconsideration shall be filed with the Board within five (5) calendar days of the date of service of said motion.
- 268.4 Unless otherwise directed by the Chief Administrative Appeals Judge, the Review Panel assigned to the case shall review and rule on the motion for reconsideration.
- 268.5 Reconsideration of a Decision and Order shall require the affirmative vote of at least two members of the Review Panel.
- 268.6 Notwithstanding the filing of a request for reconsideration, the Chief Administrative Appeals Judge may, *sua sponte*, order reconsideration *en banc* of a Review Panel Decision and Order within ten (10) days of any Review Panel decision.
- 269 ATTORNEY FEES
- 269.1 No legal fee for services rendered on behalf of a claimant in the successful pursuit or successful defense of an award shall be valid unless approved pursuant to 7 DCMR section 109 in the case of Public Sector appeals or 7 DCMR section 224 in the case of Private Sector appeals.
- 269.2 Notwithstanding the time limits proscribed by 7 DCMR section 109 or 7 DCMR section 224, an application to the Board for the award of an attorney's fee (including, where appropriate, request for reimbursement of costs) for legal work performed before the Board on behalf of a successful claimant shall be filed with the Board within ninety (90) calendar days after the claim for benefits becomes final and all appeals have been exhausted.
- 269.3 A fee application filed with the Board shall include only time spent on services performed while the appeal was pending before the Board, and shall be complete in all respects, containing all of the information specified at 7 DCMR section 109 or 7 DCMR

section 224, as appropriate.

- 269.4 A fee application shall be served on all other parties, accompanied by a certificate of service. Any opposing party may respond to the fee application within seven (7) calendar days of receipt of the fee application, which shall be filed with the Board and served upon all other parties.
- 269.5 If a settlement petition submitted to the Office of Workers' Compensation for approval pursuant to D.C. Official Code section 32-1508(8) (2001) includes agreement as to the payment of an attorney's fee, there shall be no requirement that the Board separately consider or approve the award of an attorney's fee with respect to such settlement agreement.

270 JUDICIAL REVIEW

- 270.1 Pursuant to D.C. Official Code sections 1-623,28(b) and 32-1522(b)(3) (2001), any party adversely affected by a final decision of the Compensation Order Review Board may file an appeal thereof with the District of Columbia Court of Appeals within thirty (30) calendar days of the issuance of the Board's Decision and Order.
- 270.2 Reconsideration of a Decision and Order pursuant to section 268.1 does not stay the running of the thirty (30) day period for filing an appeal with the D.C. Court of Appeals.

271 DEFAULT IN THE PAYMENT OF COMPENSATION

- 271.1 In the event of default by an employer in the payment of compensation awarded pursuant to a Decision and Order issued by the Board, a request by the party to whom such compensation is payable for a declaration of such default, for the purpose of filing such declaration with the Superior Court of the District of Columbia pursuant to D.C. Official Code § 32-1519 (2001) shall be filed with and brought solely before the Administrative Hearings Divisions, and not before the Board.

Persons desiring to comment on this emergency and proposed rulemaking may submit their comments in writing not more than thirty (30) days after publication of this notice in the D.C. Register. Comments may be addressed to E. Cooper Brown, Acting Chief Administrative Appeals Judge, Compensation Order Review Board, Department of Employment Services, 64 New York Avenue, N.E., 3rd Floor, Washington, D.C. 20002.

OFFICE OF ADMINISTRATIVE HEARINGS

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Chief Administrative Law Judge of the Office of Administrative Hearings (OAH), pursuant to the authority set forth in Section 8 of the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76, D.C. Official Code § 2-1831.05(b)(7)), gives notice of the adoption, on an emergency basis, of the following amendments to Chapter 28 of Title 1 of the District of Columbia Municipal Regulations (DCMR), "Office of Administrative Hearings Rules of Practice and Procedure."

Adoption of these rules on an emergency basis will ensure that important and necessary procedural reforms are available promptly to the parties that appear before OAH. Therefore, adoption of these rules on an emergency basis is necessary to protect public health, safety and welfare. These emergency rules were adopted on August 31, 2005, and became effective on that date. These emergency rules will expire 120 days after their adoption, or upon publication of a notice of final rulemaking in the *D.C. Register*, whichever occurs first.

The Chief Administrative Law Judge also gives notice of his intent to take final rulemaking action to adopt these rules as an amendment to Chapter 28 of Title 1 DCMR "Office of Administrative Hearings Trial Procedural Rules" in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register* in accordance with § 6(a) of the District of Columbia Administrative Procedure Act, D.C. Official Code § 2-505(a).

Sections 2827.1, 2827.2, 2827.3, 2827.4, and 2827.5 of 1 DCMR Chapter 28 are amended to read as follows:

- 2827.1 If a Respondent fails to answer a Notice of Infraction within the time allowed by law, an Administrative Law Judge or the Clerk shall issue a notice of default, notifying the respondent of any penalties provided by law.
- 2827.2 If a Respondent fails to answer a second Notice of Infraction within the time allowed by law, an Administrative Law Judge shall review the case file to determine whether there is sufficient evidence of proper service, whether the Government has sought no more than the legally authorized fine, and whether the Notice of Infraction meets all legal requirements on its face.
- 2827.3 After reviewing the case file pursuant to Section 2827.2, the Administrative Law Judge shall issue an order finding the Respondent in default and imposing the legally authorized fine and penalty, unless there is insufficient evidence of proper service or the Notice of Infraction is improper on its face. If there is insufficient evidence of proper service, or if the Notice of Infraction does not meet all legal

requirements on its face, the Notice of Infraction shall be dismissed without prejudice.

2827.4 If a Respondent fails to answer a Notice of Violation, and the case has not been dismissed pursuant to Section 2804.5 of these Rules, an Administrative Law Judge shall review the case file to determine whether there is sufficient evidence of proper service, whether the Government has sought no more than the legally authorized fine, and whether the Notice of Violation meets all legal requirements on its face.

2827.5 After reviewing the case file pursuant to Section 2827.4, the Administrative Law Judge shall issue an order finding the Respondent in default and imposing the legally authorized fine and penalty, unless there is insufficient evidence of proper service or the Notice of Violation is improper on its face. If there is insufficient evidence of proper service, or if the Notice of Violation does not meet all legal requirements on its face, the Notice of Violation shall be dismissed without prejudice.

Section 2839.2 of 1 DCMR Chapter 28 is amended to read as follows:

2839.2 The administrative court shall endeavor in all its proceedings to safeguard the public from the unauthorized practice of law in violation of D.C. Court of Appeals Rule 49. Where required by law, an Administrative Law Judge shall permit a party to be represented by another person who is not an attorney. A party may also be represented by an individual, or by a representative of any entity listed in Section 2839.4, if the party had a prior contractual relationship substantially related to the subject matter of the case that existed prior to the case arising (such as a landlord/tenant or owner/property manager relationship). In addition, in an unemployment compensation case, a party may be represented by any authorized agent.

Section 2839.9 of 1 DCMR Chapter 28 is amended to read as follows:

2839.9 Repealed.

Section 2898 of 1 DCMR Chapter 28 is amended to read as follows:

2898 Repealed.

Comments on these proposed rules should be submitted in writing to Ms. Lisa Coleman, General Counsel, Office of Administrative Hearings, 441 4th Street, N.W., Suite 870-North, Washington, DC 20001-2714, with thirty (30) days of the publication of this notice in the *D.C. Register*. Copies of these proposed rules are available without charge at that address.