

**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 No. 06-042**

**LISA CENTORCELLI,**

**Claimant–Respondent,**

**v.**

**AMERICAN RED CROSS AND NATIONAL UNION FIRE INSURANCE COMPANY,**

**Employer/Carrier–Petitioner.**

Disposition of a “Request for Clarification” of  
Administrative Law Judge Terri Thompson Mallett  
AHD No. 99-127B, OWC No. 284070

Robert C. Baker, Esquire, for the Petitioner

Lisa E. Pisano, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel; E. COOPER BROWN, *Chief Administrative Appeals Judge*, concurring:

**AMENDED ORDER**

This Amended Order is issued due to the premature issuance of an Order in this appeal on November 9, 2006, due to an administrative error. That Order was issued without the Concurrence which is part of the Order, which is hereby vacated and this Amended Order, substantively identical to the Order of November 9, 2006, except to the extent that this Amended Order contains the Concurrence, is issued in its place.

Jurisdiction to consider matters arising from the actions of the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) is conferred upon the Compensation Review Board (the Board, see, 7 DCMR 118.1 and throughout, or 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).<sup>1</sup> That jurisdiction covers review of "Compensation Orders", which, while not defined in the Act, are defined by regulation as "an award issued by a Hearing or Attorney Examiner [now, an Administrative Law Judge, or ALJ] which rejects a claim or makes an award of benefits with respect to a claim under the Act." 7 DCMR 299, "Compensation Order".

Two such Compensation Orders have been issued previously in this case, both of which were appealed to the CRB. In the first appeal, a Decision and Order was rendered by the CRB, remanding the matter to AHD for reconsideration of the claim for permanent partial disability benefits under the schedule, with such review directed to be undertaken in light of a new, more flexible rule that had been established by the CRB in such cases, the CRB having abandoned an earlier more rigid rule. However, the ALJ who had issued the original Compensation Order had resigned from AHD while the appeal was pending. The matter was reassigned to a new ALJ, who issued a second Compensation Order based upon the record, but this was done without issuing a recommended or proposed Compensation Order, or permitting the parties to file exceptions thereto prior to issuing a Compensation Order in final form.

Petitioner appealed that Compensation Order, objecting in the appeal that the failure of the ALJ to issue a proposed or recommended Compensation Order, and to permit the parties to file exceptions thereto, violated a provision of the District of Columbia Administrative Procedure Act (the APA), D.C. Code § 2-509 (d). The APA provision dealt with procedures to be employed where a decision in a contested case adjudicated by a government agency is rendered by "a majority" which includes a person who did not hear the evidence.

This panel, on behalf of the CRB, considered the matter, and issued a Decision and Order, in which the matter was remanded to AHD for further proceedings. After considering the APA language in question, and after discussing the obvious fact that the APA referred to decisions issued by "majorities" rather than single ALJs, the panel explored and discussed the purpose of the APA provision, and concluded that despite the semantic differences between decisions rendered by "majorities" and decisions rendered by single ALJs, there was an underlying purpose being promoted by the APA provision, and that that purpose was to allow a party whose case is to be decided by a person or persons who did not hear the evidence to "make their case" to the decision maker or makers, by being permitted to review any proposed or recommended decision and file exceptions thereto. Specifically, the panel wrote:

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<sup>1</sup> 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 (the Board, or 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 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.

[T]he APA provision does not require that all of the adjudicators participating in the decision making process have personally heard the evidence, or that the parties be afforded a new hearing, the opportunity to offer additional evidence, or to raise new or additional issues. What is required in this context is that the parties be apprised of the proposed outcome prior to the issuance of a final order, and be afforded the opportunity to submit argument and to identify record evidence in support of their preferred outcome.

Because no such opportunity was presented to the parties in this case, neither party was in a position to take advantage of the APA's protections, or waive<sup>2</sup> their application [footnote omitted]. Accordingly, the Compensation Order on Remand must be vacated, and the matter remanded to AHD for further procedures consistent with the cited APA provision [footnote omitted].

Decision and Order, page 5.

Rather than carry out the directive of the CRB to undertake further proceedings to permit the parties to file exceptions, the ALJ issued a document entitled "Request for Clarification", in which the ALJ asserted that "[t]he decision of the CORB [a usage sometimes employed by ALJs in AHD to describe this Board, which by regulation is denominated "the Board"; see 7 DCMR 118.1] to extend application of D.C. Code § 2-509 (d) to compensation orders issued by an ALJ appears to directly contradict the Act." Request for Clarification, page 3.

The ALJ points to no language in the Act that is contradictory to application of the APA to the adjudicatory process for resolving disputed claims under the Act, and the ALJ is wrong to assert that the provisions of the APA do not apply to those proceedings. They do. The ALJ likewise failed to identify language in the Act that "contradicts" the terms of the specific provision of the APA at issue. Further, the ALJ's suggestion that the statutory and regulatory rules establishing that compensation orders be based upon "substantial evidence" constitutes such a contradiction is not only wrong, it is irrelevant to the further question of whether the APA provision at issue applies (or does not apply) to ALJs in AHD: Compensation Orders (as with all final orders covered by the APA) must be based upon substantial evidence, regardless of whether the provisions dealing with the filing of exceptions to a proposed or recommended Compensation Order apply as well.

Further, the suggestion by the ALJ that applying the provision of the APA is "duplicitous [sic<sup>3</sup>] of the review procedures of the CORB and contrary to the fundamental principals of fairness and efficiency" is, with all due respect, mystifying. Application of the rule to permit a party an *additional* opportunity to direct the attention of an ALJ, who did not preside over the hearing of the testimony and receipt of documentary evidence, or the oral argument of a party, to record evidence

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<sup>2</sup> AHD has long followed a practice whereby in instances such as this, an Order to Show Cause is issued, permitting the parties to voice any objection to the matter being reassigned and decided by an ALJ who did not hear the case. Presumably an agreement to such a process would effectively waive the APA provision at issue. Why that procedure was not followed in this case we do not know.

<sup>3</sup> We assume that the ALJ meant "duplicative", being the adjectival form for "duplicate", rather than "duplicitous", meaning "marked by duplicity" and suggesting deception. See, *Merriam Webster's Collegiate Dictionary, 10<sup>th</sup> Edition*, 1993, page 359.

in support of that party's position, *promotes* fairness rather than compromises it. Further, the filing of exceptions with an initial fact finder, which is akin to filing a written closing argument, is fundamentally different from appealing the decision of that fact finder to CRB, in ways we believe are obvious: the ALJ is free to adopt any reasonable interpretation of the evidence in rendering a Compensation Order, while on appeal the CRB is limited to determining whether the interpretation adopted is legally permissible and is supported by substantial evidence. It is a different process, not a duplicative one. And, "efficiency" would be better served in this case had the ALJ merely followed the instructions in the original Decision and Order, by, for example, announcing that the "Compensation Order on Remand" would be deemed a "Proposed Compensation Order on Remand", accepting and considering any exceptions filed, and then issuing a final "Compensation Order".

Which leads to the final point that the "Request for Clarification" is not a creature recognized by the workers' compensation statute or the implementing regulations. While, in this instance, we have gone to some length to discuss the apparent disagreements that the ALJ has with our prior decision, we note that this is a practice in which we will not again engage. Except in the possible instance of there being some technical irregularity apparent in a Decision and Order issued by the CRB, such as where for example it appears that there has been an editing error resulting in missing or inaccurate text, there is no occasion upon which a request for "clarification" by an ALJ is contemplated in the adjudicatory process under the Act or regulations. The CRB is certainly capable of being in error, and we have no doubt that when we are, the parties will manage to bring our error to the attention of the District of Columbia Court of Appeals, as contemplated by the Act, and that error will be corrected. However, in the interests of the orderly, efficient and fair administration of the Act, it is improper for an ALJ to seek reconsideration<sup>4</sup> by the CRB of a decision, in the guise of a "request for clarification".

The "Request for Clarification" is denied, and AHD is directed to carry out the prior order of the CRB.

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<sup>4</sup> Parties may seek reconsideration by virtue of the procedure established for that purpose in 7 DCMR 268.1 through 268.6. However, permitting an ALJ to do so presents the additional problem, apparent here, that parties have no voice in the reconsideration sought, an obvious due process concern.

**ORDER**

The vacating of the Compensation Order on Remand of March 12, 2006 is hereby reiterated and the matter is remanded to AHD for further proceedings consistent with the Decision and Order of May 23, 2006.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
Administrative Appeals Judge

November 15, 2006  
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DATE

E. COOPER BROWN, *Chief Administrative Appeals Judge*, CONCURRING:

I concur with the majority decision issued herein. I write separately to address what I consider to be the fundamental underlying legal principle guiding the Compensation Review Board in its analysis of compensation orders issued at the Hearings level upon remand from the CRB where the Administrative Law Judge deciding the case and issuing the compensation order is not the ALJ that initially heard the evidence that resulted in the original compensation order.

The manner by which the Administrative Hearings Division resolved the initial remand from the CRB's Decision and Order of November 3, 2005 -- by a different Administrative Law Judge who had not presided over the initial evidentiary hearing, and without affording the parties the opportunity to be heard prior to issuance of the Compensation Order on Remand (COR) -- necessarily resulted in the CRB's reversal of the remand decision for having failed to present the COR as a "proposed compensation order" to the parties for response prior to its issuance. While the Board cited Section 2-509(d) of the D.C. Administrative Procedures Act in reversing and remanding the case to AHD, the overriding consideration of the Board in reversing the COR was the underlying constitutional due process dictates that are to be accorded the parties, who have protected interests at stake under the D.C. Workers' Compensation Act.

In *Renard v. D.C. Dept of Employment Services*, 731 A.2d 413 (D.C. 1999), the Court of Appeals made it clear that claims for compensation under the D.C. Workers' Compensation Act constitute "contested cases" for which a trial-type hearing is mandated under the Act in accordance with constitutional due process dictates. 731 A.2d at 414-415. As the Court has more recently explained, "[w]hen protected interests are implicated, the Constitution requires notice and

opportunity for hearing appropriate to the nature of the case." *Gallothom v. D.C. Alcoholic Beverage Board*, 820 A.2d 530, 534 (D.C. 2003).

While the D.C. Court of Appeals has recognized a full panoply of procedural due process rights required in contested case proceedings,<sup>5</sup> in the instant matter what is "appropriate to the nature of the case" may vary depending upon the issues to be addressed and the context within which they may be resolved upon remand. Thus, as the Board has recently ruled, the dictates pronounced in our decision in this case of May 23, 2006 need not necessarily be followed where other procedural protections can be instituted upon remand that afford the parties their due process rights. In *Claudia Jones v. Potomac Job Corps*, CRB Nos. 06-40, OHA No. 98-192B (June 8, 2006), the Board addressed a case similar to the instant matter to the extent that it involved a change in ALJ's following issuance of the initial compensation order, subsequent to a remand by the CRB requiring further proceedings. As the Board therein noted, it is not necessary to go so far as to require the circulation of a proposed compensation order prepared by an ALJ that did not initially hear the case where the parties are afforded the opportunity to show why the matter upon remand should not be decided by a different ALJ based on the existing record and afforded an opportunity to submit additional evidence and/or present further legal arguments with respect to the issue or issues presented pursuant to the remand.

In the instant matter, the ALJ's "Request for Clarification" (to which the CRB herewith responds) states that the only matter to be resolved upon remand was a "legal issue". Were this so, due process dictates that the parties nevertheless be afforded an opportunity to submit legal briefs addressing the standard to be applied under the case law cited as the reason for the remand, *Wormack v. Fishback & Moore Electric*, CRB No. 03-159 (July 21, 2005), to the evidence before the judge on remand. However, to state that the remand required resolution of only a legal issue is to ignore the express language of the CRB's Decision and Order of November 3, 2005, wherein the Board indicated the *potential* evidentiary nature of the proceedings upon remand in stating that the case was remanded "for further evaluation and consideration, consistent with the foregoing discussion [from *Wormack*]" . . . taking into consideration in deriving a percentage of disability under the Act "the factors including the degree of medical impairment and considering the effect of said impairment upon Petitioner's industrial disability." Slip Op. at 5.

In returning this matter to the Administrative Hearings Division, I would urge the presiding ALJ to heed the continuing contested case nature of these proceedings and, whether through the processes dictated by D.C. Code § 2-509(d) or pursuant to the Board's recent decision in *Jones v. Potomac Job Corps*, *supra*, afford the parties the due process protections upon remand to which they are entitled.

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<sup>5</sup> See *Richard Milburn Pub. Charter Alternative High School v. Cafritz*, 798 A.2d 531, 538 n.7 (D.C. 2002), wherein the Court state, citing D.C. Code § 1-1509: "Among the procedures required during contested case proceedings are the following: reasonable notice of the hearing must be provided; the notice must state the time, place, and issues involved; an opportunity must be provided to all parties to present evidence and argument; the agency bears the burden of proof; any oral testimony or documentary evidence may be placed on the record unless irrelevant or cumulative; every party has the right to present a case or defense orally or through written testimony; all parties have the right to the assistance of counsel, to present rebuttal evidence and to cross-examine witnesses; the agency is required to maintain an official record; transcripts are available upon a timely request; decisions must be based on the record and must be in writing; and the decision must include findings of fact and conclusions of law."

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E. COOPER BROWN  
Chief Administrative Appeals Judge