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. 06-42

LISA CENTORCELLI,

Claimant–Respondent,

v.

AMERICAN RED CROSS AND NATIONAL UNION FIRE INSURANCE COMPANY,

Employer/Carrier–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Terri Thompson Mallett
AHD No. 99-127B, OWC No. 284070

Robert C. Baker, Esquire, for the Petitioner

Lisa S. Pisano, Esquire, for the Respondent[1]

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:

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).[2]

[1] Mr. Stephan Karr represented Respondent at the initial formal hearing. No one responded to this appeal on Respondent's behalf, and Respondent did not participate in this appeal.

[2] 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 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

BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order on remand, which was filed on March 12, 2006, the Administrative Law Judge (ALJ) awarded respondent 17% permanent partial disability to the right leg. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that (1) the procedures employed in issuing said Compensation Order on Remand violated provisions of District of Columbia Administrative Procedure Act, D.C. Code § 2-501, *et seq.* (2001 as amended) (the APA); (2) the award was not in accordance with the law because, in arriving at a disability percentage figure, the ALJ considered evidence concerning the effect of Petitioner's disability on her ability to earn future wages; and (3) notwithstanding the allegedly improper consideration of the effect of the injury upon Respondent's ability to earn wages in the future, the factual finding of such a future effect was unsupported by substantial evidence. Petitioner asserts that each error requires reversal.

Because we agree that the procedure utilized in issuing the Compensation Order on Remand did not comport with the APA, and are remanding the matter to AHD for further proceedings, we do not reach the second and third grounds for appeal.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is 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. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. Dist. of Columbia Dep't. of Employment Serv's.*, 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.

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.

The order under review was issued following an earlier remand of a Compensation Order for reconsideration of Respondent's claim for a schedule award. In the original proceedings leading up to the issuance of that Compensation Order, a formal hearing was held before the Hon. Reva Brown, an ALJ in AHD. Judge Brown issued the Compensation Order, in which she made an award. In that Compensation Order, she expressed her view that her decision making options were constrained to a selection of one medical impairment rating or another, basing her decision on a rule of construction of the Act that was abandoned and replaced with a new, more flexible rule while the Compensation Order was on appeal. That order was remanded for reconsideration in light of the new rule. However, Judge Brown had left the agency prior to the remand, requiring that the matter be reconsidered by a new ALJ, one who had not heard the original case.

The new ALJ reviewed the record and issued a Compensation Order on Remand, applying the newly announced rule, and making a greater award than had been made by the prior ALJ. Petitioner has now appealed that Compensation Order on Remand to the CRB.

Petitioner raises as an initial matter an objection to the procedure followed in the issuance of the Compensation Order on Remand. In its "Memorandum in Support of Application for Review of Employer/Insurer" (Memorandum), Petitioner asserts that "[t]he Compensation Order on remand was not issued in accordance with the requirements of the District of Columbia Administrative Procedure Act, DC Code Section-509 (d) (2006) [the APA]", and argues that the APA requires "that in a contested case such as this, whenever the individual who is to render the final decision did not personally hear the evidence, no decision adverse to a party other than the District government shall be made until a proposed order or decision including Findings of Fact and Conclusions of Law, has been served upon all parties and an opportunity has been afforded each party adversely affected to file exceptions and present argument to the individual who will actually issue the decision". Memorandum, page 8 – 9.

Petitioner did not quote the language of the cited provision, which does not state explicitly what Petitioner contends. Rather, it reads as follows:

> Whenever in a contested case a majority of those who are to render the final order or decision did not personally hear the evidence, no order or decision adverse to a party to the case (other than the Mayor or an agency) shall be made until a proposed order or decision, including findings of fact conclusions of law, has been served upon the parties and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of those who are to render the order or decision, who, in such a case, shall personally consider such portions of the exclusive record, as provided in subsection (c) of this section, as may be designated by any party.

D.C. Code § 2-509 (d) (2001 as amended). While there is no question that workers' compensation proceedings, including formal hearings in contested cases under the Act, are governed by the APA generally (see, 7 DCMR § 221.4 and *Renard v. District of Columbia Dep't. of Employment Serv's.*, 731 A.2d 413 (1999)), it is also clear that formal hearings under the Act are not conducted by boards or commissions, but rather are heard and decided by single ALJs. The question that springs

to mind becomes whether, in light of the statute being directed towards decisions rendered by "a majority", it has any application where, as here, the decision is issued by a single ALJ.

The APA does not contain a definition for "majority". However, the term is defined in *Black's Law Dictionary*, Seventh Edition (1999), at page 966 as "A number that is more than half of a total; a group of more than 50 percent". Similarly, the *Merriam Webster Collegiate Dictionary*, 10th Edition, (1997) includes at page 702 the following definitions: "the quality or state of being greater; … a number greater than half the total".

These definitions do not help illuminate whether the application of the section to formal hearings under the Act is intended by the APA; while one could argue that a majority of one is one, because one is greater than one-half, such an analysis would be artificial and pedantic, given that there is no meaningful sense in which there is a "half" person in the real world, where formal hearings are conducted. Simply put, workers' compensation cases brought to formal hearings under the Act are determined not by a majority, but by a single ALJ, thus making reference to procedures to be employed where decisions are rendered by majorities (such as by panels, commissions or boards) problematic.

In that we can not meaningfully follow the provision in its exact form, we are required to assess the purpose of the provision, and if possible, interpret it so as to give it meaning in the context of the formal hearing process under the Act, or identify a reason or reasons why it would be inappropriate to apply the provision in this case.

The apparent purpose of the provision is to assure that, where a decision is to be rendered in a contested case in which less than the number of adjudicators required to render a decision have personally heard the presentation of the evidence, interested parties are entitled to know what the intended, or "proposed" outcome will be, and to contest that outcome by "fil[ing] exceptions and present[ing] argument" to the minimum number of adjudicators necessary to reach a final decision, and that such adjudicators shall "personally consider such portions" of the record as shall be designated by the parties. In other words, it appears that the provision seeks to assure that parties are given an opportunity to argue their case and direct specific attention to specific record evidence to at least the minimum number of the potential "deciders" who could control the outcome of a case, where not all of those deciders were present when the evidence was first heard.

Nothing about this purpose suggests that it should be applicable in decision making processes involving panels or boards, but not in single adjudicator settings. Rather, the provision appears to preserve the opportunity of a party to be certain that its arguments and evidence are considered by a sufficient number of adjudicators to prevail, if those adjudicators agree with the arguments of the party.

Further, nothing about the process prescribed by the APA has any less reason to exist where the final decision is rendered by a single individual rather than a collective. Rather, there is every reason to suppose that the legislature, in passing this provision, meant to assure all participants in administrative adjudication that they would be able to present arguments and point out evidentiary support for those arguments to the eventual decision makers. As the Court of Appeals has noted, following or not following this APA provision has procedural due process implications, and we see

no reason why these implications are any less relevant where a decision is rendered by an individual as opposed to a panel or board. *See, Gallothom, Inc. v. District of Columbia Alcoholic Beverage Board*, 820 A.2d 530 (2003). Accordingly, we see no reason to hold that parties to formal proceedings under the Act are not entitled to the same procedural rights as are granted to parties who are subject to decisions rendered by panels, commissions or boards.

It is notable, however, that the 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 their application.[3] Accordingly, the Compensation Order on Remand must be vacated, and the matter remanded to AHD for further procedures consistent with the cited APA provision.[4]

CONCLUSION

The Compensation Order on Remand of March 12, 2006 was issued without procedural conformance with the requirements of D.C. Code § 2-509 (d) (2001 as amended), and the matter must be remanded to AHD to permit further proceedings in which the provisions of that statute can be effectuated.

ORDER

The Compensation Order on Remand of March 12, 2006 is hereby vacated and the matter is remanded to AHD for further proceedings consistent with the foregoing Decision and Order and the APA.

[3] In circumstances such as those presented here, the procedure created by the statute does involve delay and the potential for additional costs being incurred, and as such are presumably subject to waiver, if for example, neither party objects to a decision being issued by a new ALJ based upon a record previously adduced under a prior ALJ, pursuant to notice and an opportunity to show cause why the new ALJ ought not render the decision without further argument or reference to specific parts of the record.

[4] The APA does not contain specific guidance concerning the process by which the parties may exercise their rights, including the time within which such exceptions are to be filed and the record portions identified for consideration, the form and manner of submission of argument, the timing or order of submission of such items by the parties, or the opportunity for rebuttal or supplemental record identification. Accordingly, such matters shall be left to the sound discretion of the ALJ on remand, subject to the reasonable exercise thereof.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

_____May 23, 2006_____
DATE