

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. 08-007

CURTIS GIBSON,

Claimant – Respondent

v.

ARAMARK CORPORATION,

Self-Insured Employer – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Melissa Lin Klemens
AHD No. 07-293, OWC No. 635657

Curtis B. Hane, Esq., for the Petitioner

Jessica G. Bhagan, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, LINDA F. JORY and SHARMAN J. MONROE, *Administrative Appeals Judges*.

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

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order 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, which was filed on September 27, 2007, the Administrative Law Judge (ALJ) granted the Claimant-Respondent's (Respondent) request for temporary total disability benefits continuing from January 24, 2007. The Self-Insured Employer-Petitioner (Petitioner) timely filed an Application for Review on October 10, 2007 seeking a review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the Compensation Order is not in accordance with the law and is based upon erroneous findings of fact.² The Respondent timely filed an Opposition advocating that the Compensation Order be affirmed.

ANALYSIS

As an initial matter, the standard 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. D.C. Official Code § 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. District of Columbia Department of Employment Services*, 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.

² The Petitioner attached four (4) numbered exhibits to its Application for Review. Pursuant to 7 DCMR § 266.1, the CRB's appellate jurisdiction is limited to a review of the record made before AHD or OWC, as applicable. It is not empowered to conduct a *de novo* review of matters appealed to it. Consequently, any exhibits that are either not part of the official file created before AHD or not admitted into evidence by the ALJ will not be considered in rendering this decision.

Turning to the case under review herein, the Petitioner alleges that the following:

- (1) that the ALJ committed reversible procedural error by denying its motion to exclude the Respondent's exhibits because it received them only 48 hours prior to the hearing;
- (2) that the ALJ committed reversible error by disallowing its motion at hearing to contest whether the Respondent sustained an accidental injury;
- (3) that the ALJ failed to make findings of fact on the Respondent's receipt of unemployment compensation benefits and its effect on his receipt of workers' compensation benefits. Citing *Stanford v. Carey International, Inc.*, Dir.Dkt. No. 99-68, OHA No. 99-144, OWC No. 533475 (April 30, 2003), the Petitioner maintains that it is entitled to a credit for unemployment compensation benefits received by the Respondent; and
- (4) that the medical evidence of record shows that the Respondent was able to return to work as early as March 2007, contrary to the ALJ's finding that he was unable to work since January 24, 2007.

The workers' compensation proceedings before this agency are administrative in nature. The rules of procedure and practice used in the court system are not binding on the proceedings, but can be used as guidelines. See 7 DCMR §§ 221.4, 261.4. Both the Act and the District of Columbia Administrative Procedures Act (DCAPA), which also governs administrative proceedings under the Act, give an ALJ broad discretion to determine all questions in adjudicating workers' compensation case. See D.C. Official Code §§ 2-509, 32-1525(a); 7 DCMR §§ 221.3, 223.3. This discretion, however, is not unfettered and must be rationally based and not capricious or arbitrary. A decision that reflects an abuse of discretion constitute a reversible error. See generally *Palmerton v. Parsons Corporation*, CRB No. 05-016, AHD No. 05-016, OWC No. 586530 (January 5, 2006) (ALJ's exclusion of the 17 hours of work from petitioner's fee petition on basis that the worked performed was for administrative tasks without further explanation was an abuse of the ALJ's discretion and reversible).

The Panel takes administrative notice that the AHD Scheduling Order and rules of practice require exchange of exhibits between the parties by a date certain, which in the instant case was July 31, 2007. In the absence of the submission of exhibits by the schedule deadline it would have been reasonable on the part of the Petitioner to assume that the Respondent did not intend to rely upon any exhibits at the time of hearing.³ Thus, upon receipt of the Respondent's exhibits less than 48 hours in advance of the scheduled formal hearing, the Petitioner was well within its right to object to introduction of the exhibits at the time of the hearing.

The Court of Appeals has held that, "in general, an individual is entitled to fair and adequate notice of *administrative proceedings* that will affect his [or her] rights, in order that he [or she] may have an opportunity to defend his [or her] position." *Transportation Leasing v. D.C. Dept. of Employment Services*, 690 A.2d 487, 489 (D.C. 1997) (citing *Ridge v. Police & Firefighters*

³ Notwithstanding, the record indicates that, to his credit, Petitioner's counsel made at least one attempt to ascertain whether Respondent had exhibits that he intended to submit, and requested copies of same.

Retirement and Relief Bd., 511 A.2d 418, 424 (D.C. 1986)) (emphasis added). By any stretch of the imagination, it cannot be said that the Petitioner received fair and adequate notice of the exhibit evidence that the Respondent intended to rely upon at the time of hearing. In light of the procedures established for pre-hearing discovery and the exchange of documents, including express provision for the filing of any objection to such documents *in advance of* the formal hearing, it was fully reasonable on the Petitioner's part to rely for the preparation of its case on the fact that no exhibits had been produced, and thus to assume no exhibits would be introduced at the time of hearing or immediately prior thereto as occurred in this case.

While the Panel agrees that when confronted, as in the instant case, with a last minute submission of exhibits to which objection is raised, the documents' admissibility is within the discretion of the ALJ, provided that discretion is not abused. At the same time, however, the ALJ is not limited in her response to allowing or disallowing the introduction of the proffered exhibits. The ALJ could reasonably postpone the hearing for a sufficient time to allow the protesting party the opportunity to review the proffered documents and, if warranted, conduct such further discovery as might prove warranted. *See Transportation Leasing*, 690 A.2d at 489 n.2. *See also* 7 DCMR §§ 220.5 and 223.4. However, in deciding whether a continuance is warranted, *Transportation Leasing* further countenances that a determination is necessary as to whether the lack of fair and adequate notice of the exhibits to be introduced has resulted in prejudice to the opposing party. Whether prejudice resulted from the ALJ's allowance in the instant case of the last-minute introduction of the Respondent's exhibits, as the Petitioner argues, must be examined.

The Petitioner's first argument of prejudice is that it was not aware of the presence of issue of accidental injury, a matter that the Petitioner had previously stipulated as not contested, until it obtained the Respondent's exhibits. It asserts that the ALJ's action of allowing admission into evidence of the Respondent's exhibits and denying its motion to raise the issue during the hearing of whether the Respondent actually sustained a work-related accidental injury as a defense was prejudicial to the Petitioner. In response to the Petitioner's assertion, this Panel has carefully reviewed the Respondent's exhibits and fails to see where anything remotely contained therein supports a contention that the Respondent did not experience an accidental injury on the date in question or in the manner claimed by Respondent. The Petitioner cites, as example, a treatment note by Dr. William Vetter, which references the MRI conducted in March of 2007 but which fails to relate the findings contained therein to the Respondent's asserted work injury. However, given that Respondent's claim is based upon a lumbar strain, and the MRI finds a degenerative disk condition, it is irrelevant that Dr. Vetter's subsequent reading of the MRI report does not relate the disk condition to the Respondent's work injury. Moreover, the record before us on appeal shows that evidence was, nevertheless, allowed into the record on this subject through the Petitioner's witnesses, and that that evidence, rather than contesting the fact of an accidental injury, actually served to corroborate its existence. *See* HT 100-101. *See generally Clair v. D.C. Department of Employment Services*, 658 A.2d 1040, 1044 (D.C. 1995)(where there is an absence of contrary evidence supporting an issue and a resolution of differing versions of the facts is not required, no purpose would have been served by remanding the case to the ALJ for further findings).

The Petitioner, in further support of its claim of prejudice, additionally asserts on appeal that because it had no knowledge of the treatment provided by a Dr. Mosuro until the Respondent's exhibits were produced, the Petitioner was deprived of the opportunity to conduct further discovery relative to the medical findings and reports of these physicians. *See* Employer's Memorandum of Points and Authorities, at pg. 7. Dr. Mosuro did an initial evaluation on April 26, 2007, diagnosing lumbar spinal stenosis and prescribing epidural injections, which were subsequently administered on May 8th and May 22nd, at which time Dr. Mosuro released the Respondent to part-time light duty employment. The Petitioner has failed, however, to establish how the last-minute awareness of Dr. Mosuro's treatment in any way resulted in prejudice. Nor is this Panel otherwise able to discern any prejudice, given that at issue is whether the Respondent has been totally temporary disabled since the date of his injury, as the ALJ determined, and we fail to see where Dr. Mosuro's treatment in April or the doctor's release of the Respondent to return to light duty employment in May would have altered the ALJ's finding upon which her determination of temporary total disability was based, *i.e.* that the Petitioner failed to provide the Respondent with suitable alternative employment.

With respect to unemployment compensation, a review of the record reveals that a credit to the Petitioner for monies paid was not presented to the ALJ as a contested issue or otherwise placed into controversy by the Petitioner at any time during the formal hearing. In the usual circumstance, a party's failure to raise an issue before the ALJ precludes that party from raising said issue on appeal as the ALJ did not have the opportunity to review pertinent evidence and make a judgment thereon. *See Davis v. District of Columbia Department of Employment Services*, 542 A.2d 815 (D.C. 1998). However, in this jurisdiction, as a matter of law, an employer is entitled to a credit for unemployment benefits received by an injured worker during the disability period requested "to prevent an injured worker from receiving double recovery of monies from an employer." *See Beckwith v. Providence Hospital*, CRB No. 07-138, AHD No. 06-139, OWC No. 615744 (September 7, 2007). In this case, the record contains some evidence on the Respondent's receipt of unemployment compensation. Therefore, the ALJ was required to address the receipt and this matter must be remanded for findings of fact and conclusions of law on whether the Petitioner is entitled to the credit. *See generally Washington Metropolitan Area Transit Authority v. D.C. Department of Employment Services*, 926 A.2d 140, 148 (D.C. 2007)(CRB is without authority to reverse an order of an ALJ denying compensation and in its place issue an award of compensation, but must remand the matter to the ALJ with instructions that the latter issue such an order).

With respect to the nature and extent of disability, on review of the record, the Panel determines that the ALJ's findings that the Respondent is entitled to temporary total disability benefits continuing from January 24, 2007 is supported by substantial evidence. Thus, the Panel will not set aside the findings.

CONCLUSION

The Compensation Order of September 27, 2007 is, in part, not supported by substantial evidence in the record and is not in accordance with the law.

ORDER

The Compensation Order of September 27, 2007 is hereby AFFIRMED IN PART AND REMANDED IN PART.

The issue of whether the Petitioner is entitled to a credit arising from the receipt of unemployment compensation benefits is remanded. On remand, the ALJ may conduct such further proceedings as may be deemed necessary and issue an Amended Compensation Order containing findings of fact and conclusions of law on this issue.

All other portions of the Compensation Order are affirmed.

FOR THE COMPENSATION REVIEW BOARD:



SHARMAN J. MONROE
Administrative Appeals Judge

January 31, 2008

DATE