GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
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CRB No. 05-203

JOHN DEANE, Claimant – Respondent,

v.

TOTAL BLOOD MANAGEMENT, INC., AND AIG CLAIMS SERVICE,

Employer/Carrier – Petitioner.

Appeal from a Dismissal Order of
Chief Administrative Law Judge Malcolm J. Luis-Harper
AHD No. 05-019, OWC No. 587134

Anthony J. Zaccagnini, Esquire, for the Petitioner

Steven H. Kaminski, Esquire, for the Respondent

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

LINDA F. JORY, *Administrative Appeals Judge,* on behalf of the 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 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005)[1]. Pursuant to §230.04, the authority of the Compensation Review Board extends over

[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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, 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 D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq.*, 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

appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division or the Office of Workers' Compensation under the public and private sector Acts.

BACKGROUND

This appeal follows the issuance of an Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA), District of Columbia Department of Employment Services (DOES). In that Order, which was filed on January 26, 2005, the Chief Administrative Law Judge (Chief ALJ), dismissed Employer-Petitioner's Application for Formal Hearing (AFH) due to employer's failure to appear for a Formal Hearing within 90 minutes of the convention thereof.

ANALYSIS

Employer-Petitioner asserts the Chief ALJ abused his discretion by not granting petitioner a short continuance, in light of counsel's inability to timely be present at the scheduled Formal Hearing due to adverse weather and traffic conditions, and dismissing its Application for Formal Hearing. In support thereof, Employer-Petitioner submits as an attachment to its Memorandum, the Metro section of the January 20, 2005 *Washington Post* highlighting an article entitled "First Snowstorm Stalls the Region" and asserts that he was not alone in his travel difficulties as the Claimant was also late for the scheduled Formal Hearing. Employer-Petitioner asserts that the length of the delay he requested was certainly reasonable; throughout the delay he and his office were in contact with the Office of Hearings and Adjudications; (now the Administrative Hearings Division or AHD) indicating his position on the road; and, submits the phone records of both his cell phone and his paralegal's office phone. Employer-Petitioner argues "To preclude an employer's right to contest the nature and extent of permanent disability over what is truly a "technicality" and without any asserted prejudice to the non-moving party or the agency, is not in the furtherance of justice and is an abuse of discretion.

Claimant-Respondent asserts the ALJ's dismissal of Employer's Application for Formal Hearing was a "culmination of a pattern of failing to appear at Administrative proceedings and failure to abide by the deadlines set in the OHA scheduling order"[2]. Claimant-Respondent also points out that although Employer-Petitioner alleges the Chief ALJ failed to consider a last-minute motion for continuance of the Formal Hearing, no where in the Application for Review does Employer state that it actually made a request for a continuance on the day of the hearing. Claimant-Respondent also conceded that claimant himself was late to the Formal Hearing due to the weather; he was traveling from Wyoming, Delaware and was considered by the Chief ALJ to have arrived, along with claimant's counsel, and the court reporter, within a reasonable time of the convention of the hearing. *See* Order, n 2.

Act of 2004.

[2] Although not material to the instant outcome, Claimant-Respondent also advises that following OHA's granting of counsel for claimant's request for a prior continuance to January 19, 2005, it was counsel for employer who requested that the time be moved from 9:00 am, to 1:00 pm.

A thorough review of the transcript of the proceedings conducted by the Chief ALJ does not reveal any indication that counsel for employer had requested a continuance of the Formal Hearing either to a later time or another date. Moreover, in his own affidavit, counsel for employer's only mention of a continuance is his statement at paragraph nine (9) "Based upon my particular plight, I was under the assumption that Judge Harper was going to continue the hearing if I could not be there by 2:30 p.m." Having reviewed the record in its entirety, the panel is of the opinion that the matter does not turn on whether counsel asked for a continuance and was or was not granted the same but whether the Chief ALJ's dismissal of the Application for Formal Hearing for employer's failure to appear in a timely manner constituted an abuse of discretion or was dismissal no in accordance with the law.

7 D.C.M.R. §223.2 provides:

> If the party requesting the hearing fails to appear, the application for Hearing shall be dismissed unless the other party objects and shows good cause why the application should not be dismissed.

However, 7 D.C.M.R §223.2 has been enlarged by AHD in its scheduling order[3] at paragraph no. 9, which states:

> Where the party applying for a Formal Hearing fails to perform pursuant to the Scheduling Order, without good cause, said application for hearing shall be dismissed pursuant to 7 DCMR §222.2. Said dismissal shall be predicated upon either a Motion of the non-requesting party or a *sua sponte* Order to Show Cause. Where a party is informed of a Motion to Dismiss - through service of a Motion by the non-requesting party or through an Order to Show Cause – the party shall respond thereto within five (5) working days of service. Failure to respond shall be deemed acquiescence in said Dismissal. A Motion for Dismissal pursuant to this provision shall be filed with OHA within ten (10) working days of a party's failure to perform.

A review of the hearing transcript reveals Claimant-Respondent did in fact make an oral motion to dismiss Employer-Petitioner's application and attempted to show cause why it should be dismissed. *See* HT at 4. Although the hearing transcript reveals Employer-Petitioner contacted AHD "at least twice if not three times," there is no reference by the ALJ that Employer-Petitioner was informed of Claimant-Respondent's Motion to Dismiss and no reference to any response counsel for Employer-Petitioner might have provided to the ALJ. Nevertheless, on January 26, 2005 the ALJ issued the Order dismissing the Application for Formal Hearing.

While the Act and the regulations promulgated to administer the Act have put the burden on the non-moving party to show good cause why the application should not be dismissed, (as opposed to showing why it should be dismissed), paragraph no. 9 of the Scheduling Order issued to the parties by AHD clearly states the burden is on the party who applied for the Formal Hearing to show cause why its AFH should not be dismissed for failing to perform. The Scheduling Order

[3] The Scheduling Order issued by the ALJ in proceedings before AHD is presumed to have the force and effect of any duly promulgated agency regulation.

sets forth a response time and the means by which the moving party should be notified of said Motion to Dismiss and the moving party is provided with a response time of five days either from the service of the non-moving party's motion or OHA" Order to Show Cause. In that the Scheduling Order plainly states a party informed of a Motion to Dismiss through service of a Motion or an Order to Show Cause shall have 5 working days to show cause why the application should not be dismissed, it is clear the moving party in the instant matter was not afforded any opportunity to demonstrate why its Application for Formal should not be Dismissed.

Notwithstanding Claimant-Respondent's assertion that good cause has been shown merely because he and his client were able to arrive at the hearing, although he conceded his client was also late, it is clear the moving party has not been provided any opportunity to respond with its cause for failing to appear. Instead, Employer-Petitioner took the opportunity to submit its evidence of good cause with its Application for Review. This documentary evidence, however, was not before the ALJ nor considered before the issuance of the dismissal order. Accordingly, it cannot now be considered by this forum in determining whether the ALJ abused his discretion in dismissing the Application for Formal Hearing.

The order of dismissal as written potentially creates additional, presumably unanticipated, consequences for the employer, at least one of which is potentially prejudicial in the extreme. To begin with, the ALJ has conceded in his order that January 19, 2005 "was a day of delays due to a winter snow storm" but does not indicate why he found that this condition was insufficient for showing good cause. Nor does the order indicate whether the dismissal is with or without prejudice, thus raising the question of whether or not the Director's decision in *Boucary Sacko v. Radio Shack*, Dir. Dkt. No. 02-89, OHA No. 02-342A (August 25, 2003), requires finalization by the Office of Workers' Compensation of the claims examiner's previously-issued Memorandum of Informal Conference. However, because the ALJ did not order remand to OWC, only that the Application for Formal Hearing be *dismissed*, this issue may not arise.

Yet, as drafted the ALJ's order may bear an even more foreboding prejudicial consequence for the employer. Because the order, in dismissing the case, does not remand to OWC but states that the Application for Formal Hearing be "dismissed," the employer is placed at considerable risk that should it re-file the Application for Formal Hearing, a timeliness issue will necessarily arise. In *Blanken v. D.C. Department of Employment Services*, 825 A.2d 894 (D.C. 2003), the court held that a re-filed Application for Formal Hearing following an ALJ's dismissal would not be deemed to have been untimely filed where the ALJ had, in dismissing the original Application, ordered remand to OWC – thus preserving the ongoing nature of the originally filed action such that the date of filing of the second AFH related back to the date the first Application was filed. In the instant case, there is no order of remand to OWC, and one cannot be presumed. Thus, the protection afforded by the court's ruling in *Blanken* may well elude Employer should it seek to re-file its Application with AHD.

In light of the foregoing, the instant appeal must be remanded to the Administrative Hearings Division in order to provide the presiding ALJ the opportunity to fully explain his rationale and basis for dismissing the employer's Application for Formal Hearing following an evidentiary hearing at which the employer is afforded the due process opportunity of submitting evidence in support of its argument that the hearing on its AFH should have been continued, rather than its

AFH dismissed. Assuming the ALJ remains of the opinion, after hearing from the employer (and any counter argument and evidence from the claimant), that the dismissal remains warranted, the order of dismissal that ensues should indicate whether dismissal is with or without prejudice. Further, if remand to OWC is not intended, the ALJ's order should so state.

CONCLUSION

The order of January 26, 2005 which dismissed Employer-Petitioner's AFH was issued in violation of the Scheduling Order issued to the parties on October 29, 2004.

ORDER

The Order of January 26, 2005 is hereby REVERSED and REMANDED to the OHA for further proceedings consistent with the analysis and conclusion herein.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

April 26, 2005