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
(202) 673-6402 - Fax

CRB No. 07-160

FANTA F. DAVIES,

Claimant – Petitioner,

v.

J.W. MARRIOTT HOTEL,
Self-Insured Employer – Respondent,

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 05-329A, OWC No. 606662

Heather C. Leslie, Esquire for the Petitioner

Alan D. Sundburg, Esquire for the Respondent

Before LINDA F. JORY, AND JEFFREY P. RUSSELL, *Administrative Appeals Judges*, and E. Cooper Brown, *Chief Administrative Appeals Judge.*

LINDA F. JORY, *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

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 August 13, 2007, the Administrative Law Judge (ALJ), concluded that Claimant – Petitioner (Petitioner) had not met her burden of making an initial showing that her continuing right hip symptoms are medically causally related to her December 2, 2000 work injury and denied Petitioner's claim for relief.

In her Petition for Review, Petitioner alleges as grounds for the appeal that the ALJ committed reversible error by denying her the interpreter requested though the agency. Thus, per Petitioner, the ALJ's denial of her claim for relief because he found her testimony "unworthy of belief" is inconsistent with the substantial evidence in the record. Employer-Respondent (Respondent) has filed a response to Petitioner's Memorandum of Points and Authorities and therein asserts that Petitioner "waived any objection to proceeding at Hearing without the use of an interpreter" and that the ALJ's decision was rational and supported by substantial evidence in the record. Respondent also filed a cross-appeal asserting that in the event Petitioner's request to vacate the Compensation Order is granted, the ALJ's determination that Petitioner had timely filed her claim for benefits was in error as is the ALJ's finding that the parties had reached a stipulation as to Petitioner's average weekly wage.

Because we find that Petitioner was denied the right to a fair hearing by proceeding without an interpreter, we reverse and vacate the entire Compensation Order as being contrary to law, and remand the matter to AHD for a Formal Hearing de novo with Petitioner having the benefit of an interpreter.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. Official Code §32-1501 *et seq.*, at §32-1522(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. App. 2003). Consistent with this scope of review, the CRB and this panel are bound to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained

---

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 Act of 2004.

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.

In support of her appeal, Counsel for Petitioner asserts that Petitioner's first language is Cheole, a dialect spoken in Petitioner's home in Sierre Leon, West Africa. Petitioner further asserts that pursuant to §12 of the Scheduling Order issued by AHD, a request for a translator who speaks Cheole was made to AHD on October 19, 2005 and in response to this request an interpreter did show to assist Petitioner. Review of the Hearing Transcript confirms Petitioner's assertion that the ALJ denied Petitioner the use of the translator and allowed direct examination and cross examination of Petitioner without the same.

On the issue of the denied interpreter, Respondent asserts in its defense that the question of the need for an interpreter arose for the first time at the Formal Hearing and that while Petitioner contends on review that a request for an interpreter was submitted to the agency on or about October 19, 2005, it did not receive a copy of this request nor was the request included in the formal hearing record. Respondent reproduced the discussion held at the formal hearing as taken from the hearing transcript and asserted that the discussion as reproduced contained the complete and only discussion of the Court regarding the use of an interpreter. While this Panel agrees with Respondent's description of the conversation, the Panel disagrees that Petitioner waived any objection to proceeding to Formal Hearing without the use of an interpreter as no evidence or proffer was made regarding the identity of the interpreter or how the interpreter happened to come to be at the Formal Hearing, whether by the request of the agency or otherwise.

This Panel also initially questioned how the interpreter came to be at the Formal Hearing and similarly questions why the ALJ did not directly inquire of the same while on the record. Our review of the record indicates that the ALJ apparently did not review the AHD file to determine if such a request had been made of the agency by Petitioner nor did he make inquiry of the AHD staff member, who the CRB takes administrative notice, is delegated to arrange for interpreters for AHD formal hearing. The transcript also does not reveal that the ALJ actually asked counsel if a request had been made for the interpreter pursuant to the scheduling order. To the contrary, the transcript reveals that S. Everett Brown[2] represented Petitioner at the formal hearing and conceded that he was not sure whether or not an interpreter was requested as he was "stepping for another attorney" in his office so he could not say what was done procedurally.

The Panel has therefore reviewed the AHD administrative file pertaining to this matter and takes administrative notice of the record therein indicating that on November 11, 2005, AHD received a letter and a request of an interpreter via facsimile from counsel for Petitioner's office and that the request was in fact initialed by the person it was addressed to, namely Patricia Felder-Clinton. The letter and request specifically identify the Formal Hearing date as December 6, 2005 and that Petitioner is from Sierra Leon, West Africa. The facsimile is initialed "PFC" and above the initials is the word "DONE". Having reviewed these two documents in the administrative file on behalf of the Board, this Panel concludes that Petitioner did in fact request of AHD that an interpreter attend the formal hearing on December 6, 2006, and that notwithstanding, the ALJ refused to allow the interpreter to assist Petitioner.

---

[2] Although the ALJ lists Benjamin T. Boscolo, as counsel for Petitioner in the Compensation Order, according to the hearing transcript, Mr. Boscolo did not appear before the ALJ on December 6, 2005. The Certificate of Service indicates that S. Everett Brown's address is the same as Attorney Boscolo's, thus it is assumed Mr. Brown is an associate with ChasenBoscolo.

D.C. Code §32-1525 provides:

> In making an investigation or inquiry or conducting a hearing the Mayor shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry or conduct such hearing in such manner *as to best ascertain the rights of the parties.*

(emphasis added). The responsibility and discretion of the ALJ conducting the formal hearing is also governed by the regulations promulgated to administer the Act. 7 D.C.M.R. §223.5 states:

> The order in which evidence and allegations shall be presented and the procedures at the hearing generally, except as this chapter otherwise expressly provides, shall be in the discretion of the [Administrative Law Judge] and of the nature *as to afford the parties a reasonable opportunity for a fair hearing.*

(emphasis added). *See generally Oubre v. District of Columbia Department of Employment Services,* 630 A.2d 699 (August 26, 1993)

This Panel cannot conclude that the ALJ utilized his discretion in conducting the hearing in a manner that best ascertained the rights of Petitioner and certainly did not afford Petitioner a reasonable opportunity for a fair hearing by denying her access to the interpreter that her attorney had requested on her behalf pursuant to AHD's scheduling order. Because we find that Petitioner was denied the right to a fair hearing by proceeding without an interpreter, we reverse and vacate the entire Compensation Order as being contrary to law, and remand the matter to AHD for a Formal Hearing de novo with Petitioner having the benefit of an interpreter.

With regard to Respondent's cross-appeal and specifically on the issue of timely claim, the Panel agrees with Respondent's assertion that the finding of timely claim was not in accordance with the law. On remand the ALJ is reminded that payments of short term disability benefits are not considered payments of workers compensation benefits in determining whether a claim is timely pursuant to §32-1514(a).

The Panel further concludes the ALJ erred in finding that the parties stipulated to the issue of average weekly wage and specifically to an average weekly wage of $514.04. According to the formal hearing transcript, subsequent to counsel for Respondent's assertion that there was an error with the stipulated average weekly wage, the ALJ instructed counsel to submit its evidence on the average weekly wage issue post-hearing. *See* HT 9,10. Counsel for Petitioner did not oppose this approach and at the conclusion of the formal hearing, the parties were advised to submit proposed findings of fact and conclusions of law covering all of the contested issues by the close of January 6, 2006. Although Respondent asserts on appeal that it filed a Motion to Re-open the Record for Submission of Additional Evidence specifically addressing the question of the Petitioner's average weekly wage, the ALJ makes no mention of said motion or to the proposed finding of fact submitted by Respondent asserting the average weekly wage is a different amount than the amount the ALJ included as a stipulation. Inasmuch as the Compensation Order is hereby vacated as a whole and the matter remanded for a Formal Hearing

de novo the ALJ is directed to ascertain the correct average weekly wage the parties stipulate to or to address that evidence submitted by the parties on the issue. *See* D.C. Code §32-1525(a)

CONCLUSION

We conclude Petitioner was denied the right to a fair hearing by proceeding without an interpreter as had been requested. We further conclude the ALJ's finding of timely claim is not in accordance with the law. We accordingly reverse and vacate the entire Compensation Order as being contrary to law, and remand the matter to AHD for a Formal Hearing *de novo* with Petitioner having the benefit of an interpreter.

ORDER

The Compensation Order of August 13, 2007 is hereby **VACATED** and the matter **REMANDED** to AHD for a Formal Hearing *de novo* to address all issues including but not limited to timely claim and Petitioner's average weekly wage with AHD providing an interpreter as originally requested by Petitioner

FOR THE COMPENSATION REVIEW BOARD:

_____

LINDA F. JORY
Administrative Appeals Judge

October 12, 2007
DATE