

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. 06-28

GHADA IBRAHAM,

Claimant – Petitioner,

v.

PINKERTON’S, INC. and ZURICH INSURANCE COMPANY OF NORTH AMERICA,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
AHD/OHA No. 04-351A, OWC No. 591858

Alan S. Toppleberg, Esq., for the Petitioner

Kelly D. Fato, Esq., for the Respondent

Before FLOYD LEWIS, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *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, 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

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 January 20, 2006, the Administrative Law Judge (ALJ), after conducting an *ex parte* hearing with only the Employer/Carrier-Respondent (Respondent) present, denied temporary total disability. The Claimant-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the ALJ lacked jurisdiction to issue the January 20, 2006 Compensation Order and that the Compensation should, consequently, be vacated.

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.

Turning to the case under review herein, the Petitioner alleges that AHD and the ALJ lacked jurisdiction to conduct a formal hearing in this matter because on November 15, 2004, an ALJ, other than the ALJ who issued the January 20, 2006 Compensation Order, had issued an Order dismissing this matter without prejudice remanding it to the Office of Workers’ Compensation (OWC) for further proceedings in accordance with the parties’ agreement. The Petitioner asserts that she was pursuing her claim at the OWC level, requesting that OWC issue an Order based upon its Memorandum of Informal Conference. The Petitioner contends that AHD and the ALJ had “ample and repeated” notice that she did not intend to participate in the formal hearing process based upon the Respondent’s Application for Formal Hearing, that AHD and the ALJ never responded to her repeated formal objections to the proceedings, that AHD did not conduct a hearing to determine if jurisdiction was present and AHD did not respond to her lack of compliance with the scheduling order. Finally, the Petitioner argues that she did not make a claim for relief before the

prior to October 1, 2004, the effective date of the D.C. Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

ALJ as the Application was filed by the Respondent and that the ALJ erred in finding that a claim had been made.

The issue on this appeal is a procedural one: whether, after the issuance of a dismissal without prejudice and remand to OWC, the AHD regained jurisdiction over this matter. Otherwise stated, the question is whether if, upon a proper, jointly requested voluntary and non-prejudicial dismissal of an initial Application for Formal Hearing and remand to the OWC, a party is free to request a new formal hearing by filing a new AFH, prior to (1) the scheduling by OWC of any post-dismissal proceedings, (2) the issuance by OWC of any post-dismissal orders,, memoranda or recommended orders, and (3) the request for an informal conference by any party, and where as a result of the AFH, (a) a new Formal Hearing is scheduled, (b) all parties are given notice of the scheduling thereof, and (c) no order or other action is issued or taken by AHD postponing or dismissing the scheduled formal hearing, AHD has jurisdiction to proceed to conduct the Formal Hearing scheduled and issue a legal and binding Compensation Order based upon the evidence produced at that Formal Hearing pursuant to established rules and regulations governing such proceedings.

The AHD obtains jurisdiction over a matter through the filing of an Application for Formal Hearing. *See* 7 DCMR §§ 219.23, 220.1. While the Petitioner is correct that this matter was properly remanded to OWC in November 2004, the Petitioner does not cite any authority, nor is the Panel aware of any authority, to support her position that this matter must have remained at OWC until it issues an Order based upon its previously issued, properly rejected and, therefore, nullified Memorandum of Informal Conference. When the Respondent filed its Application for Formal Hearing, AHD regained jurisdiction over this matter and OWC was precluded from taking further action. Accordingly, the January 20, 2006 Compensation Order issued in this case is a legally binding decision from AHD.

On appeal, the Petitioner makes much about the correspondence filed with AHD and the ALJ which conveyed her objections to the Respondent's Application for Formal Hearing. In light thereof, the Panel takes administrative notice of the filings submitted by the parties after the Respondent filed its Application for Formal Hearing, said filing being contained in the AHD official file.²

The AHD official file shows on April 21, 2005, the Respondent filed an Application for Formal Hearing. Thereafter, on April 29, 2005, the ALJ issued a Scheduling Order. The Scheduling Order was sent to the counsel filing this appeal on behalf of the Petitioner.³ Via the Scheduling Order, *inter alia*, the formal hearing in this matter was set for July 28, 2005 and the required Joint Pre-Hearing Statement and Stipulation Form were made due by June 3, 2005. On June 6, 2005, the Respondent filed a Joint Pre-Hearing Statement. Thereon, the name of the Petitioner's counsel was signed by an individual employed by the Respondent with the initials "MGW".

² Along with their respective Memoranda of Points and Authorities, both parties submitted copies of various correspondence as exhibits. Given that pursuant 7 DCMR § 266.1, the Panel's review is limited to the record made before AHD, the Panel takes administrative notice of the contents of the AHD official file.

³ A copy was also sent directly to the Petitioner.

Although the Petitioner asserts in her Memorandum that AHD had no jurisdiction over this claim despite the April 21, 2005 Application for Formal Hearing because jurisdiction resided with OWC, the record does not contain a Motion to Dismiss the Application for Formal Hearing or other such formal pleading from the Petitioner challenging AHD's exercise of jurisdiction. Likewise, the record does not contain any formal motion from the Petitioner challenging the validity of the Joint Pre-Hearing Statement and Stipulation Form. The record lacks a formal request from the Petitioner for a continuance. More importantly, the record does not contain an order or other such formal pronouncement from the ALJ continuing or postponing the formal hearing scheduled for July 28, 2005. It is clear from a review of the official file that the Petitioner, or the Petitioner's counsel on her behalf, was on notice that the matter was proceeding to a formal hearing on July 28, 2005. On the day and time set for the hearing, neither the Petitioner nor her counsel appeared.

Given the state of the record, the Panel cannot state that the ALJ committed error in conducting a formal hearing as scheduled on July 28, 2005 without the Petitioner or her counsel present. At the very least, the Petitioner should have appeared at the formal hearing and raised her objections to the exercise of jurisdiction, to the Joint Pre-Hearing Statement, etc. on the record so that the ALJ could formally rule on them. The Petitioner did not do so. Indeed, the Petitioner failed to act in accordance with the established rules and regulations governing AHD proceedings although fully apprised of the status of her case at AHD. The Panel will not set aside the Compensation Order.⁴

CONCLUSION

After a jointly requested voluntary and non-prejudicial dismissal of an initial Application for Formal Hearing and remand to the OWC, a party is free to request a new formal hearing by filing a new Application. Thereafter, the AHD regains jurisdiction to conduct a formal hearing, and issue a legal and binding Compensation Order based upon the evidence produced at that formal hearing pursuant to established rules and regulations governing such proceedings. The Compensation Order of January 20, 2006 is in accordance with the law.

ORDER

The Compensation Order of January 20, 2006 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

⁴ Because the issue was not raised, the Panel need not address the questions of whether the formal hearing, denoted as *ex parte* by the ALJ, was in fact an *ex parte* proceeding, or whether if the proceeding was in fact *ex parte*, such a proceeding was appropriate absent an Order to Show Cause pursuant to the instructions in the Scheduling Order. However, the Panel notes that there is nothing in the record to indicate that if the Petitioner had appeared at the formal hearing, then the Petitioner would have been precluded from putting on her case in full.

May 1, 2006

DATE