GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-113

ATRICIA ARMSTEAD,
Claimant–Petitioner,

v.

FIRST TRANSIT and
GALLAGHER BASSETT SERVICES,
Employer/Third-Party Administrator-Respondent.

Appeal from a July 26, 2016 Compensation Order
by Administrative Law Judge Lilian Shepherd
AHD No. 16-187, OWC No. 734640

(Decided January 13, 2017)

Michael J. Kitzman for Claimant
Jason A. Heller for Employer

Before JEFFREY P. RUSSELL, HEATHER C. LESLIE, and GENNET PURCELL, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL BACKGROUND

The following facts and procedural background material are taken from the Compensation Order issued July 26, 2016 ("CO") which is under review herein. Only those facts that are not in dispute are contained in this recitation.

Atricia Armstead ("Claimant") sustained injuries to her back when on September 24, 2015, while operating a bus for First Transit ("Employer"), the emergency brake "popped", causing the bus to come to a sudden and unexpected halt.[1]

[1] We assume that the word "popped" as used in the Compensation Order suggests that the brake for some reason unexpectedly engaged.

Claimant was wearing a seat belt at the time, but was jerked such that she was injured to the point where she was directed by Employer to seek medical care at a Concentra medical clinic that same day. The personnel at Concentra diagnosed a lumbar strain and back pain, advised the use of over-the-counter pain medication (Advil), released Claimant to return to "regular duty", and advised her to return to the clinic in four days.

Claimant sought additional medical care the following day at George Washington Hospital, where she was diagnosed with an acute thoracic sprain or strain. Claimant was prescribed Motrin and Valium, and advised to engage in stretching.

On October 21, 2015, Claimant was seen and evaluated at Employer's request by Dr. Robert Smith, an orthopedic surgeon, for the purpose of an independent medical evaluation (IME). Dr. Smith opined Claimant had sustained a low back sprain/strain in the September 24, 2015 incident, and that as of the date of the IME that Claimant had fully recovered from the injury and could return to work with no restrictions.

Claimant was seen in follow-up by Dr. Ricardo Pyfrom, an orthopedic physician and hand surgeon, on October 27, 2015. Dr. Pyfrom diagnosed thoracic and lumbar muscular and ligamentous sprains. Dr. Pyfrom placed Claimant in off-work status, a status that he never rescinded.

On May 18, 2016, at a formal hearing before an Administrative Law Judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Office of Hearings and Adjudications ("OHA") in the District of Columbia Department of Employment Services ("DOES"), Claimant sought an award of temporary total disability from October 27, 2015 through the date of the hearing and continuing, as well as authorization for continuing medical care and payment of causally related medical expenses incurred.

Following the May 18, 2016 hearing, the ALJ convened a telephone conference[2] between counsel for Employer and Claimant. In that conference, Employer advised that it wished to "continue" the formal hearing to present "newly discovered evidence". Claimant's counsel objected. The telephone conference was not conducted on the record. However, in the telephone conference, followed the next day by a written Order to Allow Employer to Introduce New Evidence and to Cross Examine Claimant Regarding the New Evidence (the "Order"), Employer's request was granted and the matter was scheduled to reconvene on June 16, 2016.

On June 16, 2016, the parties again appeared before the ALJ, who, over Claimant's renewed objection, reopened the record to receive additional evidence concerning Claimants' allegedly being gainfully self-employed as a disc jockey, contrary to her testimony at the original proceedings to the effect that she has not worked since October 27, 2015.

[2] The CO does not state when the conference occurred. However, from the hearing transcript of the reconvened hearing on June 16, 2016, it appears that the conference occurred within hours of the conclusion of the May 18, 2016 proceedings. HT II at 4.

On July 26, 2016, the ALJ issued the CO in which she found that Claimant had adduced evidence sufficient to invoke the presumption of compensability, that Employer had adduced evidence sufficient to rebut that presumption, and that Claimant had failed to adduce a preponderance of the evidence that her disability is medically causally related to the work injury. Accordingly the ALJ denied the claims.

On August 23, 2016, Claimant filed Claimant's Application for Review and Memorandum of Points and Authorities in Support of Application for Review ("Claimant's Brief"), seeking reversal of the CO.

On September 6, 2016, Employer filed Employer and Insurer's Opposition to Claimant's Application for Review and Memorandum of Points and Authorities in Opposition to Claimant's Application for Review ("Employer's Brief"), urging that the CO be affirmed.

Because the ALJ's acceptance of evidence post-hearing was an abuse of discretion, and the credibility determination upon which the ALJ's decision hinged at least in part upon the credibility determination, we vacate the decision and remand for further consideration without regard to the evidence received following the first formal hearing.

DISCUSSION AND ANALYSIS

The first matter raised by Claimant in this appeal relates to the reconvening of the formal hearing and reopening of the record for receipt of additional evidence concerning Claimant's alleged self-employment during the period for which she was claiming entitlement to temporary total disability benefits. The decision to permit the additional evidence is formalized in the Order.

Relying upon D.C. Code § 32-1502 (c), and *Young v. DOES*, 681 A.2d 451 (D.C. 1996) Claimant contends that the record should not have been reopened to accept the proffered evidence because Employer failed to demonstrate any "unusual circumstance" that would excuse the failure to produce the evidence at the first session. Claimant argues that, although the record of the June 16, 2016 proceedings remained "open" at the close of those proceedings, the record was only open for the purpose of receipt of the transcript of those proceedings, HT I. Claimant's Brief at 6-7.

Employer disagrees, arguing in its Brief that Employer had established sufficiently unusual circumstances to justify reopening the record, and that deciding whether sufficiently "unusual circumstances" exist is "solely within the discretion of the Administrative Law Judge". Employer's Brief at 5.

We disagree that the ALJ has absolute discretion in deciding such matters. Rather, since the Order is one not based upon the creation of an evidentiary record, our obligation is to determine whether the ALJ's decision was arbitrary, capricious or an abuse of discretion. *See* 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW § 51.03 (2001).

The Order contains no assertion or finding of "unusual circumstances" that prevented Employer from presenting the evidence at the first proceeding, and contains no real discussion of the basis for the decision to reopen the record. Resort to the transcript of June 16, 2016 provides the only

basis upon which the ALJ acted, and it is noteworthy that, at the time proceedings resumed, Employer did not make a very compelling case that there were any "unusual circumstances" presented:

> JUDGE SHEPHERD: Is there a reason you didn't get it [an investigator's report and information concerning Claimant's alleged self-employment] prior to the hearing?
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> MR HELLER: There is no reason that we did not get it prior, Your Honor. To be frank, the unusual circumstance is that this hearing was in for an open period of temporary total benefits, where Claimant testified that she had not been working since this occurrence. This Facebook information suggests the Claimant may have perjured herself before this Court with respect to her being able to work, whether she's receiving compensation for work. I don't think it's anything more unusual than that, Your Honor.
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> JUDGE SHEPHERD: And the purpose for which you want to have her back on the stand is for?
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> MR. HELLER: Your Honor, I'd like to question her about her DJ business, which she has been actively promoting on Facebook.
>
> JUDGE SHEPHERD: Okay.
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> MR. KITZMAN: And again, Your Honor, the Court of Appeals has stated it's not content of the information that has to be unusual, it's the circumstances why it wasn't ready when we were supposed to go to court.
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> JUDGE SHEPHERD: Okay. I read the cases that you referenced and if you're relying on someone else to provide information and they provide it – in this case they provided it the day of that the hearing completed or within hours of the completion. The record was still open at the time and the information will go towards the Claimant's credibility, the Claimant's – the weight of the evidence. And it's – at this point in time I will find that it was an unusual circumstance that the information was delayed or not provided prior to the hearing, but instead the date of the hearing, and that Employer's counsel reached out to the agency within hours and provided the information. It may or it may not have any impact on the decision. Ultimately the decision is going to be made based upon your client's credibility and the evidence that was submitted by her.

HT II at 8 – 10.

The unusual circumstances alleged by Employer in its Brief in this appeal are the failure of Claimant to advise Employer of her engagement in the alleged self-employment activities, despite Employer having issued "timely discovery."

We note that this was not a ground upon which the ALJ relied in the Order or at the time of the second proceeding.

Further, Employer does not describe of what that discovery consisted (i.e., interrogatories, document production requests, deposition testimony, or otherwise). It argues that "It was not until after the initial hearing that Employer and Insurer received information from Claimant's Facebook account which evidence that the Claimant misrepresented facts and mislead Employer and Insurer during her testimony at the May 18, 2016 Formal Hearing [sic]. Following receipt of the information, it was presented to [the ALJ], while the record remained open, who then determined that the information was material, relevant, and should be admitted into the record." Employer's Brief at 5.

Regarding the state of the record at the close of the May 18, 2016, HT I reads as follows:

> JUDGE SHEPERD: All right. The record will close whenever the transcript is received. There being nothing further, the hearing is adjourned. Thank you both.
>
> THE REPORTER: Going off the record at 10:08.
> (Whereupon, the hearing was adjourned at 10:08 a.m.)

HT II at 62-63.

Claimant argues that the record was held open solely to receive the hearing transcript. Employer submits that the record had not closed.

"Adjournment" is defined as:

> 1. A putting off of a court session or other meeting or assembly until a later time.
> 2. The period or interval during which a session is put off.

BLACK'S LAW DICTIONARY, Seventh Ed., 1999, at 42.

Claimant argues that D.C. Code § 32-1520 (c) precludes the ALJ from accepting the additional evidence. That provision reads:

> § 32-1520. Procedure in respect of claims.
>
> (a) Subject to the provisions of § 32-1514, a claim for compensation may be filed with the Mayor in accordance with regulations prescribed by the Mayor at any time after the first 3 days of disability following any injury, or at any time after death, and the Mayor shall have full power and authority to hear and determine all questions in respect of any claim.
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> (b) Within 10 days after such claim is filed, the Mayor shall notify the employer and any other person (other than the claimant), whom the Mayor considers an interested party, that a claim has been filed. Such notice may be served personally

upon the employer or other person, or sent to such employer or person by registered or certified mail.

(c) The Mayor shall make or cause to be made investigations of claims as he considers necessary, which may include processing the claim through a central system to give the Mayor an advisory opinion on the rate and degrees of disability. Upon application of any interested party the Mayor shall order a hearing within 90 days, unless the Mayor grants a special extension of time for the development of facts. ... *No additional information shall be submitted by the claimant or other interested parties after the date of hearing, except under unusual circumstances as determined by the Mayor.* ...

Id. (emphasis added).

The italicized rule has multiple purposes, among them being the avoidance attenuated proceedings and promoting the timely and efficient adjudication of claims. Permitting a party to submit additional evidence after "the day of the hearing" only in "unusual circumstances" also encourages diligence on the part of the litigants in preparing their cases.

It could be argued that permitting Employer to present the additional evidence under these circumstances does not encourage such diligence, and such an argument is not without merit.

It also behooves us to consider the regulations governing hearing procedures. Title 7 of the District of Columbia Municipal Regulations ("DCMR") contains the relevant provisions:

7-223. CONDUCT OF FORMAL HEARINGS.

* * *

223.3 *The Hearing or Attorney Examiner shall inquire fully into matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters.* Under no circumstance shall the Memorandum of Informal Conference be admitted as evidence.

223.4 If the Hearing or Attorney Examiner believes that there is relevant and material evidence available which has not been presented at the formal hearing, the Hearing or Attorney Examiner may order the parties to acquire and submit the evidence. *The Hearing or Attorney Examiner may also continue the hearing to allow the parties to develop the evidence or, at any time prior to the filing of the compensation order, reopen for receipt of the evidence.*

Id. (emphasis added).

One could argue taking into account that (1) the record had not closed at the time of the telephone conference, (2) the proceedings had been "adjourned", not "concluded", (2) the telephone conference occurred within hours of the conclusion of the May 18, 2016 proceedings, (3) the proceedings were concluded in less than 30 days from the adjournment, (4) the additional evidence was proffered on the "day of the hearing" during the telephone conference, and (5) the

evidence was received "prior to the filing of the compensation order" on July 26, 2016, the ALJ's accepting the evidence was within her discretion. However, there is authority to the contrary.

The following is from *Jones v. DOES*, 584 A.2d 17 (D.C. 1990):

> The D.C. Workers' Compensation statute provides that "no additional information may be submitted by the claimant or other interested parties after the date of hearing, except under unusual circumstances as determined by the Mayor." D.C. Code § 36-320(c). Pursuant to that statute, the agency has promulgated a regulation governing the reopening of evidentiary hearings:
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> > If the Hearing or Attorney Examiner believes that there is relevant and material evidence available which has not been presented at the hearing, the hearing may be adjourned or, at any time prior to filing of the compensation order, the hearing may be reopened for the receipt of the evidence.
>
> 7 DCMR § 223.4 (1986).
>
> * * *
>
> [T]he Director concluded that "the regulatory provisions of 7 DCMR § 223.4 governing the reopening of evidentiary hearings for the receipt of additional evidence must be interpreted under the guidelines of the 'unusual circumstances' requirement of the Act . . . . This is a two step process. First, there must be the showing of unusual circumstances, and only then can the hearing be reopened for material and relevant evidence." Because petitioner had failed to demonstrate any unusual circumstances which prevented petitioner from submitting Dr. Moscovitz' report at the hearing, the Director affirmed her decision reversing the compensation order.
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> Petitioner argues that the Director erroneously interpreted the statute and regulation, focusing on the statute's provision for receipt of additional evidence under "unusual circumstances as determined by the Mayor" (emphasis added). Petitioner argues that this provision gives the Mayor ... the authority to promulgate regulations defining the circumstances under which a hearing may be reopened. Petitioner contends that 7 DCMR § 223.4 should be interpreted as defining "unusual circumstances" under the Act to mean "relevant and material evidence which has not been presented at the hearing." Under petitioner's interpretation, the Hearing Examiner did not err in admitting the additional relevant and material medical report.
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> * * *
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> In this case the Director's construction of the regulation is reasonable. First, petitioner's reading of the regulation is difficult to reconcile with the statute. The agency has been delegated the authority to determine the meaning of the statutory phrase, "unusual circumstances." Under petitioner's analysis of the rule, unusual circumstances would be shown whenever relevant and material evidence was not presented at the hearing. Petitioner concedes that the permissive nature of the rule

("the hearing may be reopened") gives the examiner "control over the submission of post-hearing evidence," but he fails to explain how, under his interpretation, the examiner could ever exclude non-cumulative relevant and material evidence not previously presented. Thus, 7 DCMR § 223.4, as read by petitioner, would effectively eliminate the requirement that a party show circumstances out of the ordinary in order to submit post-hearing evidence. The Director was free to reject petitioner's strained interpretation, and to conclude that 7 DCMR § 223.4 must be read in conjunction with the statutory "unusual circumstances" concept, and not as defining it, in effect, out of existence [footnote omitted].

Moreover, the Director's construction is consistent with traditional administrative agency practice. "Once a hearing has been held, it will not generally be reopened for the purpose of introducing new or additional evidence which could have reasonably been presented at the hearing." 4 J. STEIN, G. MITCHELL & B. MEZINES, ADMINISTRATIVE LAW § 30.01 at 30-11 (1990). Some agencies allow post-hearing evidence, but only upon a showing of "good cause" for the failure to introduce the evidence at the hearing. See id.; *Cities of Campbell v. F.E.R.C.*, 248 U.S. App. D.C. 267, 278, 770 F.2d 1180, 1191 (1985) ("Reopening an evidentiary hearing is a matter of agency discretion, and is reserved for extraordinary circumstances") (citations omitted). Petitioner has cited no agency that allows post-hearing evidence as a matter of routine. The Director reasonably rejected an interpretation that would deviate from general agency practice.

[B]ecause petitioner has failed to demonstrate any unusual circumstances justifying his failure to introduce the evidence at the hearing, the Director properly reversed the Hearing Examiner's order relying on the improperly admitted evidence.

Jones, supra, at 17--20.

The *Jones* rule has been in existence for over 25 years. While we can reconsider rules and statutory interpretations of prior Directors, where those interpretations have been reviewed and affirmed as being reasonable constructions of the Act and regulations by the District of Columbia Court of Appeals ("DCCA") we should exercise restraint in reconsidering their validity. This is particularly true where the rule is of long standing and nothing in the intervening time period suggests that anything has changed either in the thinking of the Council or in the legal landscape generally that would call for abandoning the rule. Such is the case here.

While the record was technically still open, the transcript demonstrates that the ALJ and the parties all understood that it was being kept open for a limited administrative purpose unrelated to the state of the evidentiary record. Similarly, the "adjournment" was likewise for that purpose and no other. The fact that the new evidence was brought to the attention of the ALJ and Claimant on the day of the hearing is not relevant, if one accepts, as we do, that the hearing had ended for all evidentiary purposes. The use of "the day of the hearing" in the regulation is in our view meant to convey "at the time of the hearing." And the fact that the CO had not yet been filed is, under *Jones*, not relevant to whether a record can be reopened at the request of a party (as opposed to being held open or reopened by the ALJ *sua sponte*) in the absence of a showing

of unusual circumstances which prevented the party from presenting the evidence at the first session.

We discern no compelling reason to depart from this long established principle. We conclude that the ALJ's decision to admit the additional evidence, including the cross-examination of Claimant in connection therewith, was contrary to law and an abuse of discretion.

Because the evidence that was improperly admitted formed a central basis for the ALJ's determination that Claimant was not a credible witness, and because that credibility determination was central to the ALJ's ultimate decision to deny the claim, the denial must be vacated. The matter must be remanded to the ALJ for further consideration, without regard to the evidence proffered and received at the second proceeding.

Because the matter is being remanded, we deem it advisable to address a second problem with the CO.

The ALJ's analysis concerning the medical causal relationship of the claimed disability and the work-related injury conflates the issues of medical causal relationship with the issue of nature and extent of disability. The evidence cited by the ALJ, being the IME opinion that Claimant had suffered no more than a strain/sprain that had completely resolved by the time she was seen by the IME physician, in the absence of a finding that Claimant nonetheless was disabled, is not an opinion concerning medical causal relationship. It is, rather, an opinion relating to whether Claimant is or is not capable of returning to work. That is, it is an opinion concerning the nature and extent of disability, if any. Accordingly, we determine that the finding that Claimant has failed to prove a medical causal relationship between her alleged disability and the work injury is not supported by substantial evidence for the simple reason that there has been no finding of a disability in the first instance.

Therefore we vacate that finding and remand for further consideration of the claim, including the proper application of analysis concerning medical causal relationship, about which Claimant was entitled to a presumption in her favor, and nature and extent of disability, about which there is no such presumption.

CONCLUSION AND ORDER

The decision to reopen the record is REVERSED. The analysis employed concerning medical causal relationship is not in accordance with the law, is not supported by substantial evidence, and is VACATED. The denial of the claim is VACATED and the matter is REMANDED for further consideration of the claim without reference to the evidence submitted June 16, 2016 and with instructions to assess the claim for relief under the appropriate legal framework regarding nature and extent of disability.

So ordered.