

**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. 05-204**

**ABDELMJID BOUCHAM,**

**Claimant – Respondent**

**v.**

**LEGAL SEA FOODS, INC. AND FEDERAL INSURANCE CO.,**

**Employer/Carrier – Petitioner.**

Appeal from a Compensation Order of  
Administrative Law Judge Amelia G. Govan  
OHA No. 04-447, OWC No. 598351

Matthew Peffer, Esq., for the Petitioner

Robert C. Baker, Jr., Esq., for the Respondent

Before SHARMAN J. MONROE, LINDA F. JORY, *Administrative Appeals Judges* and FLOYD LEWIS,  
*Acting Administrative Appeals Judge.*

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

**REMAND DECISION**

**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).<sup>1</sup>

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<sup>1</sup> 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 Act of 2004.

## BACKGROUND

This appeal follows the issuance of a Compensation Order from the Office of Hearings and Adjudication (OHA), now called the Administrative Hearings Division (AHD), in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on January 24, 2005, the Administrative Law Judge (ALJ) temporary total disability benefits from March 13, 2004 to April 25, 2004 and temporary partial disability benefits from April 26, 2004 to November 1, 2004, with a credit to the Employer-Petitioner for prior monetary payments.<sup>2</sup> The ALJ also awarded interest on accrued benefits and causally related medical benefits. The Employer-Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, the Employer-Petitioner alleges as error that the ALJ awarded benefits without considering all the evidence presented at the formal hearing, and without considering the Claimant-Respondent's lack of credibility. The Employer-Petitioner also alleges that it filed a Motion to Re-open the record on November 22, 2004 to submit additional evidence relating to the nature and extent of the Claimant-Respondent's disability and his credibility which was not addressed prior to the issuance of the Compensation Order.

## 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. *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 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.

Before considering the merits of the appeal, the Employer-Petitioner's allegation concerning its Motion to Re-open the record must be addressed. A review of the official record reveals that on December 6, 2004, the Employer-Petitioner submitted, via correspondence, a motion to reopen the record to admit into evidence the interrogatory answers the Claimant-Respondent filed on August 3, 2004 in his personal injury case in Arlington County Circuit Court. During the formal hearing, the Employer-Petitioner had submitted some evidence about the personal injury case. The Employer-Petitioner alleged that, based upon the answers given by the Claimant-Respondent during his October 13, 2004 deposition, it was misled into believing that

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<sup>2</sup> On February 2, 2005, the ALJ issued an Errata correcting minor errors in the Compensation Order.

the personal injury case had not yet proceeded to discovery. It asserts it became aware on November 22, 2004, that the Claimant-Respondent had provided sworn Answers to Interrogatories and subpoenaed the document. A copy of the attached the Answers to Interrogatories was attached to the motion. The Employer-Petitioner pointed to the inconsistencies between the Claimant-Respondent's sworn answers in his personal injury case and his testimony at the formal hearing testimony about his current physical condition. A review of the official record also reveals that the ALJ did not address the motion before issuing the Compensation Order in this case.

D.C. Official Code § 32-1522 (b)(2) provides that "if any party shall apply . . . for leave to adduce additional evidence and shall show . . . that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the initial hearing . . . [the ALJ] may order such additional evidence to be taken and to be made a part of the record." The D.C. Court of Appeals addressed this provision in *King v. District of Columbia Department of Employment Services*, 560 A.2d 1067 (D.C., 1989) and again in *Bennett v. District of Columbia Department of Employment Services*, 629 A.2d 28 (D.C., 1993). In both cases, a party filed a motion to supplement the record with additional evidence to the Director, the predecessor appellate body to the CRB, before the Director issued a final appellate decision. The Director, however, issued a decision without first considering the motion. In both cases, the court held that, pursuant to D.C. Official Code § 32-1522 (b)(2), then D.C. Code § 36-322, the Director was obligated to consider whether the evidence was material and whether there were reasonable grounds for not adducing the evidence in the hearing. *See King, supra* at 1073; *Bennett, supra* at 30. The court further held that the Director's failure to consider the motion was subject to a reversible error.<sup>3</sup>

Herein, the Employer-Petitioner filed a motion to reopen the record to admit additional evidence relating to the nature and extent of the Claimant-Respondent's disability and his credibility on December 6, 2004. The Compensation Order was issued on January 24, 2005 and there is no indication in the official record that the motion was considered before the Compensation Order issued. Unlike the court in *King* and *Bennett*, the panel declines to initially review the evidence under D.C. Official Code § 32-1522 (b)(2). Rather, the panel determines that the ALJ is obligated to consider whether the evidence was material and whether there were reasonable grounds for not adducing the evidence in the hearing before issuing the Compensation Order. The ALJ is more familiar with this matter and is, therefore, in a better position to make the initial review and findings.

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<sup>3</sup> In *King*, the court examined the new evidence and determined that the factfinder would have made the same "ultimate finding" which the Director would have affirmed. The court then categorized the Director's failure to consider the motion to supplement the records as a harmless error under D.C. Code § 1-1510 (b) and affirmed the Director's final decision. In *Bennett*, the court examined the evidence and determined that it was better for the Director to decide the materiality of the new evidence. It stated the application of D.C. Code § 1-1510 (b) was not appropriate because the question of substantial evidence to support the factfinder ultimate finding on the nature and extent of the injured worker's disability was close. The court reversed and remanded the matter to the Director to consider the motion to supplement the record.

CONCLUSION

The ALJ's failure to address the Employer-Petitioner's Motion to Re-Open the record to submit additional evidence relating to the nature and extent of the Claimant-Respondent's disability and his credibility before issuing the January 24, 2005 Compensation Order was a reversible error.

**ORDER**

The Compensation Order of January 24, 2005 is hereby is REVERSED AND REMANDED for consideration of the Employer-Petitioner's motion to re-open the record filed on December 6, 2004. The ALJ shall issue a Compensation Order stating the ruling on the motion and a rationale therefore, as well as findings of fact and conclusions of law on the issues presented for resolution in this case.

FOR THE COMPENSATION REVIEW BOARD:

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SHARMAN J. MONROE  
Administrative Appeals Judge

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DATE