GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 17-019

JAMES RICE,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES,
Employer-Petitioner.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2017 APR 21 PM 12 24

Appeal from a January 26, 2017 Compensation Order on Remand
by Administrative Law Gwenlynn D'Souza
AHD No. PBL 15-014, DCP 0468-WC-15-0000248

(Decided April 21, 2017)

James Rice, pro se[1]
Frank McDougald for Employer

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge,* and GENNET PURCELL and HEATHER C. LESLIE, *Administrative Appeals Judges.*

Before LAWRENCE D. TARR, for the Compensation Review Board.

DECISION AND REMAND ORDER

INTRODUCTION

This is the third review related to the claim filed by James Rice ("Claimant") seeking temporary total disability benefits and medical benefits for injuries purportedly sustained in a November 28, 2014 accident at work when he was employed by the District of Columbia Department of Motor Vehicles ("Employer"). Two previous Compensation Review Board ("CRB") decisions remanded this case because of procedural irregularities. As will be discussed, we again vacate the award of benefits and remand this case.

[1] At the first formal hearing, Claimant was represented by Richard Daniels.

BACKGROUND

Claimant has alleged he was injured on November 28, 2014, when he tried to exit a vehicle that he was inspecting after hot antifreeze sprayed on him. His claim for workers' compensation benefits was denied by Employer's Public Sector Workers' Compensation Program ("PSWCP") and Claimant filed for a formal hearing.

Prior to the November 18, 2015 formal hearing, the Administrative Law Judge ("ALJ") assigned to the case held a pre-hearing conference ("PHC") on July 22, 2015. At the PHC conference the ALJ at least twice advised Claimant, who was not represented, that he would have to prove his case and that he had to submit all exhibits. PHC at 5, 12, and 17.

Also at the PHC, the parties endorsed a Joint Pre-Hearing Statement in which they identified these contested issues:

> Claimant: Work related injury right (hip)
>
> Employer: Claimant's injuries did not arise as a result of a work related event. There is no evidence to support Claimant's claim that he sustained burns to his right leg and right foot as a result of the alleged workplace incident or that he sustained injuries to his back or right hip.

Only Claimant testified at the formal hearing.

After his direct testimony and before cross-examination, the ALJ stated that there "appeared to be nothing in the record related to an opinion of medical causation." HT at 33. Employer's counsel objected to the ALJ advising Claimant and his representative that there wasn't sufficient evidence to make a decision and asserted it should prevail since Claimant had not met his burden of proof.

After first saying she would grant a continuance, the ALJ took a brief recess. When she returned the ALJ announced that she was going to dismiss Claimant's claim without prejudice. HT at 39. The ALJ issued an Order to this effect on December 1, 2015.

Employer appealed the December 1, 2015 Order dismissing the claim without prejudice. On May 25, 2016, the CRB vacated the ALJ's Order. The CRB found the ALJ acted arbitrarily and capriciously in dismissing the claim without prejudice:

> Inasmuch as Claimant was afforded a pre-hearing conference when he was not represented by counsel and then was granted a two month continuance, Claimant was provided ample time to obtain medical evidence. The ALJ's determination that there appeared to be nothing in the record related to an opinion of medical causation gives the impression that she reviewed employer's evidence and was of the opinion that Claimant could not prevail. We conclude that Employer therefore

> was not afforded a fair hearing and the ALJ's dismissal was arbitrary and capricious.

*Rice v. D. C. Department of Motor Veh*icles, CRB No. 15-202 (May 25, 2016).

The CRB vacated the ALJ's Order and remanded the matter "for the sole purpose of the issuance of a Compensation Order addressing the issues set forth at the November 18, 2015 hearing."

The ALJ issued a Compensation Order on Remand ("COR1") on June 30, 2016, without reconvening the formal hearing. In COR1 the ALJ identified two issues for determination:

> Whether or not Claimant sustained an injury to his right hip in the performance of his duties on November 28, 2014?
>
> Whether or not the injury was medically-causally related to the work injury?

COR at 2.

In response to the first stated issue, the ALJ held Claimant sustained an injury to his right hip. As to the second issue, whether Claimant's injury was medically causally related to that injury, the ALJ held it was, despite there being no medical opinions that effect. The ALJ held:

> Based on the record, particularly Dr. Shiflett's diagnosis within a short period of time after the accident, the undersigned finds the work incident of November 28, 2014, caused Claimant's soft tissue injury to the right hip, but not his severe osteoarthritis and avascular necrosis.

Id at 4.

The ALJ entered on Order awarding Claimant temporary total benefits and causally related expenses from November 28, 2014, until December 5, 2014. Employer appealed COR1.

The CRB vacated the award in COR1 and remanded the case because the ALJ erred by not reconvening the formal hearing to allow Employer to cross-examine Claimant and present its case in chief. *Rice v. D.C. Department of Motor Vehicles*, CRB No. 16-101 (November, 29, 2016).

On remand, the ALJ reconvened the formal hearing on January 5, 2017. At the reconvened hearing, Claimant was cross-examined. Employer did not call any witnesses.

The ALJ issued the COR now before us, COR2, on January 26, 2017. In COR2, the ALJ, without notice to the parties, made two changes to the issues for determination from COR1. In COR2, the ALJ added one new issue for determination (Whether Employer properly issued a Notice of Determination?) and added two body parts (right foot and right leg) to the right hip that was purportedly injured in the accident at work.

With regard to the first added issue, the ALJ held Employer did not timely issue a Notice of Determination and therefore was deemed to accept claims for right leg, right foot, and right hip injuries.

Because of this ruling, the ALJ held all other issues were moot. The ALJ did not enter an award but remanded the matter to Employer's PSWCP to determine the nature and extent of Claimant's disability. COR2 at 5.

Employer filed an Application for Review ("AFR") on February 24, 2017 and a Motion to Stay COR2 on March 8, 2017. Claimant filed his opposition to the AFR on March 14, 2017 and his opposition to the Motion to Stay on March 20, 2017. The CRB granted the Motion to Stay on April 5, 2017 and ordered this case receive an expedited decision.

DISCUSSION

Employer raises two issues on review. Employer first asserts the ALJ again denied it a fair hearing by *sua sponte* raising the issue of whether it properly issued a Notice of Determination. Employer argues that the ALJ's decision should be reversed because Claimant never asserted this issue, the ALJ provided no notice to Employer that this issue would be addressed, and because Employer never had the opportunity to respond to this issue by presenting objections or evidence.

We agree with Employer that the ALJ committed reversible error by deciding an issue for which the ALJ gave no notice and no opportunity for the parties to present evidence on that issue.

No doubt, an ALJ has flexibility in conducting a hearing. However, the ALJ must conduct the hearing fairly.

> We are aware that an ALJ is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure and may conduct a hearing in a manner so as to best ascertain the rights of the claimant; however tis flexibility is not without limits. The ALJ still is charged with adjudicating a fair hearing for all parties.

Peoples v. District of Columbia Department of Mental Health, CRB No. 10-048 (June 17, 2011).

Fundamental notions of fairness require that a party must be given notice and an opportunity to respond to issues before the ALJ.

As the DCCA has stated:

> We have held that "in general, an individual is entitled to fair and adequate notice of administrative proceedings that will affect his [or her] rights, in order that he [or she] may have an opportunity to defend his [or her] position." . . . We have observed, moreover, that this notice guarantee has its "roots in constitutional due process." . . . We also have stressed that this notice requirement embraces the

> proposition that an agency "may not change theories in midstream without affording reasonable notice of the change." . . . The "requirements of procedural due process are met if upon review the court is satisfied that a complainant was given adequate opportunity to prepare and present his [or her] position to the [hearing examiner] and that no prejudice resulted from the originally deficient notice."

Transportation Leasing v. DOES, 690 A.2d 487,489 (D.C. 1997). (Citations omitted).

That the ALJ's failure resulted in prejudice to Employer is readily apparent. The ALJ relied on D.C. Code § 1- 623.24 to support her finding that Employer did not timely controvert this claim by January 4, 2015,without giving Employer the opportunity to present any evidence on that issue.[2]

Employer raises a second assignment of error-that the ALJ lacked jurisdiction to make a determination regarding any possible injuries to claimant's right leg and right foot because all Claimant asserted was an injury to his right hip and there never has been a notice of determination regarding Claimant's right leg and right foot.

We agree with Employer that the ALJ lacked jurisdiction to make a determination regarding any injuries to claimant's right leg and right foot for two independent reasons.

First, the ALJ added claims for injuries to the foot and leg without giving notice to Employer or an opportunity to defend those claims. Additionally, even if proper notice and opportunity was provided, the ALJ did not have jurisdiction to decide any claim other than injury to Claimant's hip.

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[2] That statute, in subsection a-3, says the 30-day deadline to controvert a claim does not apply "if the Mayor provides notice in writing that extenuating circumstances preclude the Mayor from making a decision within this period."

With its AFR, Employer filed a document that was sent to Claimant on January 2, 2015, within the 30-day deadline. This document, titled "Notice of Controversion Regarding Original Claim For Compensation" advised Claimant:

> *Your public workers' compensation claim is hereby CONTROVERTED for the reason(s) indicated below:*
>
> We do not have sufficient medical evidence to make a determination on your claim, pursuant to 7 DCMR § 112.4 (b). We are waiting to receive the following: **Form 1; Form CA-7 part B; Form 3; Form 3A; paystub; and copy of ID card.**

We do not decide whether this document complies with D.C. Code § 1-623.24 (a-3). We point this out to show how the ALJ's failure to give Employer the chance to present evidence on the issue prejudiced Employer by not allowing it to defend the issue.

For AHD to have jurisdiction over a claim, PSWCP must have issued a final determination on the merits of that injury. *Bryant v. D.C. Department of Corrections*, CRB No. 10-068 (August 6, 2012).

Here, PSWCP's final determination, issued on June 8, 2015, only denied a right hip injury:

> The alleged right hip injury and need for total hip replacement is deemed not compensable as there is no causal connection to the degenerative condition of your hip that is the result of a preexisting condition…The Program finds that your injury did not occur within the course and scope of your employment and that your degenerative condition of your right hip was not the result of the event that took place on November 28, 2014. Therefore, your workers' compensation claim is **DENIED.**

CONCLUSION AND ORDER

The ALJ's January 26, 2017 Compensation Order on Remand is not in accordance with the law and its' award is VACATED. This matter is remanded to the Administrative Hearings Division for the ALJ to issue a new decision deciding only the issues raised by the parties; Whether or not Claimant sustained an injury to his right hip in the performance of his duties on November 28, 2014? And whether or not the injury was medically-causally related to the work injury?

So ordered.