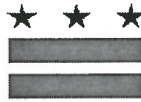


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-101

**JAMES RICE,
Claimant-Respondent,**

v.

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

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 NOV 29 AM 9 39

Appeal from a June 30, 2016 Compensation Order on Remand
by Administrative Law Judge Gwenlynn D'Souza
AHD No. PBL 15-014, DCP No. 0468-WC-15-0000248

(Decided November 29, 2016)

Richard A. Daniels for Claimant¹
Frank McDougald for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In a prior Decision and Order to Vacate, the Compensation Review Board ("CRB") outlined Claimant's injury, treatment, and the procedural history of Claimant's claim as such:

On July 22, 2015, an administrative law judge (ALJ) called to order a pre-hearing conference. Claimant appeared at the pre-hearing conference as well as counsel for Employer. Claimant was advised that the conference was held in order to help the *pro se* Claimant understand the hearing process and that the ALJ's decision will be based upon evidence provided to her at the hearing which was scheduled for September 24, 2015. Claimant subsequently requested that the Formal

¹ Richard A. Daniels appeared on behalf of the Claimant before the Administrative Hearings. There has been neither an appearance on behalf of Claimant nor filings with the CRB by Claimant.

Hearing date be continued and a notice of rescheduled hearing was issued scheduling the matter for November 18, 2015.

Claimant appeared at the Formal Hearing with Richard A. Daniels who was identified as his attorney. Hearing Transcript (HT) at 2, 4. A pre-hearing order (PHO) presented to the ALJ indicated the parties stipulated to an injury date of November 28, 2014, timely claim was made and timely notice was provided. The parties further stipulated that Claimant has not returned to work. The ALJ signed the PHO and stated that it was her understanding that the issues for adjudication were jurisdiction, employer/employee relationship, whether claimant sustained an injury to his right hip while in the performance of his duties, and whether Claimant's injury is medically causally related to a work injury.

Employer identified five exhibits which were admitted into the record as "joint" exhibits, as the ALJ stated Claimant was relying on Employer's exhibits. HT at 9.

After Claimant's testimony was taken, the ALJ held an off-the-record discussion, took a brief recess and ultimately advised the parties that she was dismissing the Claimant's claim without prejudice and that she would be issuing a written order stating the same. The Order of Dismissal (Order) which issued on December 1, 2015 has been timely appealed by Employer to the Compensation Review Board (CRB).

Rice v. D.C. Department of Motor Vehicles, CRB No. 15-202 (May 25, 2016) ("DO") at 1, 2.

Employer appealed. As outlined in the DO, Employer argued, in part:

Here, the record shows that Claimant's representative did not submit any medical documentation and chose to rely on the exhibits presented by Employer. The record further shows that only after the ALJ stated that there was no evidence of medical causation did Claimant's representative request to "hold the record open for 30 days to submit that and try once more." Tr at 33. Initially, the ALJ, over objection of Employer's counsel granted the request, but after a recess, dismissed the matter without prejudice. Just as in *Peoples*, [infra] the ALJ recognized that Claimant could not prevail and instead of proceeding with the hearing and ruling accordingly, chose to dismiss the matter. Such a disposition by the ALJ was "arbitrary and capricious because it [was] not based upon a fair and proper application of the law." Moreover, the disposition by the ALJ deprived Employer of a "fair hearing" to which it is entitled. Accordingly, the December 1, 2015 Order should be vacated.

DO at 2.

The CRB agreed. Relying upon *Peoples v. District of Columbia Department of Mental Health*, CRB No. 10-048 (June 17, 2011) (*Peoples*), the CRB vacated the dismissal order and remanded the case, concluding Employer was not afforded a fair hearing. The CRB ordered:

The Order of Dismissal is arbitrary, capricious, and an abuse of discretion and is accordingly VACATED. The matter is remanded for the sole purpose of the issuance of a Compensation Order addressing the issues set forth at the November 18, 2015 hearing.

DO at 4.

A Compensation Order on Remand ("COR") was issued on June 30, 2016. The COR concluded Claimant did sustain an accidental injury on November 28, 2014 and awarded temporary total disability benefits from November 28, 2014 through December 5, 2014.

Employer appealed. Employer first argues the COR is in error as Employer was denied the opportunity to cross-examine Claimant before the ALJ dismissed the case. Second, Employer argues the COR's conclusion that Claimant sustained a work related injury on November 28, 2014 is not based upon the substantial evidence in the record.

Claimant has not filed a response.

ANALYSIS²

Employer first asserts:

...prior to the issuance of the COR, the ALJ did not inquire of Employer whether Employer wanted to cross-examine Claimant or would waive its right to cross-examination. Employer never waived its right to cross-examine Claimant. Thus, in the absence of Employer's express waiver of its right to cross-examine Claimant, it was error for the ALJ to issue the COR without affording Employer the right to cross-examine Claimant.

Employer's Brief at 4.

We agree. A review of the transcript shows that after Claimant answered questions on direct examination by his counsel, and after the ALJ had an occasion to ask questions after direct examination had ended, the ALJ then dismissed the case without allowing Employer to cross examine Claimant. Employer opposed the dismissal, in part, because it would be prejudicial for "the case to be stopped mid-stream." Hearing transcript at 36.

² The scope of review by the Compensation Review Board ("CRB") and this Review Panel, as established by the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended D.C. Code § 1-623.01 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. Code § 1-623.28(a). "Substantial evidence", as defined by the District of Columbia Court of Appeals ("DCCA"), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES*, 834 A.2d 882 (D.C. 2003) ("*Marriott*"). 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 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, supra*, 834 A.2d at 885.

In a similar case, the District of Columbia Court of Appeals (“DCCA”) remanded a case after an ALJ denied Employer the right to present a witness. *Potomac Electric Power Co. v. DOES* and Quinton Briscoe, No. 08-AA-344 Mem. Op. & J. (August 31, 2009) (“*Briscoe*”). The CRB affirmed the underlying Compensation Order, finding the ALJ’s error harmless after concluding the witness testimony would reveal nothing of substantial relevance, pursuant to a submitted affidavit. On appeal, the DCCA disagreed with the CRB, applying the “rule of prejudicial error” and concluding that there was substantial doubt that the ALJ would have made the same findings if the witness testimony had been allowed. The DCCA went on to explain:

"[i]n all adjudicative proceedings, cross-examination and confrontation are the handmaidens of trustworthiness in the face of factual dispute." *Glenbrook Rd. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 605 A.2d 22, 39 (D.C. 1992) (internal citation omitted). Indeed, the Administrative Procedure Act grants every party the right to present its case or defense by oral or documentary evidence. D.C. Code § 2-509 (b).

Briscoe, *supra* at 8.³

In the case before us, the ALJ prohibited Employer from cross-examining Claimant, or presenting any potential rebuttal evidence, if necessary, in light of cross-examination. The ALJ simply dismissed the case, over Employer’s objections. That dismissal was vacated by the CRB, who remanded the case back to the ALJ for issuance of an order based upon the issues presented at the Formal Hearing.

In light of Employer’s arguments, our prior DO remanded the case for the issuance of a Compensation Order. DO at 4. While the ALJ issued a COR, the ALJ did so without re-convening the hearing to allow Employer to cross-examine Claimant and/or put forth any further evidence or testimony, including rebuttal evidence, Employer felt necessary, to finish the Formal Hearing. This is in error. Until such time as the Formal Hearing is completed, we cannot say the parties, specifically Employer, was afforded a fair hearing.

In light of our decision, we decline to address Employer’s other arguments as the record before us is incomplete. Until such time as the Formal Hearing is re-convened and completed, we cannot say the COR is supported by the substantial evidence or in accordance with the law.

CONCLUSION AND ORDER

The June 30, 2016 Compensation Order on Remand is VACATED. The matter is remanded to allow the Formal Hearing to re-convene to allow Employer to cross examine Claimant and present its case in chief.

So ordered.

³ Although *Briscoe* is an unpublished decision without precedential authority, the Court's position on this issue is informative. This Panel agrees with, adopts, and applies the courts’ reasoning in *Briscoe* to this appeal