

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. 07-124

MARTINEZ BOX,

Claimant-Respondent,

v.

D. C. GENERAL HOSPITAL,

Employer-Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Leslie A. Meek
AHD PBL No. 07-030, DCP Nos. 761010-2001-0006

Kevin Turner, Esquire, for the Petitioner

Stephen Bou, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and LINDA F. JORY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 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 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

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 May 25, 2007, the Administrative Law Judge (ALJ) granted Respondent's request for reinstatement of temporary total disability benefits. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ improperly denied Petitioner's request for a continuance made at the commencement of the formal hearing, and proceeded to conduct the hearing despite Petitioner's assertion at that time that it had not received adequate notice of the scheduling of the hearing.

Because the ALJ did not address the central issue in connection with the request for a continuance, and did not adequately state the reasons for her denial of the motion for continuance, we vacate the Compensation Order and remand for further consideration of the motion for continuance and further proceedings, if warranted.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28 (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.

Turning to the case under review, Petitioner couches its legal argument in terms of "subject matter jurisdiction". However, Petitioner does not explain how this matter is a jurisdictional one, and we do not see it as such. Rather, we view the issue presented as one of fundamental procedural fairness and compliance with statutory and regulatory procedure.

As Petitioner points out, the regulations governing the conduct of formal hearings under the Act provide, at 7 DCMR § 107.2, that the hearing officer, in this case the ALJ to whom the matter is assigned for conduct of the formal hearing, "shall set the time and place of the hearing, and shall

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

mail or deliver in person written notice to the claimant and the Corporation Counsel [now known as the Office of the Attorney General] at least ten (10) days prior to the hearing.” This regulation sets forth the minimum requirements for providing adequate notice to a party that a formal hearing is going to occur, at which their rights and/or obligations with respect to the Act are to be determined. Whether the formal hearing should have occurred on March 22, 2007 must be considered in light of that regulation.

At the time of the convening of the formal hearing, the transcript reveals that the following colloquy occurred:

JUDGE MEEK: Thank you very much. Well, I do know that we have a preliminary matter before us. I believe Employer would like to put forth a motion at this time?

MR. TURNER [counsel for Petitioner]: Yes, Your Honor. We move to continue this case, and the reason why we’re asking that the matter be continued is that our office hasn’t to this point received the scheduling order that, I believe, Your Honor mailed on looks like February 1, 2007. We first learned in this case through some communication from Claimant’s counsel to Ms. [sic] McDougald, the supervisor in the Personnel and Labor Relations Section.

I am aware that Mr. Bou [Respondent’s counsel] faxed the documents to our office on February 20th. I never received the fax, and in querying other people in the office, at least in our section, nobody had received the document. I’d add that the fax machine that we have is not dedicated only to our section, it’s a fax machine shared by everybody on the 10th floor in the Office of the Attorney General.

Again, our position is that we were never served with a copy of the scheduling order. I’m not sure whether this document was sent certified mail or not, but in our office –

JUDGE MEEK: What document are you speaking of?

MR. TURNER: The scheduling order. Yesterday, someone from our office conferred with the Office of Hearings and Adjudication, and we were advised that there was no green card returned indicating that someone signed the document. I’m also given to believe, because of the preliminary discussion, that not all scheduling orders are sent certified mail. I would say that that’s contrary to my experience with regard to both scheduling orders as well as decisions and other orders.

JUDGE MEEK: Are the scheduling orders required to be mailed certified mail?

MR. TURNER: They’re not required to be mailed certified mail, but it’s my understanding that that’s the policy, at least the practice of the Office of Hearings and Adjudication, and I would add that my knowledge of the Postal Service, particularly as it relates to D.C. Government, documents that are sent certified mail are handled somewhat differently than documents that are put into the regular mail. One of the differences that I know is that the mailroom, which is authorized by

USPS, they sign for documents that are sent certified, as opposed to the ultimate destination of the document. So to the extent that any document is sent to my office certified mail, it's not our office that signs for it, it's someone down in the mailroom.

With that being the case, the only representation that I can make is my office did not receive the document. I'm not saying it wasn't mailed, I don't know. But the document was not received in our office. And none of the actions that we typically take once we do receive scheduling orders were done in this instance.

JUDGE MEEK: Thank you. As far as your motion for continuance is concerned, Mr. Turner, I appreciate that, but your motion is denied. I'm going to go ahead and proceed with the hearing today [...]

HT 5 – 9. That colloquy constitutes the entire discussion of the motion at the time of the formal hearing. At no point in those proceedings did the ALJ give any reason for her denial of the motion. However, in the Compensation Order, the ALJ stated in a footnote as follows:

Employer asserts that the Scheduling Order for this matter was never received by employer. Employer states it first learned of this case a few days before the scheduled hearing date, on or about March 20, 2007 and that employer had not had an opportunity to review its client's file. Employer also asserts that it did not receive claimant's February 20, 2007, facsimile concerning this case. While employer detailed various problems that it was experiencing receiving mail and facsimiles, employer admitted that it had knowledge of the impending Formal Hearing at least two days before its scheduled date, yet employer waited until commencement of the hearing to make its request for a continuance.

Compensation Order, footnote 1, page 1 – 2. We note that, although this footnote also lacks any specific identification of a reason why the continuance request was denied, it could be read to imply that the reason was a delay by Petitioner in seeking it.

In neither the transcript nor the Compensation Order is there any reference to whether the terms of the above cited regulation had been complied with, despite the fact that Petitioner's counsel made the unchallenged proffer that he had been advised by a member of the staff of the Office Hearings and Adjudication that there was no "green card", evidencing receipt by Petitioner's office of the certified mailing of the Scheduling Order, in its files, and that neither he nor anyone in his office had received the Scheduling Order. The sole reason that we can glean from the record or the Compensation Order for the denial of the motion was that Petitioner had "admitted that it had knowledge of the impending Formal Hearing at least two days before its scheduled date, yet employer waited until commencement of the hearing to make its request for a continuance". This statement, however, is unsupported by anything in the record. Nothing in the colloquy quoted above can be interpreted to be any such "admission" of a two day delay in raising the issue. The only statement that gives any time frame for when Petitioner learned of the impending hearing was that Petitioner's office made inquiries the preceding day concerning the existence or lack thereof of the "green card".

Putting aside the lack of support for the ALJ's factual finding of a two day delay in raising the matter, upon being advised by counsel that Petitioner alleged that it had not received the notice, the ALJ was obligated to address that allegation. While motions for continuances are normally within the sound discretion of the ALJ, in this instance it was asserted that a regulatory mandate had not been fulfilled.² While a decision as to whether there has been an unreasonable delay between the time a party is aware of a circumstance warranting a request for a continuance and the making of that request, and what the consequence of that delay should be, will normally be left to the sound discretion of the ALJ, this case presents a different circumstance. Here we are not presented with a request for additional time due to an unexpected delay in obtaining evidence, locating witnesses, or completing discovery. Rather, the issue was one of compliance with a regulatory mandate which is a predicate to conducting the formal hearing at all, and has implications that go to the most fundamental aspect of procedural fairness, the right to adequate notice of a hearing.

Respondent asserts in these proceedings that Petitioner had knowledge of the date of the formal hearing because Respondent faxed and mailed a letter containing the date and time of the scheduled formal hearing to Petitioner on February 20, 2007, along with a partially completed Pre-Hearing Order, copies of which were attached to the opposition filed. We take no cognizance of those documents, nor do we consider the contents of the attachments to Petitioner's Application for Review, because we are not empowered to conduct fact finding.

However, to the extent that Respondent argues (as he does in his opposition to this appeal) that Petitioner had knowledge of the date of the formal hearing because Respondent's counsel advised Petitioner of that date, such argument is irrelevant to the question of whether the regulation has been complied with. The regulation places the obligation of notifying the parties of the date and place of the hearing on the agency and the ALJ, and does not contemplate or permit that obligation to be undertaken by opposing parties. Nor does the regulation appear to make "actual knowledge" of the date, from whatever source obtained, a basis for proceeding in the face of a failure to comply with the regulation.

CONCLUSION

The Compensation Order followed a formal hearing that was conducted without the ALJ resolving the issue of non-compliance with the regulation governing notification of the parties as to the date of the formal hearing, and the Compensation Order likewise fails to address the issue. It is therefore contrary to law and must be vacated, with the matter being remanded to AHD for resolution of whether the regulation was complied with. If the ALJ, after further fact finding inquiry³, determines that the regulation was complied with, a new Compensation Order, in which the factual bases for the findings are identified and the reasons for a denial of the continuance request are given, may issue without further proceedings. If, however, the ALJ determines that the regulation was not complied with, a new formal hearing must be conducted in compliance therewith.

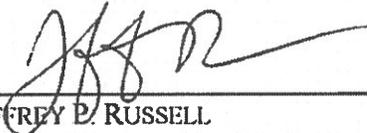
² Although Petitioner did not point out to the ALJ that the notice requirement is included in the governing regulations, such is the case.

³ Such inquiry can, of course, include taking administrative notice of the contents of the AHD files and records pertaining to the issuance and mailing of Scheduling Orders and other orders in AHD.

ORDER

The Compensation Order of May 25, 2007 is vacated, and the matter is remanded to AHD for further proceedings consistent with foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

August 1, 2007

DATE