

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. 08-024

SHELLEY REED,

Claimant – Respondent

v.

D.C. DEPARTMENT OF TRANSPORTATION,

Self-Insured Employer – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 06-049, DCP No. 761021-0001-2005-0013

Andrea Comentale, Esq., for the Petitioner¹

William B. Sarvis, Jr., for the Respondent²

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

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

DECISION AND ORDER

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).³

¹ At the formal hearing, the Petitioner was represented by Ross Buchholz, an attorney within the same office as the named counsel.

² The record indicates that Mr. Sarvis is not an attorney, but a labor consultant. Hearing Transcript (HT) at p. 7.

³ 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 District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, 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. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive

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 September 28, 2007, the Administrative Law Judge (ALJ) awarded temporary total disability benefits continuing from May 13, 2006 and causally related medical expenses to the Claimant-Respondent (Respondent). On October 26, 2007, the Respondent filed an Application for Review seeking review of that Compensation Order. The Respondent filed an Opposition.

As grounds for this appeal, the Petitioner alleges as error that the Compensation Order is not supported by substantial evidence and is not in accordance with the law.

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. Official Code §§ 1-623.28(a) and 32-1521.01 (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. 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 herein, the Petitioner alleges that the ALJ erred in granting the Respondent’s Motion to Reopen the Record and admitting into evidence the medical report of Dr. Manning without a showing from the Respondent that reasonable grounds existed for its unavailability at the formal hearing. It cites *Wilson v. Norrel Services*, H&AS No. 93-639, OWC No. 252396 (March 27, 1995) as support for allegation. The Petitioner asserts that the ALJ’s findings contain numerous factual errors, thereby undermining the conclusions of law in the Compensation Order. The Petitioner pointed to several instances of errors such as the date of injury, where, when and from whom the Respondent received initial medical treatment for her injury, and when the Respondent received medical treatment from Dr. Cynthia Cervieri. The Petitioner asserts that the Respondent’s testimony contradicts the documentary evidence of

Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), 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.

record and the ALJ erred in relying on it. Finally, the Petitioner asserts that the ALJ erred in applying the treating physician preference to this case because the opinions of the Respondent's physicians are "essentially conclusory and largely based upon Claimant's subjective complaints." Agency's Petition for Review at p. 7.

In its Opposition, the Respondent asserts that the ALJ's grant of her Motion to Reopen the Record is in accordance with the law as the ALJ indicates in Compensation Order in footnote 1. The Respondent asserts that the ALJ's statement of the incorrect date of injury is a minor typographical error and does not have any bearing on the conclusions of law reached. Further, the Respondent maintains that the ALJ properly applied the treating physician preference especially given that the independent medical examiner, Dr. David Dorin, examined her once for the "sole purpose of determining duty status and possibly litigation." Employee's Opposition to Agency's Petition for Review at p. 4.

With respect to the granting of the Motion to Reopen the Record, disability compensation proceedings before this agency are administrative in nature. The rules of procedure and practice used in the court system are not binding on the proceedings, but can be used as guidelines and an ALJ has broad discretion to determine all questions in adjudicating such compensation case. *See* D.C. Official Code §§ 1-623.24(b)(2); 2-509. This discretion, however, is not unfettered and must be rationally based and not capricious or arbitrary. A decision that reflects an abuse of discretion is a reversible error.⁴ Further as indicated in *Wilson* cited by the Petitioner, a party may submit additional evidence post-hearing if there exists reasonable ground for failing to adduce the evidence at the hearing. Herein, the ALJ stated in the Compensation Order that Dr. Manning's report was based upon an August 15, 2006 examination of the Respondent's right wrist. The formal hearing was held on July 25, 2006. On review of the record, the Panel determines that the ALJ did not abuse his discretion in granting the Motion to Reopen the Record.

The Panel reviewed the Compensation Order and the record evidence in its entirety. The Panel agrees that the decision below contains numerous factual errors, to wit: that the Motion To Reopen the Record was filed by the Petitioner when it was filed by the Respondent (pg. 1, footnote 1); that the date of injury is March 5, 2005 when the evidence shows it as March 28, 2005 (pg. 3); that Respondent received medical treatment at George Washington Hospital Emergency Room when the evidence shows that it George Washington University Hospital Emergency Room (pg. 3 and Claimant's Exhibit (CE) No. 2); that Respondent received medical treatment at the emergency room was from Dr. Rafik Muawwad at the emergency room when the name of the physician is not legible (pg. 3 and CE No. 2); that the Respondent was examined by Dr. Christina Cervieri on July 24, 2006 when the evidence shows the date as June 28, 2005 (Pg. 3 and CE No. 10); and that the Petitioner contended that the sprain sustained on May 28, 2005 had resolved when the evidence shows that the date of injury is March 28, 2005 (pg. 4); and concluding that the Respondent's right wrist impairment is causally related to her March 28, 2006 work injury (pg. 7).

⁴ *See generally Palmerton v. Parsons Corporation*, CRB No. 05-016, AHD No. 05-016, OWC No. 586530 (January 5, 2006) (ALJ's exclusion of the 17 hours of work from petitioner's fee petition on basis that the worked performed was for administrative tasks without further explanation was an abuse of the ALJ's discretion and reversible).

However, contrary to the Petitioner's allegation, the Panel determines that the errors are harmless and do not undermine the conclusions of law in the Compensation Order. Although the ALJ made errors on dates, the ALJ's recitation of the medical evidence upon which he relied in reaching his findings and conclusions is accurate. Thus, the ALJ's finding that the Respondent continues to experience symptoms in her right wrist as a result of her work injury is supported by substantial evidence in the record as a whole. Further, the ALJ's legal conclusions are in accordance with the law. The Panel will not disturb the decision below.

CONCLUSION

The Compensation Order of September 28, 2007 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of September 28, 2007 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

January 15, 2008
DATE