

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-146

TAI SMITH,
Claimant–Respondent,

v.

GENERAL DYNAMICS BOLLING AFB and BROADSPIRE,
Employer–Petitioner.

Appeal from a Compensation Order by
The Honorable Nata K. Brown
AHD No. 10-235B, OWC No. 667317

Anthony J. Zaccagnini, Esquire for the Petitioner
Eric M. May, Esquire for the Respondent

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, MELISSA LIN JONES, and
HEATHER C. LESLIE,¹ *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.² HEATHER
C. LESLIE dissenting.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In 2005, Ms. Tai Smith began working for General Dynamics Bolling AFB (“General Dynamics”) as a network, operations-center technician assisting customers over the phone. Issues arose over whether Ms. Smith had suffered a work-related accidental injury and whether she had sustained a permanent partial disability.

The parties proceeded to a formal hearing. At that proceeding, Ms. Smith’s attorney requested Mr. Michael Acton (Ms. Smith’s supervisor and the employer’s designated representative) be

¹ Judge Leslie has been appointed by the Director of the Department of Employment Services (“DOES”) as a temporary Compensation Review Board (“CRB”) member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

² Jurisdiction is conferred upon the CRB pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, (“Act”), 7 DCMR §250, *et seq.*, and the DOES Director’s Administrative Policy Issuance 05-01 (February 5, 2005).

sequestered because he intended to testify. Mr. Acton was sequestered, and in a Compensation Order dated August 16, 2012, an administrative law judge (“ALJ”) granted Ms. Smith’s claim for relief.³

On appeal, General Dynamics raises due process issues, most notably Mr. Acton’s exclusion from the formal hearing; because Mr. Acton is the employer’s representative, General Dynamics argues he was entitled to be in the room for the formal hearing. In response, Ms. Smith disagrees that the ALJ committed any due process violation because the ALJ was within her discretion to exclude General Dynamics’ representative from the formal hearing.

General Dynamics raises several other issues on appeal, and Ms. Smith responds to these issues in her opposition; however, our resolution of this due process issue is dispositive. By requiring a new formal hearing, the underlying basis for the remaining issues is subject to change, and we decline to offer what ultimately may be advisory opinions.

ISSUE ON APPEAL

1. Is the exclusion of General Dynamics’ representative from the formal hearing a due process violation requiring a new formal hearing?

ANALYSIS⁴

At the formal hearing, Ms. Smith’s attorney requested Mr. Acton be sequestered because “he is not a corporate officer. He is not a vice president or an assistant vice president or a member of the board. He is here merely as a fact witness. There is no basis upon which his position at the company for whom he works would entitle him to be considered as a corporate representative.”⁵

After inquiring as to why General Dynamics did not designate someone else who was not going to be a witness, the ALJ initially ruled Mr. Acton would be permitted to remain present for the formal hearing. When a dispute then arose over Ms. Smith’s counsel’s ability to call Mr. Acton as an adverse witness before Ms. Smith testified, the ALJ reversed her ruling and required Mr. Acton leave the room. General Dynamics’ attorney objected.

We agree with our dissenting colleague that an ALJ has discretion to conduct a hearing in a manner that affords the parties a reasonable opportunity for a fair hearing; however that discretion is not

³ *Smith v. General Dynamics Bolling AFB*, AHD No. 10-235B, OWC No. 667317 (August 16, 2012).

⁴ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁵ Hearing Transcript, p. 6.

unfettered such that a formal hearing can be conducted in a way that violates due process. In other words, even the “shortest and quickest possible route” and “a wide degree of latitude in how to administer the prehearing and hearing phases of the formal process” require due process, and due process requires no person be deprived of life, liberty, or property without notice and an opportunity to be heard.⁶ Under the United States Constitution and in workers’ compensation cases, “person” includes a business, especially when that business is an interested party to the litigation. Specifically, the regulations to the Act define “interested party” as “the District of Columbia, and an employer, a carrier, an employee, or a beneficiary whose rights or obligations pursuant to a claim under the Act shall be determined in a particular proceeding, including a mediation conference.”⁷

Mr. Acton isn’t just a witness; he is the employer’s representative; under these circumstances, he is the employer.⁸ Consistent with the dissent’s logic, it is difficult to conceive of any individual qualifying as an employer’s representative.

A claimant’s counsel is afforded no input into the selection of an employer’s representative, and there is no requirement in the Act that the employer’s representative be a “vice president or an assistant vice president or a member of the board.” An employer involved in a workers’ compensation cases may not be a corporate entity, and such restrictions would unduly constrain that party’s ability to fairly and adequately represent itself at a formal hearing adjudicating its obligations under the Act.

We are not called upon to determine whether “there are no circumstances in which a claimant can be excluded from the proceedings.” Given an ALJ’s powers of contempt pursuant to §32-1529(b), we can foresee circumstances that would permit an ALJ to exclude a claimant from the proceedings.

Excluding Mr. Acton was improper because the ALJ barred the defendant from being present at the hearing. Thus, the law requires we remand this matter for a new hearing at which the employer is entitled to have its designated representative present for the duration of the proceedings. Any remaining matters in this appeal are moot.

⁶ U.S. Const. amend V.

⁷ 7 DCMR §299

⁸ As such, he is distinguishable from the sequestered witness in *Jones*, *infra*.

CONCLUSION AND ORDER

The August 16, 2012 Compensation Order is not in accordance with the law because a party in interest was excluded from attending the formal hearing. The August 16, 2012 Compensation Order is VACATED, and this matter is remanded for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

December 19, 2012
DATE

HEATHER C. LESLIE *dissenting*.

The majority has found and concluded that it was improper for the ALJ to sequester Mr. Acton, the Employer's designated representative, from the court room during the Claimant's testimony. For the reasons set forth below, I respectfully disagree.

7 DCMR § 223.5, states,

The order in which evidence and allegations shall be presented and the procedures at the hearing generally, except as this chapter otherwise expressly provides, shall be in the discretion of the Hearing or Attorney Examiner and of the nature as to afford the parties a reasonable opportunity for a fair hearing.

Thus, the statute explicitly provides the ALJ has the discretion to conduct the hearing in such a manner which affords the parties a "reasonable opportunity" for a fair hearing. Moreover, in the realm of workers compensation hearings, as stated by the District of Columbia Court of Appeals (DCCA), "if a hearing is necessary, formal rules of evidence do not apply." *Ferreira v. DOES*, 531 A.2d 651, 658 (1987). Ferreira states further,

The informality and flexibility purposely animating the procedures governing workers' compensation claims and the agency's participatory role in the fair adjudication of these claims militate against the formalism DOES exhibited here.

As Professor Larson notes:

The adjective law of workmen's compensation, like the substantive, takes its tone from the beneficent and remedial character of the legislation. Procedure is generally summary and informal The whole idea is to get away from the cumbersome procedures and technicalities of pleading, and to reach a right decision by the shortest and quickest possible route. 3 LARSON, *supra*, § 77A.10 at 15-1 to 15-2.

DOES' responsibilities continue through the hearing and post-hearing stages. The "hearing or attorney examiner *shall inquire fully* into matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters." 7 DCMR § 223.3 (emphasis added). Furthermore, a hearing examiner may determine, post-hearing, to reopen the hearing:

If the Hearing or Attorney Examiner believes that there is relevant and material evidence available which has not been presented at the hearing, the hearing may be adjourned or, at any time prior to filing of the compensation order, the hearing may be reopened for the receipt of the evidence.

Id. § 223.4. Thus, the procedures attendant upon the resolution of a workers' compensation claim are purposely designed to give DOES the flexibility to fairly and efficiently adjudicate a claim.

Since the rules of evidence are not binding, the ALJ has the discretion to, or not to, sequester witnesses, at her discretion. See *Jones v. District Unemployment Compensation Board*, 395 A.2d 392 (1978).

It is clear from the statutory and regulatory scheme constructed to govern the hearing process that formal rules of evidence and procedure are not meant to be rigidly applied, and that the ALJ is expected to have a wide degree of latitude in how to administer the prehearing and hearing phases of the formal process, certainly wider than a trial judge in a strictly judicial setting in which the evidentiary and procedural rules are meant to govern, rather than merely guide. The real limits on the ALJ's discretion, in my view, are those that protect a party's due process rights.

Thus, it is without doubt true that a party has a due process right to be present at a hearing in which the party's rights are being adjudicated. Therefore, there are no circumstances in which a claimant can be excluded from the proceedings. From a claimant's perspective, all the rights being adjudicated are personal to him or her, and inseparable from him or her. The same is not true of a corporate entity: the rights and obligations of a company that is an employer or an insurer are not personal to anyone in particular, and are separable from any specific individual.⁹

In this case, Mr. Acton had no personal right or interests at stake. While the Employer and insurer had every right to have a representative present, there is no reason to posit that they have an absolute right to have a specific person present, if that person's presence, in the view of the ALJ, has the potential to adversely affect the fact-finding process.

If, upon Mr. Acton's exclusion, the Employer sought to have another individual present, it would certainly have been entitled to arrange for a new corporate designation to be made, such as requesting for a continuance to allow for another individual come, and if the ALJ denied the

⁹ This would not be true where the employer is an individual.

employer that opportunity, that would in all likelihood be deemed an abuse of discretion. No such request was made in this case, however.

The rule on witnesses is not part of our statutory or regulatory scheme. It has been employed over the years as a matter adopted practice. Its application in our procedures should be carried out with a view towards maximizing the efficacy of the fact finding mission, not the judicial nature of that process.

I disagree with the majority removing the ALJ's ability to sequester fact witnesses who is the Employer's corporate representative. I do not agree with the majority that by being a designated corporate representative, Mr. Acton was then an interested party under the act. Mr. Acton does not have any rights and obligations pursuant to the Claimant's claim. The Claimant, the Employer, and the insurer are the interested parties.¹⁰

A review of the hearing transcript reveals the ALJ considered the Claimant's request to sequester Mr. Acton and considered the Employer's argument that Mr. Acton had a right to stay as an employer representative. Due to the likelihood Mr. Acton would testify as a witness, the ALJ sequestered him. The ALJ has the flexibility to fairly and efficiently adjudicate a claim, as stated above. Her decision should only be reversed only if it is arbitrary, capricious or an abuse of discretion. *Ferreira*, supra. Based upon the record, I believe the ALJ's decision was not arbitrary, capricious, or an abuse of discretion warranting a remand and new hearing.

HEATHER C. LESLIE
Administrative Appeals Judge

¹⁰In the only case found regarding who was an interested party, the CRB concluded that the Claimant, Employer, and Insurer were the interested parties when determining whether all interested parties had been served a Notice of Informal Conference. *Yates v. Aggregate Industries*, CRB No. 06-16, OWC No. 601655 (January 7, 2006).