# United States Department of Labor
# Employees' Compensation Appeals Board

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| **A.C., Appellant** | ) | |
| **and** | ) | **Docket No. 07-289** |
| | ) | **Issued: November 20, 2007** |
| **GENERAL SERVICES ADMINISTRATION, Burlington, NJ, Employer** | ) | |

*Appearances:*
*Thomas Uliase, Esq.*, for the appellant
*Office of Solicitor*, for the Director

Oral Argument October 10, 2007

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On November 13, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 26, 2006 affirming the termination of compensation effective April 12, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### *ISSUES*

The issues are: (1) whether the Office properly exercised its discretion with respect to appellant's request for a subpoena; and (2) whether the Office met its burden of proof to terminate compensation for wage loss and medical benefits effective April 12, 2005.

### *FACTUAL HISTORY*

The Office accepted that appellant sustained a lumbar sprain in the performance of duty on August 15, 2002. Appellant stopped working on August 15, 2002 and began receiving compensation for temporary total disability. By decision dated June 6, 2003, the Office terminated compensation for wage loss, finding the weight of the evidence was represented by

Dr. Howard Zeidman, an orthopedic surgeon selected as a second opinion physician. This decision was set aside by an Office hearing representative on December 29, 2003, on the grounds that a conflict in the medical evidence existed pursuant to 5 U.S.C. § 8123(a).

Appellant was referred to Dr. Stanley Askin, a Board-certified orthopedic surgeon, to resolve the conflict. In a report dated January 30, 2004, Dr. Askin opined that a lumbar strain had resolved. By decision dated April 15, 2004, the Office terminated compensation for wage-loss and medical benefits effective April 17, 2004. Appellant, through his representative, requested a hearing before an Office hearing representative.

By letter to the Branch of Hearings and Review dated November 22, 2004, appellant argued that Dr. Askin had been selected often as a referee physician and the selection process was improper. He requested, pursuant to 20 C.F.R. § 10.619, a subpoena for records concerning the selection of Dr. Askin.

By decision dated January 4, 2005, an Office hearing representative set aside the termination decision. The hearing representative found Dr. Askin's report to be insufficient to terminate compensation, and also directed the Office to review the selection process to determine whether the Physicians' Directory System (PDS) was properly utilized in the selection of Dr. Askin as a referee physician.

Dr. Askin submitted a supplemental report dated February 12, 2005. He again opined that the accepted employment injury had resolved. The record also contains copies of computer entries for physicians bypassed during the referee selection process. The entries provide a notation as to the reason the physician was bypassed; most of the physicians have a notation "too busy for exam[ination]."

In a letter to the Office dated March 21, 2005, appellant requested, under the Freedom of Information Act (FOIA), a list of physicians selected as referee physicians from November 2003 to June 2004. By letter dated April 1, 2005, the Office stated that lists of medical providers are generally not releasable to the public. By letter dated April 19, 2005, to the Solicitor of Labor, appellant again requested, pursuant to the FOIA, a list of physicians selected as referee physicians from November 2003 to June 2004.

In a decision dated April 12, 2005, the Office terminated compensation for wage-loss and medical benefits. The Office found the weight of the evidence was represented by Dr. Askin.

Appellant requested a hearing before an Office hearing representative. In a letter dated July 28, 2005 to the Branch of Hearings and Review, appellant made a request to subpoena Office records concerning the selection of Dr. Askin from the PDS, specifically a list of physicians selected for the three months before and after the selection of Dr. Askin on January 20, 2004.

A hearing was held on February 23, 2006. In response to appellant's inquiry as to the subpoena request, the hearing representative initially indicated that she did not have access to the information. She also stated that appellant did not show that Dr. Askin was chosen out of the proper order. In addition, the hearing representative stated, with respect to the subpoena request,

she had "been told that because that is at the solicitor's office, that it [i]s not something that [i]s appropriate for me to respond to."

By decision dated April 26, 2006, the hearing representative affirmed the April 12, 2005 decision. The hearing representative found the weight of the evidence was represented by Dr. Askin. According to the hearing representative, appellant's representative "was advised that his request for additional documents related to other case files was in the [O]ffice of the Solicitor of Labor, per his letter to that office dated April 19, 2005. His subpoena request was denied." In discussing the allegation that Dr. Askin was improperly selected, the hearing representative cited *Roger S. Wilcox*.[1]

## ***LEGAL PRECEDENT -- ISSUE 1***

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[2] 20 C.F.R. § 10.619(a) provides that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process. The hearing representative may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents.

The hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.[3] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.[4]

## ***ANALYSIS -- ISSUE 1***

Appellant filed a subpoena request pursuant to 20 C.F.R. § 10.619 for documents relating to the selection of Dr. Askin as a referee physician. Specifically, appellant requested a list of physicians chosen as referee physicians for the period November 2003 to June 2004. The hearing representative does not provide an adequate decision with respect to the subpoena request.

In the April 26, 2006 decision, the hearing representative referred appellant's letter dated April 19, 2005 to the solicitor's office. The hearing representative then stated, "His subpoena request was denied." The April 19, 2005 letter was request for information under the FOIA. It is not clear whether the hearing representative was referring the FOIA request when stating that the subpoena request was denied. To the extent that the hearing representative was addressing the

[1] 45 ECAB 265 (1993).

[2] 5 U.S.C. § 8126(1).

[3] *See Gregorio E. Conde*, 52 ECAB 410 (2001).

[4] *Claudio Vazquez*, 52 ECAB 496 (2001).

pending subpoena request, she provided no reasons or additional explanation. The hearing representative had not issued a written decision on the subpoena request prior to the February 23, 2006 oral hearing. While the subpoena request was discussed at the February 23, 2006 oral hearing, a proper Office decision must contain findings of fact and a statement of reasons.[5] The *Wilcox* case noted by the hearing representative did not discuss a subpoena request or provide relevant precedent on the subpoena issue.[6]

The Board cannot determine if the hearing representative adjudicated the request for a subpoena. To the extent the April 26, 2006 decision was intended to represent a denial of the subpoena request, the Board cannot determine if the hearing representative abused her discretion because there is no indication as to how the hearing representative exercised her discretion. Until the subpoena issue is properly adjudicated, the termination of compensation issue is not in posture for decision. The case will be remanded to the Branch of Hearings and Review for a proper decision with respect to the subpoena request and the termination of compensation.

## ***CONCLUSION***

The Office hearing representative did not issue a proper decision adjudicating the request for a subpoena. The case will be remanded for an appropriate decision.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 26, 2006 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 20, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[5] 20 C.F.R. § 10.126 (1999).

[6] In *Roger S. Wilcox*, *supra* note 1, the Board found the Office properly denied appellant's request to participate in the selection of a referee physician.