STATE OF WISCONSIN PERSONNEL COMMISSION

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JEROME BLIED,

Appellant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. 81-290-PC

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INTERIM DECISION AND ORDER

This matter is before the Commission at this point following an interim decision and order entered November 30, 1982.

This is an appeal pursuant to §§230.45(1)(d) and 230.36(4), Stats., of the denial of hazardous duty benefits. Following a hearing, the examiner issued a proposed decision which had the effect of excluding as hearsay a physician's report on a form developed pursuant to §102.17(1)(d), Stats., which permits the introduction of certified or verified medical and surgical reports in worker's compensation proceedings, which had been offered by the appellant, and ruling in favor of the respondent on the merits.

In the aforesaid interim decision and order, the Commission adopted the examiner's evidentiary ruling, but rather than addressing the merits, directed that the appellant be given the opportunity to have the hearing reopened to present testimony by the physician who prepared the report, with opportunity for the respondent to cross-examine and to present countervailing testimony. The opinion stated as follows:

> "The Commission's decision to permit the appellant to call the physician as a witness is premised upon the following facts: 1) the appellant was not represented by counsel at the hearing, 2) it was not unreasonable for the appellant to expect that his exhibits would be admitted into evidence when the document was entitled

'Practitioner's Report on Accident or Industrial Disease in Lieu of Testimony,' and 3) the document relates to the causation question which is the central issue in this appeal." p.5.

On January 14, 1983, the respondent filed a motion requesting that the Commission issue a final decision based on the testimony and evidence received at the initial hearing. This motion is based on the theory "that the Personnel Commission does not have the statutory authority at this time to permit the appellant to produce further evidence ...," and that if such authority exists, the Commission should "reconsider its decision to permit the calling of additional witnesses in the circumstances of this particular case."

The respondent's contention regarding lack of authority is premised first on the proposition that what the Commission did was to grant a rehearing pursuant to §227.12, Stats., but that the statutory prerequisites set forth in that section were not present.

By its terms, §227.12 has no application to what occurred here. That section provides that:

> "Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing ..." (emphasis supplied)

There has been no final order in this case, and the Commission did not order a "rehearing," but rather permitted further hearing before a final order.

Next, the respondent argues that there is no express or fairly implied authority "for the agency officials who will render the final decision to remand the matter to the hearing examiner for the taking of further testimony after the proposed decision has been served on the parties." However, the respondent concedes that the hearing examiner has the authority "during the course of a hearing to permit the taking of additional testimony."

It is difficult to understand, if the hearing examiner has the authority during the course of the hearing to permit additional testimony, how the Commission lacks the authority, in reviewing the conduct of the hearing, after the hearing but before the final decision, to require the same result. The implication of such a state of affairs is that the Commission would be powerless to correct a broad range of matters as to which it may disagree with the examiner. For example, if the examiner erroneously were to rule that the testimony of a particular witness should be excluded, then the Commission would be unable to correct the error by causing the hearing to be reopened to allow that testimony. In the opinion of the Commission, it has relatively broad authority under §227.09 to review the conduct of hearings by it examiners, and this authority includes the power to permit hearings to be reopened for additional testimony.

The respondent also argues that even if the Commission has the authority to reopen the hearing, such action in this case would constitute an abuse of discretion.

It is argued that the absence of counsel should be discounted in this case because the appellant's many years of experience as a police officer and undoubted greater familiarity with courtroom procedures than many lay employes leads to the conclusion that his decision to proceed without counsel must have been informed and knowing. However, regardless of whether a decision to proceed without counsel is more or less informed, a party appearing without counsel usually should receive more leeway in technical matters anyway. Exactly how much leeway is a matter for the discretion of the Commission. However, some degree of solicitude is indicated so that such parties have a reasonable opportunity for a fair hearing and to present their cases as fully as possible.

The respondent next argues that the appellant never indicated at the hearing that he believed that the exhibit in question would be admitted into evidence on the strength of its title, "Practitioner's Report on Accident or Industrial Disease in Lieu of Testimony," and that he expressed no surprise at the objection and the ruling on it.

It is not unexpected that a non-attorney would not make as explicit a record on this matter as would an attorney. However, it seems a fair inference that when the appellant introduced this report, and did not call the authorizing physician, that he had some expectation that this form would be received in evidence. This expectation, while ultimately mistaken, was not entirely unreasonable, particularly in light of the title of the form. In this regard it is noted that the examiner initially sustained the objection to the document, then reversed that ruling after the hearing, and finally, in his proposed decision and order, reversed the ruling again and excluded the document.

The final argument made by the respondent is that the third factor cited by the Commission in its November 30, 1982, decision that "the document relates to the causation question which is the central issue in this appeal," does not support the decision.

The centrality or importance of the evidence in question is a legitimate factor to consider in determining whether to permit the reopening of a hearing for additional evidence. For example, if the report here in question had been but one piece of evidence among many bearing on a relatively collateral issue, this would militate against the delay and expense inherent in reopening a hearing for additional evidence.

In the opinion of the Commission, hearings before it should be conducted as informally and flexibly as possible, consistent with the requirements of

the Administrative Procedure Act. Reasonable efforts must be made to make this process accessible to parties who are without counsel. See Kropiwka v. DILHR, 98 Wis. 2d 709, 721, 275 N.W. 2d 881 (1979):

> "... in state administrative agency hearings, the hearing examiner often must protect the rights of a party not represented by counsel, and see to it that the party's case is properly developed. The examiner must be impartial, however, and may not engage in partisan activity on behalf of an unrepresented party ..."

In the Commission's opinion, its November 30, 1982, decision and order was consistent with this precept.

ORDER

The respondent's motion filed January 14, 1983, is denied.

Dated: March 4, 1983 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

JAMES W. PHILLIPS, Commissioner

AJT:ers

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