

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. 07-171

HUGH WASHINGTON,

Claimant–Petitioner,

v.

A&L CONSTRUCTION,

Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Amelia G. Govan
AHD No. 06-163, OWC No. 618905

Marvin Liss, Esquire, for the Petitioner

Kirk D. Williams, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, SHARMAN J. MONROE, *Administrative Appeals Judges*, and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

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 §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 250, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

OVERVIEW

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 July 7, 2007, the Administrative Law Judge (ALJ) denied Petitioner's claim for relief because the ALJ determined that there was no employer-employee relationship under the Act. Petitioner filed an Application for Review (AFR) on August 2, 2007, seeking review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the finding of no employer-employee relationship is not in accordance with the law. Respondent filed an opposition to the appeal, arguing that the Compensation Order is supported by substantial evidence and is in accordance with the law.

Because the ALJ's finding was based upon an erroneous determination that Respondent was not an employer, because it did not constitute a "regular business", the conclusion that there is no employer-employee relationship is contrary to law, and we reverse and remand the matter for further proceedings.

ANALYSIS

As an initial matter, the scope 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. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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 International 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, Petitioner alleges that the ALJ's decision is a misapplication of the law, in that the ALJ had found, correctly, that Petitioner was not an independent contractor "or that the activities in which he [Petitioner] participated (hanging drywall, painting, tiling, etc.) were not an integral part of home renovation projects undertaken by A&L". Compensation Order, page 5, quoted by Petitioner at page 3 of "Claimant's Memorandum of Points and Authorities in Support of Application for Review". Petitioner argues that such a finding is inconsistent with the later finding of the ALJ that "The work claimant performed as a helper/laborer was not an integral part of any regular business". Compensation Order, page 5.

The Act defines "employer" as including "any individual, firm, association, or corporation ... using the service of another for pay in the District of Columbia"(D.C. Code § 32-1501 (10)), and defines "employee" as including "every person ... in the service of another under any contract of hire or apprenticeship, written or implied, in the District of Columbia ..." (D.C. Code § 32-1501 (9)), and then lists several specific exceptions, one of which is germane here, being "An employee engaged in employment that is casual and not in the course of trade, business, occupation or profession of the employer ..." (D.C. Code § 32-1501 (9) (E)).

It is evident to us that the ALJ found that this "casual employee" exception did not apply to these facts, because the "activities" in which he was engaged were "an integral part of [the] home renovation projects undertaken by A&L". This finding of the ALJ is not contested in this appeal,

and is supported by substantial evidence. The ALJ nonetheless denied compensation because she found that the work which was integral to A&L's renovation was not part of the work of any "regular business", which renders the denial erroneous. While it is not clear to us what exactly the ALJ meant in using the term "regular business", it is apparent that the ALJ believed that only such a "regular business" could be an "employer" under the definition quoted above. This is not so: an employer can be "any individual, firm, association or corporation", an extremely broad, and one might say, a completely exhaustive description. Whether an individual is employed by another individual, or by another individual operating under a trade name, or by a company that is incorporated, is of no consequence when coverage under the Act is the issue.

In any event, the facts in this case as found by the ALJ are that Petitioner performed work as a general laborer, under an oral agreement, for \$100.00 a day on an irregular but recurring basis, at A&L's discretion, to perform work on renovation projects that A&L was performing for some third party or parties, at prices set by A&L and the third party. Petitioner's pay bore no relationship to the amount of the contract or agreements between A&L and the third parties. This represents a wage of \$12.50 an hour assuming an eight hour day, which did not vary depending upon how much or how little work was performed on that day, and did not vary depending upon the type of work performed any given day. These findings are consistent with employee status, and inconsistent with non-employee status, under the established tests.

Lastly, we note that the sole substantive argument put forth by Respondent in this appeal in support of the Compensation Order is that "the ALJ found that Claimant's work for employer 'was not continuous, but intermittent, and was clearly for portions of particular jobs ...'", "Employer's Memorandum of Points and Authorities in Opposition to Claimant's Application for Review", page 3. While it is true that such factors might be considered as being indicative of a "casual employee" under the above noted exception, we also note that the ALJ did not deny this claim based upon that exception, and in fact appears to have considered and rejected its application. We also note that the "casual employee" exception is based not upon the fact that the a claimant is not an employee; it assumes that a claimant may well be an employee as defined by the Act, but excludes such employees from coverage because of its "casual" nature outside the ambit of the employer's business or trade.

On this record, as a matter of law, Petitioner is an employee and Respondent is an employer under the Act, and the claim is not excluded under D.C. Code § 32-1501 (9)(E).

CONCLUSION

The Compensation Order of July 6, 2007 is not in accordance with the law.

ORDER

The Compensation Order of July 7, 2007 is reversed, and the matter is remanded to AHD for consideration of the additional issues that were presented for resolution but were not reached due to the finding of the lack of an employer-employee relationship.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

August 19, 2008
DATE