

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
DIRECTOR

CRB 14-092

**JOHN T. HAMILTON,
Claimant-Petitioner,**

v.

**MEGA BUS AND SEDGWICK CMS,
Employer and Insurer - Respondents.**

Appeal from a June 26, 2014 Compensation Order by
Administrative Law Linda Jory
AHD No. 14-084A, OWC No. 708285

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 DEC 30 PM 10 59

Zachary Erwin, for the Respondent
Michael Kitzman, for the Petitioners

Before HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges* and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND REMAND ORDER

This case is before the Compensation Review Board on the request for review filed by the Employer of the June 26, 2014, Compensation Order (CO) issued by an Administrative Law Judge in the Administrative Hearings Division (AHD) of the District of Columbia's Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for benefits, finding that the jurisdiction did not rest in the District of Columbia. We VACATE and REMAND.

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, a resident of Baltimore, Maryland, worked as a Bus Operator for the Employer. Claimant's job duties involved driving a Mega Bus to various cities on the east coast. Claimant would start at Employer's garage in Landover, Maryland and stop in Washington, D.C. at Union Station before proceeding to other cities. On August 12, 2013, Claimant was driving from Union Station to Charlotte, North Carolina when he injured his back while unloading luggage in Richmond, Virginia.

Claimant sought treatment and was unable to work for a period of time due to his work related injury. Claimant returned to work in a light duty position on April 27, 2014.

A full evidentiary hearing occurred on June 1, 2014. Claimant sought an award of temporary total disability benefits from October 5, 2013 to April 27, 2014, interest on accrued benefits and payment of all casually related medical expenses. The issues raised were whether jurisdiction in the District of Columbia was proper, and the nature and extent of Claimant's disability. A CO was issued on June 26, 2014 denying the claim for relief. The ALJ determined that jurisdiction was not proper in the District of Columbia, relying on the test enunciated in *Hughes v. DOES*, 498 A.2d 567 (D.C. 1985)(Hughes).

Claimant timely appealed. Claimant argues that the CO's conclusion that jurisdiction does not rest in the District of Columbia is contrary to Hughes and not in accordance with the law. Thus, Claimant urges the CO should be vacated and remanded for further consideration.

Employer opposes Claimant's appeal, stating the CO is supported by the substantial evidence in the record and is in accord with the law.

THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed CO are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and §32-1521.01(d) (2) (A) of Act.

Consistent with this standard of review, the CRB is constrained to uphold a CO 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, supra*.

DISCUSSION

Claimant argues that the ALJ erred in applying the *Hughes* test. The ALJ first correctly noted that D.C. Code 32-1503(a)(2) controlled based upon the facts of the case. This section states,

Except as provided in subsections (a-1) through (a-3) of this section, this chapter shall apply to: (2) The injury or death of an employee that occurs outside the District of Columbia if, at the time of the injury or death, the employment is localized principally in the District of Columbia.

As the ALJ correctly states:

The Director of the Department of Employment Services (the Director) established a three prong test to determine the locality of claimant's

employment. This test was adopted by the Court of Appeals in *Hughes v. District of Columbia Department of Employment Services*, 498 A.2d 567 (D.C. 1985) (*Hughes*) and incorporated in the annotations of D.C. Code, as amended §32- 1503. Under the *Hughes* test, to determine the location of an employment relationship, the trier of fact must weigh the following factors:

- (1) The place of the employer's business office or facility at which or from which the employee performed the principal service for which he was hired or
- (2) If there is no such office or facility at which the employee works, the employee's residence, the place where the contract is made and the place of performance, or
- (3) If neither (1) nor (2) is applicable, the employee's base of operations.

CO at 3.

Applying *Hughes*, the ALJ reviewed three cases Claimant argued supported his position that jurisdiction was proper, *Pro Football v. DOES*, 588 A.2d 275 (D.C. 1991)(*Pro Football*), *Lincoln Hockey v. DOES*, 997 A.2d 713 (D.C. 2010)(*Lincoln Hockey*) and *Shipkey v. DOES*, 955 A.2d 718 (D.C. 2008)(*Shipkey*). After having summarized the cases, the ALJ then analyzed the facts, stating:

Although claimant spends less than a tenth of his shift working in the District of Columbia, claimant asserts that he is in a similar situation as the employee in *Pro Football* and asks this tribunal to look at the purpose of employer instead of the applying the *Hughes* test as did the Court of Appeals in the *Pro Football* matter when the Court acknowledged that the Washington Redskins sold tickets for football games in the District of Columbia. Claimant asserts that the purpose of the instant employer is to make a profit and it does so by selling tickets for bus trips which begin in the District of Columbia. In claimant's words claimant is like a pro football player as "his practice facility, for lack of a better way of putting it, the place that he shows up to do his pre-work, check-outs, to check-in, to do those duties is locate outside the District of Columbia, but the point where he starts actually earning any type of income for [employer] is when he pulls into Union Station in the District of Columbia. The point where he stops earning any money for [employer] at the end of a route is when he pulls into Union Station in the District of Columbia at the end of his back and forth" HT at 62. Notwithstanding that there is no evidence in this record that tickets for trips on employer's buses are only sold at Union Station as opposed to, for example, "online", claimant's argument is not persuasive.

Particularly I am not persuaded by claimant's analogy of a bus operator to a team player or a theatre actor who plays in the game or acts in the show that is the purpose of the practice or rehearsal and for which a ticket is purchased. While the ticket to ride the bus may be purchased in the District, the actual show or event, i.e., the transportation from one venue to another, takes claimant immediately out of the District as soon as the bus leaves Union Station as there is very little travel in the district on any of the routes described by claimant or listed in the 91 pages of claimants routes that preceded the injury. See EE 1.

Claimant somewhat mischaracterized the Court's reasoning in *Lincoln Hockey* as having to do with the principal service performed is selling tickets to hockey games in the District of Columbia. Claimant's playing for a minor league team in Maine could do little for employer *Lincoln Hockey's* ticket sales in the District nevertheless the undersigned agrees with the similarity to the *Pro Football* case as while the claimant in *Lincoln Hockey* was playing elsewhere the ultimate performance for *Lincoln Hockey* was in the District of Columbia.

Nevertheless, I disagree with claimant's argument that the facts of the instant matter mirror those in *Pro Football* or in *Lincoln Hockey* as the job duties that he performed for employer which earned employer money for transportation of passengers occurred in the District of Columbia. While the bus ticket may have been purchased in the District the services performed are not and there is no ultimate game played or theater production that takes place in the District for with the claimant is involved. To the contrary claimant has very little contact with the District once he makes his first stop at Union Station.

Claimant cannot prevail under prong two as claimant neither lives in Washington, DC; he did not enter into his employment contract in Washington, DC, nor does he perform a majority of his work in Washington, DC. In so concluding, the undersigned is extremely mindful that in determining "the principal service for which a player is hired requires contacts more substantial than in any other place" without consideration of any ancillary preparatory time such as claimant performed in Landover, MD. See *Shipkey v. District of Columbia Department of Employment Services*, 955 A.2d 718 (D.C. App 2008) (*Shipkey*). The fact that claimant started his day in Landover, MD was not a factor in the foregoing analysis.

The principal services for which claimant was hired having found to be transporting passengers to various states on the East Coast, neither prong one or two can be met, claimant may rely on the third prong of the *Hughes* test which is employer's base of operation. Mr. Cross testified and it has not been disputed that the main base of operations of employer is Elizabeth, New Jersey and employer maintains a hub in Landover, MD.

CO at 5-6.

Claimant argues the ALJ's analysis is wrong because the evidence shows all of Claimant's routes required he begin and end in the District of Columbia, thereby satisfying the first prong of the *Hughes* test. We must disagree.

As the ALJ correctly points out, while Claimant begins his route at Union Station, he immediately leaves the District to other destinations. As Claimant concedes, Washington, D.C. was not the only stop. Claimant travels to other jurisdictions including Virginia, Tennessee, Maryland, North Carolina, Pennsylvania, New Jersey, and New York. Very little travel actually occurred in the District, thus it cannot be said that Union Station is where the Employee performed the principal service for which he was hired. We find no merit in Claimant's argument.

As to the second prong, Claimant argues that the ALJ erred in determining that the correct standard should be the plurality¹ of the contacts, contrary to the holding in *Shipkey*. *Shipkey* stated,

[O]ne of the main goals of the District of Columbia Workers' Compensation Act of 1979 was to balance the humanitarian need for compensation against the fact that employees with relatively insubstantial District contacts would file for and receive benefits in the District under the predecessor Federal Longshoremen's and Harbor Workers' Compensation Act. *See Petrilli, supra*, 509 A.2d at 633. The District of Columbia Council balanced these concerns by requiring that "employment [be] principally localized in the District" in order to qualify for compensation, and our court has recognized that "[i]t is enough to say that the term . . . requires a showing that a claimant's employment relationship with this jurisdiction must have contacts more substantial here than *in any other place*." *Id.* (emphasis added). A requirement that the contacts must be substantially more in the District than "in [all other] place[s]" *combined* is not supported by the language or purpose of the statute.

Shipkey, supra at 727.

While it was in error for the ALJ to look to whether or not the Claimant performed the majority of his job in the District, we find such error harmless as the evidence shows Claimant didn't meet the plurality of contacts, as argued by Claimant. A review of the evidence reveals on August 12, 2013, in addition to the one stop in the District of Columbia, Claimant made one stop in Virginia (Richmond) and two stops in North Carolina (Durham and Charlotte). It cannot be said that Claimant's contacts with the District of Columbia are more substantial than that of Virginia or North Carolina. Claimant's argument is rejected.

Finally, Claimant argues that Claimant prevails also as Employee's base of operations is Washington, D.C. The ALJ noted,

¹Plurality as defined by Black's Law Dictionary, Ninth Edition, means "the greatest number (esp. of votes), regardless of whether it is a simple or an absolute majority."

The principal services for which claimant was hired having found to be transporting passengers to various states on the East Coast, neither prong one or two can be met, claimant may rely on the third prong of the *Hughes* test which is *employer's* base of operation. Mr. Cross testified and it has not been disputed that the main base of operations of employer is Elizabeth, New Jersey and employer maintains a hub in Landover, MD. (Emphasis added.)

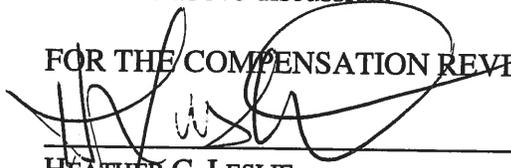
CO at 6.

The above analysis is in error. The third prong of the *Hughes* test is not determined by the Employer's base of operations, as the last paragraph states, but the *Employee's* base of operations, as the ALJ correctly noted at the outset when quoting *Hughes*. As we have stated before, we cannot affirm a CO that reflects "a faulty application of the law." *Washington Metro. Area Transit Auth. v. DOES*, 992 A.2d 1276, 1280 (D.C. 2010) (quoting *Georgetown Univ.*, 971 A.2d at 915)." Such is the case here where the above analysis determines the Employer's base of operations and not the Employee's base of operations, pursuant to *Hughes*. We are forced to remand for further findings of fact and conclusions of law determining where the Employee's base of operations is located, the third prong of the *Hughes* test.

CONCLUSION AND ORDER

The June 26, 2014 Compensation Order is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE
Administrative Appeals Judge

December 30, 2014
DATE