

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-033

KWAKWEA STRIPLING,
Claimant-Petitioner,

v.

COASTAL INTERNATIONAL SECURITY AND CHARTIS INSURANCE COMPANY,
Employer and Carrier-Petitioners.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2011 SEP 13 PM 1 32

Appeal of a Compensation Order on Remand by
The Honorable Linda F. Jory
AHD No. 10-340, OWC No. 667757

Michael J. Kitzman for the Claimant
Joel E. Ogden for the Employer and Carrier

Before LAWRENCE D. TARR, MELISSA LIN JONES, and HENRY W. MCCOY, *Administrative Appeals Judges.*

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of Kwakwea Stripling (claimant) for review of the March 18, 2011, Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication section of the District of Columbia Department of Employment Services (DOES). In that COR, the ALJ determined that the claimant's average weekly wage should be based only on her wages with Coastal International Security (employer). We affirm.

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

Beginning in December 2008, Ms. Kwakwea Stripling worked for this employer as an armed security officer. She sat in a security booth and repetitively had to open and close a heavy sliding door with her right arm and shoulder.

In June 2009, the claimant sought medical attention for ongoing, right shoulder problems. She eventually was diagnosed with a right shoulder rotator cuff tear and scheduled for surgery.

Before the surgery took place, the claimant was involved in a non-work-related automobile accident on October 10, 2009, in which she injured her left shoulder.

The claimant had arthroscopic surgery on November 2, 2009. After the surgery the claimant received treatment for her right shoulder and for her left shoulder from several doctors.

From time to time during the past twenty years, the claimant has worked for various automobile dealerships selling cars. At the formal hearing, the claimant presented four checks payable to her that were for commissions she received from selling cars. The dates and amounts of the checks were: January 7, 2009-\$518.00, January 23, 2009-\$2081.00, April 17, 2009-\$1,076.24, and July 16, 2009-\$692.47.

In a November 1, 2010, Compensation Order, an ALJ held that the claimant's left shoulder problems were not causally related to her June 2, 2009, work-related right shoulder injury.¹ The ALJ found that there were months in which the claimant worked for this employer but did not sell cars. However, without full explanation, the ALJ included in the claimant's average weekly wage calculation commission checks that were issued before June 2, 2009.

On February 2, 2011, the CRB issued a Decision and Remand Order (DRO). The CRB affirmed the ALJ's finding that the claimant's left shoulder problems were not causally related to the June 2, 2009, injury at work. The CRB vacated the ALJ's average weekly wage determination. The CRB held

In contention at the formal hearing was wage stacking of Ms. Stripling's average weekly wage. In order to be entitled to wage stacking, a claimant must hold concurrent jobs at the time of an injury. *MCM Parking Co. v. DOES*, 510 A.2d 1041 (D.C. 1986).

Issuance of a check is not necessarily evidence of employment on a specific date, and without making a specific finding that Ms. Stripling was holding concurrent jobs at the time of her injury, the ALJ states,

[t]here is no dispute that the amounts paid to claimant by Hampton Park and Niswander are commission checks paid to claimant as commissions for the sale of automobiles. However, claimant proffered no further explanation as to how the commissions are paid or when, i.e., what percentage is paid when the car is actually sold or when the check is issued.

Stripling, supra, p.9. Then, without further explanation, the ALJ finds that "the only reasonable calculation according to the undersigned s [sic] is to take [the amount of checks dated January 12, 2009, January 7, 2009, and April 17, 2009] divided by 26 weeks." *Id.* This calculation is performed despite "the finding that claimant had months before the injury that she did not sell any cars." *Id.* Without

¹ The ALJ assigned June 2, 2009, as the date of accident because that was the date the claimant's problems manifested. CO at 3.

the threshold finding that Ms. Stripling actually was holding concurrent jobs at the time of her injury on June 2, 2009, the remaining calculations are without foundation.

DRO at 4-5.

The CRB remanded the case so that the ALJ could make a finding as to whether the claimant was concurrently employed on June 2, 2009, and for a new determination of the claimant's average weekly wage.

After receiving the DRO, the ALJ issued an Order on February 11, 2011, that reopened the record so that the parties could submit additional documentary evidence by March 7, 2011. The claimant requested, and was granted additional time to submit evidence. Neither party submitted any additional evidence and the ALJ closed the record on March 17, 2011.

On March 18, 2011, the ALJ issued the COR that is the subject of this review. The ALJ held the claimant did not prove she held concurrent jobs when injured and, therefore, did not prove that her average weekly wage calculation should be based on any wages earned other than from this employer. COR at 6.

The claimant timely appealed.

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 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. 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 Section 32-1521.01(d) (2) (A) of Act.

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, supra*.

ANALYSIS

In reaching her decision, the ALJ first correctly noted that the claimant had the burden of proof:

It has been held under this Act that the injured worker retains the burden to submit competent, credible evidence upon which a finding on his/her average weekly wage may be founded as he/she is not afforded a presumption as it concerns his/her wages under the Act.(Citations omitted)

COR at 6.

The ALJ recounted the claimant's testimony from the formal hearing that she did not recall the dates on which she sold the cars that resulted in the commission checks. The ALJ further noted that despite being given additional time, the claimant did not submit any documentary evidence that proved how or when the commissions that she earned were paid. The ALJ concluded:

As it cannot be found that claimant was in fact employed by another employer or employer(s) on June 2, 2009 when she suffered the work related injury based on the existing record, a precise calculation of what her actual average weekly wage was on June 2, 2009 is moot and her average weekly wage shall be based solely on her employment with the instant employer Coastal International Security.

COR at 7.

We affirm.

The claimant had the burden to prove she held concurrent employment when she was injured. The claimant did not submit any evidence which proved the dates on which she sold the cars that resulted in the commission checks. As the CRB previously stated in the February 2, 2011, Decision and Remand Order, "Issuance of a check is not necessarily evidence of employment on a specific date."

Therefore, the claimant did not prove that she held concurrent employment and the ALJ correctly calculated the claimant's average weekly wage using only her wages from Coastal International Security.

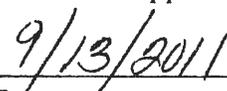
CONCLUSION AND ORDER

The March 18, 2011, Compensation Order on Remand is supported by substantial evidence and is in accordance with the law and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



LAWRENCE D. TARR
Administrative Appeals Judge



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