

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. 07-50

LAVERN HICKS,

Claimant – Petitioner

v.

DITTUS COMMUNICATIONS AND BERKLEY MID-ATLANTIC.,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Chief Administrative Law Judge Teri Thompson Mallet
AHD No. 06-116, OWC No. Unknown

Eric M. May, Esquire for the Petitioner

Howard P. Miller, Esquire, for the Respondent

Before: FLOYD LEWIS, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the 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 § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative

BACKGROUND

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 January 31, 2007, the Administrative Law Judge (ALJ) concluded that the injury suffered by Claimant-Petitioner (Petitioner) occurred in the course of her employment, but did not arise out of that employment. Thus, the ALJ denied Petitioner's claim for relief. Petitioner now appeals that Compensation Order.

As grounds for this appeal, Petitioner alleges that the ALJ's decision is not supported by substantial evidence and is not in accordance with the law.

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. D.C. Official Code §32-1522(d)(2). "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 Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this scope 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 her injuries arose out of her employment because she was introducing her new supervisor to the scope of his new employment at the time of her accident. Petitioner also contends that her injury is compensable, under an exception to the "going and coming" rule, because it occurred when she was returning to her work station on the job premises. Employer-Respondent (Respondent) counters that the Compensation Order is supported by substantial evidence and is in accordance with the law.

As the ALJ pointed out, the District of Columbia Court of Appeals upheld the Director's standard in *Grayson v. Dist. of Columbia Dep't. of Employment Servs.*, 516 A.2d 909 (D.C. 1986) emphasizing that for any resulting injury to be compensable, the injury must occur in the course of the employment, as well as arise out of that same employment. In this matter, the ALJ concluded that while Petitioner's injuries arose out of her employment, she did not present persuasive evidence

appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

that the obligations and conditions of her employment with Respondent put her in the position where she was injured.

The ALJ found that on November 10, 2005, Petitioner met with Mr. David Drake, Petitioner's future supervisor, who was to begin work on November 14, 2005. After the meeting, Mr. Drake went with Petitioner to make a deposit in the bank for Respondent, then Petitioner and Mr. Drake went to lunch at the Daily Grill. Returning to the office after lunch, Petitioner detoured to show Mr. Drake the California Grill restaurant, which was located in Respondent's office building. The ALJ found that Petitioner offered to take Mr. Drake into the California Grill through the retail entrance to show him where the lobby entrance was located. Upon entering the building, Petitioner was injured when she fell. The ALJ stated:

It is uncontroverted that Claimant was not on Employer's premises at the time of the incident and that Employer did not require Claimant to have lunch with Mr. Drake or to show him through the California Grill . . . Claimant did not present evidence, documentary or testimonial, that having lunch with Mr. Drake was a condition of her employment . . . Claimant's uncontroverted testimony is when Claimant and Mr. Drake left the Daily Grill, Mr. Drake inquired about restaurants in the area near Employer's offices. Claimant further testified:

I told him, "As we walked back to the office, I'll point some out," . . . and then I told him about the California Grill.

California Grill is in the same building as [Employer]. However, they have a retail entrance on M Street and then they have an entrance that you come in straight through the back of the lobby to get into, and I told him, ". . . since we are on M Street, I'll take you through and we'll walk through and come out where the elevators are and you'll know where it is."

HT at 41-42. It was during this detour, which was neither a condition nor an obligation of Claimant's employment, that Claimant was injured. HT 42 (footnote omitted).

Compensation Order at 6.

In concluding that Petitioner was not injured in the course of her employment, the ALJ specifically noted Petitioner's reliance on *Reynolds v. Collier*, OHA No. 00-273 (February 27, 2001), which concluded that the hazards of an employee's travel route become that employee's employment hazards if the route is the only means of access or a usual, normal or expected means of access to the employer's premises. The ALJ pointed out:

. . . it is not reasonable to expect Claimant to use the entrance to the California Grill to return to her office. On the contrary, Claimant testified that she used that entrance for the purpose of showing Mr. Drake the lobby entrance. HT at 41-42. This was not the only route into the building, nor was it the normal

route into the building. There is no evidence in the record that this was a regular route of travel for Claimant or any other occupant in the building, unless conducting business at the restaurant.

Id at 6-7.

The ALJ also rejected Petitioner's argument that she was injured while performing a task reasonably related to her employment and that she would not have been injured but for Mr. Drake accompanying her on her bank errand. The ALJ stated:

This argument is inconsistent with Claimant's testimony, described herein, wherein she testified that she generally walked back from the bank so that she could detour and purchase lunch. Claimant's work-related activities ceased at the time she left the bank and detoured to the Daily Grill for lunch. Thus, Claimant's injury, which occurred off of Employer's premises and while engaged on activities outside the scope of Claimant's work-related duties and responsibilities, does not come within the Act.

Id. at 7.

However, Petitioner also argues that the ALJ failed to analyze this matter under the "quantum" approach suggested by Larson's *Workers' Compensation Law*, § 29.01 (2000 Ed.), in which it is noted:

The discussion [in the treatise] of the coverage formula, "arising out of and in the course of employment", was opened with the suggestion that, while "course" and "arising" were put under separate headings [in the treatise] for convenience, some interplay between the two factors would be observed in various categories discussed [footnote omitted]. ... [T]he two tests, in practice, have not been kept in air-tight compartments, but have to some extent merged into a single concept of work-connection. One is almost tempted to formulate a sort of quantum theory of work-connection [footnote omitted]: that a certain minimum quantum of work-connection must be shown, and if the "course" quantity is very small, but the arising quantity is large, the quantum will add up to the necessary minimum, as it will also when the arising quantity is very small but the "course" quantity is relatively large.

But if both the "course" and "arising" quantities are small, the minimum quantum will not be met.

The quantum approach has been adopted by this agency and in the case of *Lewis v. Finnegan & Henderson*, CRB No. 04-50 (February 16, 2006), the CRB, in detail, reiterated the appropriateness of using this approach in analyzing these cases. As Petitioner points out, quoting Larson, under the "quantum" approach, the "arising out of" and the "course of employment" prongs should not be analyzed in "air tight compartments" and the two *Grayson* prongs are to be merged into a single "work-connection" concept.

After reviewing the Compensation Order in this matter, this Panel must agree with Petitioner that the ALJ erred in failing to analyze this case under the “quantum” standard. As indicated in *Lewis*, there are recognized exceptions to the “off premises” cases, in which an employee is injured in a common area within the building, such as lobbies and the agency has adopted a different and more liberal approach in evaluating these types of injuries. As such, this matter must be reversed and remanded for the ALJ to evaluate and consider the facts of this case under the agency adopted “quantum” analysis.²

CONCLUSION

The Compensation Order of January 31, 2007 is not in accordance with the law.

ORDER

The Compensation Order of January 31, 2007 is hereby REVERSED and REMANDED to the Administrative Hearings Division for further proceedings consistent with the above discussion

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

April 25, 2007
DATE

² The ALJ, in this matter, referred to and cited numerous cases and sources from other jurisdictions or under the LHWCA, the predecessor statute to our Act. While such extra-territorial reviews can be quite useful where a particular area of the law under the Act remains unsettled or for some reason needs to be reconsidered, we consider it far more useful and consistent with the efficient and predictable application and interpretation of the Act, to rely, in the first instance, upon existing decisional authority under the Act in those cases where such authority exists.