

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-126

JORGE E. PEREZ,

Claimant–Petitioner,

v.

PRECISION WALL TECH and ERIE INSURANCE COMPANY,

Employer and Insurer–Respondent.

Appeal from a Compensation Order on Second Remand of
The Honorable Leslie J. Meek, Administrative Law Judge
AHD No. 09-188, OWC No. 654702

David J. Kapson, Esquire, for the Petitioner
Jeffrey W. Ochsman, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ HENRY W. MCCOY, and HEATHER C. LESLIE,² *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Claimant Jorge E. Perez was employed as a construction worker for Precision Wall Tech (Precision) when he was injured while working in the District of Columbia on September 30, 2008. He sought workers' compensation benefits under D.C. Code § 32-1501, *et seq.*, (the Act), which Precision declined to pay voluntarily, maintaining among other things that Mr. Perez's employment was only

¹ Judge Russell was appointed by the Director of DOES as an interim Board member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

² Judges Leslie was appointed by the Director of DOES as an interim Board member pursuant to DOES Administrative Policy Issuance Nos. 11-02 (June 23, 2011).

temporarily and intermittently such that he was within the District of Columbia, in which case it maintained that there is no jurisdiction for the claim under the Act in the District of Columbia.

The matter was presented for resolution of that and other disputed issues to an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) at a formal hearing on May 21, 2009. Following the formal hearing, the ALJ issued a Compensation Order in which she found that “Claimant’s work was temporary as his work in the District was always for limited intervals”, and she denied the claim, citing D.C. Code § 32-1503 (a-3), which reads:

An employee and his employer who are not residents of the District of Columbia and whose contract of hire is entered into in another state shall be exempted from the provisions of this chapter while such employee is temporarily or intermittently within the District of Columbia doing work for such nonresident employer, if such employer has furnished workers’ compensation coverage under the workers’ compensation or similar laws of such other state, so as to cover such employee’s employment while in the District of Columbia.

Mr. Perez appealed that Compensation Order to the Compensation review Board (CRB) which vacated the denial and remanded the matter to the ALJ for further consideration, and with instructions to explain more fully how she came to her conclusion that the contents of Employer’s Exhibit (EE) 6, setting forth the number hours that Mr. Perez had worked in Maryland, the District of Columbia, and Virginia in the 12 months prior to the date of alleged injury, were such that the claim didn’t come within the Act.

On February 7, 2012, the ALJ issued a Compensation Order on Remand, in which the contents of EE 6 were recited and summarized, and the claim was again denied. Mr. Perez appealed again to the CRB. The CRB reversed the Compensation Order on Remand, concluding that the evidence cited by the ALJ did not support a finding that the employment was either temporary or intermittent, and the matter was remanded for resolution of the remaining issues that had not been reached due to the previous determinations of lack of jurisdiction.

On July 6, 2012, the ALJ issued another Compensation Order, styled a Compensation Order on Second Remand. The ALJ again set forth the contents of EE 6, and again concluded that there was no jurisdiction under the Act. Mr. Perez appealed the Compensation Order on Second Remand to the CRB, to which Precision has filed an opposition. We vacate and reverse the denial on jurisdictional grounds and remand the matter for consideration of the remaining issues.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

In the Compensation Order on Second Remand, the ALJ wrote, in the “Background” section, that the matter had been returned to her for further consideration. She wrote “The CRB issued a Decision and Remand Order directing this Tribunal to explain the factual basis for finding that Employer’s Exhibit 6 demonstrates Mr. Perez’ work in the District of Columbia was intermittent.” While that statement fairly accurately describes the directive contained in the first Decision and Remand Order issued in this case, it inaccurately describes the mandate contained in the second Decision and Remand Order.

The Decision and Remand Order relevant to the current Compensation Order on Second Remand is CRB No. 12-037. Although as part of the explanatory “Facts of Record and Procedural History” section it quoted from the first Decision and Remand Order, which was CRB No. 10-035, in the “Analysis” section the CRB reviewed the facts as found by the ALJ, and wrote as follows:

Although the ALJ has set forth Mr. Perez’s hours of employment in the District of Columbia, Maryland and Virginia for more than a year prior to his work-related accident, there is no explanation of the importance of those numbers to her conclusion.

In *Adjei* [v. *DOES*, 817 A.2d 179 (D.C. 2003)], the Court of Appeals adopted the analysis that the Act requires qualification and quantification of the actual time in the District of Columbia as opposed to describing [the] employment as a whole. What we are able to discern from the these hours [as found by the ALJ] is that for the twelve months preceding his accident, Mr. Perez worked in the District of Columbia 1,042 hours, in Maryland 91 hours, and in Virginia 972.5 hours; this evidence clearly establishes contacts with the District of Columbia greater than those in Maryland or Virginia. The evidence does not establish Mr. Perez’s employment was temporary.

Furthermore, during those twelve months preceding Mr. Perez’s accident, he worked in the District of Columbia during ten of those months; during the eight months preceding his accident, he worked in the District of Columbia every month for at least seven work-days and up to twenty-five work days [footnote omitted]. The evidence does not establish Mr. Perez’s employment in the District of Columbia was intermittent.

The conclusion that “Claimant’s work was temporary as his work in the District was always for limited intervals” [footnote omitted] is not supported by the evidence of record.

Perez v. Precision Wall Tech, CRB No. 12-037, AHD No. 09-188, OWC No. 654702 (June 20, 2012) page 3 – 4. Then, in the “Conclusion and Order” section, the CRB wrote:

The conclusion that Mr. Perez's employment was temporary or intermittent is not supported by substantial evidence and is not in accordance with the law. The Compensation Order on Remand is REVERSED and the matter is REMANDED for further proceedings consistent with this Decision and Remand Order, *including resolution of the outstanding issues raised at the May 21, 2009 formal hearing.*

Id., (emphasis added).

The CRB's prior Decision and Remand Order determined that on this record Claimant's employment was not temporary or intermittent and thus jurisdiction under the Act attached. Because the ALJ appears to have misunderstood the mandate of the CRB, the remaining issues remain unaddressed. The import of the prior Decision and Remand Order was that on these facts, there has been insufficient evidence to establish that the claim does not come within the purview of the Act. Accordingly, we must remand the matter so that the remaining issues can be addressed.

CONCLUSION AND ORDER

The Compensation Order on Remand failed to carry out the mandate of the Decision and Remand Order of June 20, 2012, and is thus not in accordance with the law. The matter is remanded for the purpose of having the remaining issues resolved as necessary, identified in the record as "Has Claimant sustained an accidental injury that arose out of and in the course of his employment?", "Is Claimant's current medical condition causally related to the work incident of September 30, 2008?", and "What is the nature and extent of claimant's disability, if any."

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

January 29, 2013
DATE