

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-037

JORGE E. PEREZ,
Claimant–Petitioner,

v.

PRECISION WALL TECH, INC. and ERIE INSURANCE,
Employer/Carrier-Respondent.

Appeal from a Compensation Order on Remand by
The Honorable Leslie A. Meek
AHD No. 09-188, OWC No. 654702

Michael Kitman, Esquire, for the Petitioner
Jeffrey W. Ochsman, Esquire, for the Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and JEFFREY P. RUSSELL,¹ *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (“CRB”) pursuant to D.C. 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).

FACTS OF RECORD AND PROCEDURAL HISTORY

On September 30, 2008, Mr. Jorge E. Perez was employed by Precision Wall Tech, Inc. (“Precision”). On that date, while working at a construction site in the District of Columbia, Mr. Perez was injured.

At a formal hearing, Mr. Perez requested temporary total disability benefits from October 20, 2008 to the date of the formal hearing and continuing as well as authorization for medical treatment. In a

¹ Judge Russell has been appointed by the Director of the Department of Employment Services (“DOES”) as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

Compensation Order dated November 10, 2009, an administrative law judge (“ALJ”) denied Mr. Perez’s request because the District of Columbia purportedly lacked jurisdiction over his claim.

Mr. Perez appealed the November 10, 2009 Compensation Order, and in a Decision and Remand Order dated June 8, 2011, the CRB vacated the Compensation Order because

there are no detailed factual findings set forth to support the conclusion that Mr. Perez’s employment legally qualifies as “intermittent.” Although the ALJ referenced *Adjei v. Department of Employment Services*,² *Adjei* requires more than a cursory finding that the injured worker’s employment is “not continuous” or “occasional.” In *Adjei*, 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 employment as a whole.³ Because the ALJ failed to explain in the Compensation Order the factual basis for finding that Employer’s Exhibit 6 demonstrates Mr. Perez’s work in the District of Columbia was intermittent, we are unable to determine the actual basis for the finding that Mr. Perez’s employment was intermittent.^[4]

In response, the ALJ issued the February 7, 2012 Compensation Order on Remand. The ALJ, again, denied Mr. Perez’s claim for relief on jurisdictional grounds, and this appeal ensued.

Mr. Perez asserts the ALJ incorrectly applied the law regarding intermittent employment because he worked more often in the District of Columbia than in any other jurisdiction. He requests we vacate the Compensation Order on Remand.

On the other hand, Precision argues Mr. Perez’s employment in the District of Columbia was intermittent because he worked at varying times and at varying jobsites within the District of Columbia, Maryland, and Virginia. Based upon Mr. Perez’s work records, Precision contends Mr. Perez’s employment was principally localized in Virginia, does not “establish a pattern of working solely and exclusively in the District of Columbia for an extended period of time,”⁵ and did not include any prospect of future exclusive employment in the District of Columbia. Precision requests the Compensation Order on Remand be affirmed.

ISSUE ON APPEAL

1. Is Mr. Perez’s employment in the District of Columbia temporary or intermittent pursuant to §32-1503(a-3) of the Act?⁶

² 817 A.2d 179 (D.C. 2003).

³ *Id.* at p.180.

⁴ *Perez v. Precision Wall Tech, Inc.*, CRB No. 10-035, AHD No. 09-188, OWC No. 654702 (June 8, 2011), p.3

⁵ Employer’s Opposition to Claimant’s Application for Review, p. 6.

⁶ Section 32-1503(a-3) of the Act reads:

ANALYSIS⁷

From the outset, it is important to recognize there is no requirement in the Act that in order to qualify for worker's compensation benefits in the District of Columbia a claimant's employment must demonstrate a pattern of working exclusively in the District of Columbia for an extended period of time or of any prospect of future exclusivity in the District of Columbia; the Act requires the employment not be temporary or intermittent.

In response to the June 8, 2011 Decision and Remand Order, the ALJ ruled Mr. Perez's employment is temporary because 1. "[s]aid assignments were not made in any area for any extended period of time" per Employer's Exhibit 6, 2. his assignments were not continuous, and 3. each month he worked in the District of Columbia, Mr. Perez also worked in Virginia or in Maryland.⁸ The ALJ described the contents of Employer's Exhibit 6 as follows:

In July, 2007, Claimant worked 56 hours in Virginia. In August, 2007, Claimant worked 163 hours in D.C. and 56 hours in Virginia. In September, 2007, Claimant worked 163 hours in Virginia. In October, 2007, Claimant worked 81 hours in D.C. and 173 hours in Virginia. In November, 2007, Claimant worked 2 hours in D.C. and 174 hours in Virginia. In December, 2007, Claimant worked 152 hours in Virginia. In January, 2008, Claimant worked 160 hours in Virginia. In February, 2008, claimant worked 78 hours in D.C. and 128 hours in Virginia. In March, 2008, Claimant worked 40 hours in D.C. In April, 2008, claimant worked 118 hours in D.C. and 40 hours in Virginia. In May, 2008, Claimant worked 190 hours in D.C., 3 hours in Maryland and 9.5 hours in Virginia. In June, 2008, Claimant worked 201 hours in D.C. . In July, 2008, Claimant worked 56 hours in D.C., 80 hours in Maryland and 24 hours in Virginia. In August, 2008, Claimant worked 124 hours in D.C. and 112 hours in Virginia. In September, 2008, Claimant worked 152 hours in D.C. and 8 hours in Maryland. In October, 2008, Claimant worked 112 hours in D.C., 24 hours

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 insurance 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. The benefits under this chapter or similar laws of such other state shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in the District of Columbia.

⁷ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand 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 International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁸ *Perez v. Precision Wall Tech, Inc.*, AHD No. 09-188, OWC No. 654702 (February 7, 2012), p.3.

in Maryland and 8 hours in Virginia. In November, 2008, Claimant worked 87 hours in Maryland.^[9]

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*, 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 employment as a whole. What we are able to discern from these hours 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 in Virginia. The evidence does not establish Mr. Perez's employment in the District of Columbia 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.¹⁰ 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"¹¹ is not supported by the evidence of record.

CONCLUSION AND ORDER

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 this 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.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

June 20, 2012
DATE

⁹ *Id.* at p.4.

¹⁰ For purposes of this analysis, a work-day is considered eight hours.

¹¹ *Perez v. Precision Wall Tech, Inc.*, AHD No. 09-188, OWC No. 654702 (February 7, 2012), p.4.