

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402-Fax

CRB (Dir. Dkt.) No. 04-50

SHERYL LEWIS,

Claimant-Petitioner,

v.

FINNEGAN & HENDERSON AND AIG,

Employer/Carrier-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Karen R. Calmeise
AHD No. 04-130, OWC No. 590009

Benjamin T. Boscolo, Esquire, for the Petitioner

Michael S. Levin, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and LINDA F. JORY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND 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

¹Pursuant 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for

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 April 9, 2004, the Administrative Law Judge (ALJ) denied Petitioner's claim for compensation benefits under the Act, finding that the stipulated injury and attendant disability did not arise out of and occur in the course of Petitioner's employment with Respondent. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ misapplied the law in determining that Petitioner's injury occurred outside the course and did not arise from her employment. Respondent opposes this appeal, and argues that the ALJ properly applied the law in denying the claim.

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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "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. Dist. of Columbia Dep't. of Employment Serv's.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard 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, neither party to this appeal contests the facts concerning the accidental injury. Further, the parties stipulated at the formal hearing, and do not dispute in this appeal, that the injury occurred and resulted in the claimed disability. All that is presented, therefore, is whether the injury is compensable under the Act, which decision will depend upon whether under the undisputed facts, the injury arose out of and occurred in the course of Petitioner's stipulated employment with Employer. Petitioner urges that these facts compel the conclusion that the claim is compensable under any reading of the Act, while Respondent argues that, under *Grayson v. District of Columbia Dep't. of Employment Serv's.*, 516 A.2d 909 (1986), the facts in this case constitute an accident occurring while Petitioner was performing an unsupervised personal errand, and is non-compensable.

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

The ALJ found the facts to be as follows:

Claimant was employed at the time of the injury as a legal secretary for employer. Her regular work schedule is from 7:30 a.m. to 4:00 p.m.

Employees of employer in claimant's job classification are not officially granted paid work breaks.

On the day of the accident, claimant left her work station at approximately 10:00 a.m. and exited the building. On reentering the lobby of the building, claimant slipped and fell onto the floor.

Claimant sustained injuries that cause her to be disabled for the periods described in the claim for relief.

I find claimant was injured while on a personal errand. Claimant was performing no work related duties nor was she providing service to Employer at the time of the incident.

Compensation Order, "Findings of Fact", page 2. These factual findings are amplified in the "Discussion" portion of the Compensation Order in the following relevant passages:

Claimant ... slipped and fell in the lobby of the office building where she was employed by employer. ... [S]he left the building and walked a short distance to the street curb to give a check to a private investigator as payment for services rendered on a personal matter. ... [W]hen she reentered the building lobby her shoes remained wet and as she stepped off a door mat onto the uncarpeted floor, she fell hitting knees and hands on the floor.

Compensation Order, "Discussion", pages 3 - 4.

The ALJ applied the "quantum" approach to analyzing these facts. Application of that test was, in our view, the proper approach. That approach to analysis of "arising out of and occurring in the course of employment" questions derives from *Larson's Workers' Compensation Law*, §29.01 (2000 Ed.) (*Larson's*), which includes the following:

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.

After quoting this passage from the treatise, the ALJ noted that “[t]he ‘quantum’ approach has been adopted by the Agency”, citing *Lafette Austin v. Eichberg Construction*, OWC No. 137446, H&AS No. 88-311 (Dir. Dec. February 16, 1990) and *Lafette Austin v. Eichberg Construction*, OWC No. 137446, H&AS No. 88-311 (Compensation Order on Remand, April 19, 1990). We discern no error in the ALJ’s description of the quantum approach, nor of her choosing to apply it in this case.

However, we do discern error in her application of the test.

In applying the “positional risk” aspect of the quantum analysis, the ALJ found that the facts presented a “very strong ‘course of’ showing”, determining that “but for” the fact of Petitioner’s being employed by Respondent, she would not have been at the place of the injury at the time that she fell. We discern no error in the ALJ’s assessment that this is a “very strong” finding under one prong of the quantum test.

The ALJ then went on discuss an apparent conflict in the testimony concerning the nature of the “work break” policy in the work place. Although she did not state explicitly that she accepted Employer’s witness’s testimony in preference to Petitioner’s in resolving said conflict, the evidence is apparently consistent on one point: Petitioner was paid for the period of time that she was engaged in the errand which preceded her injury. That is, unlike the claimant in *Grayson*, Petitioner in this case was still being paid at the time of the injury, pursuant to Employer’s policy of permitting “ ‘unofficial breaks’ for personal convenience ... [which] are not always [required to be] approved in advance by the supervisors [and which could be taken so long as the employee’s absence was] within ‘reason’ ”. Compensation Order, page 4. Thus, rather than militating against compensability, this aspect of the facts leans towards compensability.

Further, as the ALJ found, the injury occurred “in a communal area leading to employer’s premises”. Compensation Order, page 4. As pointed out by Petitioner in her brief, under the view espoused by *Larson*, the workplace includes locations where “employer has some right of passage, as in the case of common stairs, elevators, lobbies, vestibules, concourses, hallways, ramps, foot bridges, driveways or passage ways through which the employer has something equivalent to an easement”. *Larson’s, supra*, § 13.04 [3].

The ALJ also noted that the time spent away from Petitioner’s desk was brief, and that Petitioner had already reported to and commenced her work day. Compensation Order, page 4. The ALJ also notes that Petitioner was returning to work at the time of the slip and fall. Thus, although the ALJ did not explicitly state it as a fact, it is incontrovertible that the personal errand had been concluded, and Petitioner was in the process of returning to her desk when she fell.

On this record, the sole factor militating against the compensability of this incident described by the ALJ was that the errand itself, which had been concluded by the time of the fall, was purely

personal and for Petitioner's convenience (as opposed to being of benefit to Respondent, or being for the personal "comfort" of Petitioner).

On these facts, therefore, it is apparent and uncontroverted that Petitioner took a brief, condoned and paid break from her desk to perform a minor task of personal convenience, upon the uneventful conclusion of which and while returning to her work place and having reached the lobby of the building where the employment was located, she sustained a fall in which she was injured. This was not an injury that, as in *Grayson*, occurred while Petitioner was engaged in a personal errand away from the employment premises while on an unpaid absence for a pre-arranged, set and significant period of unpaid time away from work. Rather, the errand itself was a short-lived, sanctioned deviation which had ended and from which Petitioner was returning, or rather, had returned, by the time the injury occurred on what is the equivalent of the work place.

Accordingly, we determine that as a matter of law, in denying this claim solely because the then-concluded errand preceding the slip and fall was purely personal, the ALJ misapplied the "quantum" test, by giving this single factor what amounts to conclusive weight, and according no weight to the factors of location of the injury, the pay status at the time of injury, the length or duration of the deviation from employment, the condoned nature of the break, whether the deviation or errand itself had been concluded without mishap prior to the injury, and whether, but for the employment the injured worker would or would not have been at the location of the injury when it occurred.

CONCLUSION

The Compensation Order of April 9, 2004 is not in accordance with the law, and must be reversed. Because there is but one outcome possible as a result of this determination, the Compensation Order should be amended to grant the claim for relief in accordance with the foregoing discussion.

ORDER

The denial of compensation benefits contained in the Compensation Order of April 9, 2004 is hereby reversed and the Compensation Order is hereby amended to grant the claim for relief, for the reasons as set forth herein.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY J. RUSSELL
Administrative Appeals Judge

February 16, 2006
DATE