

**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 No. 08-018**

**STEVEN ADAMS,**

**Claimant–Respondent,**

**v.**

**PRECISION PAVERS AND ERIE INSURANCE GROUP,**

**Employer/Carrier–Petitioner.**

Appeal from a Compensation Order of  
Administrative Law Judge Belva D. Newsome  
AHD No. 07-290, OWC No. 635953

Jeffrey W. Ochsman, Esquire, for the Petitioner

David M. Schloss, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, SHARMAN J. MONROE, *Administrative Appeals Judges*, and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

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).<sup>1</sup>

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<sup>1</sup>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 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 September 19, 2007, the Administrative Law Judge (ALJ) granted Claimant- Respondent's (Respondent's) claim for temporary total disability benefits from December 14, 2006 through the date of the formal hearing and continuing. Employer-Petitioner (Petitioner) filed an Application for Review (AFR) on October 19, 2007 seeking review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that (1) the ALJ erred in awarding benefits between December 15, 2006 and January 5, 2007, because Petitioner had submitted into evidence a document, ER 1, which, according to Petitioner, demonstrates that Respondent had been paid full wages during that period of time, and was paid an annual bonus during that time, and Respondent was therefore not disabled because there was no wage loss in that period, and (2) the evidence established that Respondent had performed work as a landscaper during the period claimed for which he received "a thing of value", to wit, a load of firewood, and was therefore not totally disabled.

Respondent opposes this appeal, arguing (1) that the record does not contain sufficient evidence to determine whether the wages listed on ER 1 were for work performed prior to the December 14, 2006 stipulated date of injury, or purport to be for work performed thereafter, and (2) Respondent's acknowledgement that he had performed yard work on two dates during the claimed period in return for which work he was allowed to remove some tree limbs and wood for firewood, does not amount to evidence of the availability of suitable alternative employment such that Respondent should be found, as a matter of law, to be employable at a given wage rate.

Because we agree with both arguments of Respondent, the Compensation Order is affirmed.

## 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 International v. District 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

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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.

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, we note preliminarily that Petitioner does not argue or assert in this appeal that the finding by the ALJ that Respondent is, by virtue of his work related contact dermatitis, unable to return to his pre-injury employment, which required that he be exposed to substances to which he has developed an allergic reaction of such severity as to render him unable to perform his normal job functions, is not supported by substantial evidence. Nor is there any argument that Petitioner has offered Respondent a modified position which does not involve such exposures. Accordingly, Respondent has, as a matter of law, established a *prima facie* case of total disability under the standards enunciated by the District of Columbia Court of Appeals under *Logan v. District of Columbia Dep't. of Employment Services*, 805 A.2d 237 (D.C. 2002).

Respondent having established said *prima facie* case of total disability, the burden was shifted, under *Logan*, to Petitioner to demonstrate the availability of suitable alternative employment under the precepts of *Joyner v. District of Columbia Department of Employment Services*, 502 A.2d 1027 (D.C. 1986) and *Washington Post v. District of Columbia Dep't. of Employment Services*, 675 A.2d 37 (D.C. 1996), (commonly and hereinafter referred to as *Mukhtar*). The only such evidence that Petitioner points to in this regard is the testimony of Respondent that he had performed yard work (which Petitioner characterizes as “landscaping services”, but which usage the record does not necessarily support in so grandiose terms) in return for which Respondent was allowed to have some amount of wood for use as firewood.

Although the ALJ did not explicitly address this evidence in the Compensation Order, she specifically found that Respondent was a credible witness, and therefore presumably she accepted his testimony that the yard work and related activities were performed on only the two days that Petitioner’s video surveillance was conducted in which those activities were captured on tape, and that Respondent had not been paid wages for such work. While we may well have reached a contrary conclusion, credibility determinations rest squarely on the ALJ, and will not be disturbed by us. Beyond this, Petitioner’s evidence did not include any evidence of the economic value of such activities as the tape demonstrated (that is, there is no evidence as to what wages a person performing such activities in the labor market would be expected to receive), nor is there any specific evidence as to the general availability in the marketplace of such jobs as the activity demonstrated. As a result of these considerations, the ALJ’s failure to conclude that the evidence demonstrated such job availability, under *Joyner* and *Mukhtar*, is not erroneous as a matter of law.

Regarding the wages asserted by Petitioner to have been paid post-injury, we agree with Respondent that the document, ER 1, standing alone and without the aid of explanatory material or testimony, is insufficient to demonstrate that Respondent received payment after the date of injury for anything other than work performed prior thereto. Thus, the award of benefits from and after the date of injury is not erroneous as a matter of law. We also note, in this regard, that the year end bonus was presumably paid in consideration of work performed throughout the entire year, and was also presumably not paid for work not performed, and hence the bonus payment is not payment of wages for work performed after the date of injury.<sup>2</sup>

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<sup>2</sup> We are aware of the discussion in HT suggesting that the parties agreed that there was some possibility of wages having been paid for periods following the date of injury. However, there was no specific stipulation as to the amounts

## CONCLUSION

The Compensation Order of September 19, 2007 is supported by substantial evidence in the record and is in accordance with the law.

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in question, and Petitioner failed to otherwise demonstrate those amounts (or, at least, Petitioner has not directed us to where it established the amounts in the record, and we can not find it if it is there). It is incumbent upon a party to either obtain a stipulation or produce clear evidence in such matters: neither the ALJ nor the CRB are obligated or in a position to speculate in order to fill in the evidentiary gaps.

**ORDER**

The Compensation Order of September 19, 2007 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
Administrative Appeals Judge

December 11, 2007  
DATE