

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-104

**ABIGAIL DENNIS, SURVIVING SPOUSE
OF HAYES DENNIS (DECEASED)
Claimant-Respondent,**

v.

**GHUMAN, INC., T/A GOLD STAR CAB,
Uninsured Employer-Petitioner.**

Appeal from a May 29, 2015 Compensation Order by
Administrative Law Judge Amelia G. Govan
AHD No. 13-379, OWC No. 698831

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 NOV 9 AM 11 17

(Decided November 9, 2015)

Joshua Davenport for the Claimant
Jason H. Ehrenberg for the Employer¹

Before HEATHER C. LESLIE, LINDA F. JORY and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The decedent, Mr. Hayes Dennis, worked for Employer as a Manager. His duties were largely administrative in nature and included opening and closing the repair shop. The decedent utilized a taxi cab as his personal vehicle, but was not actively employed as a taxi cab driver. Employer paid the decedent his salary in cash.

The decedent lived with his wife and six children, five of which were under the age of 18 at the time of decedent's death.

¹ Harnam S. Arneja represented Employer at the Formal Hearing.

On July 19, 2012 at approximately 7pm, the decedent was killed during a robbery at Employer's repair shop.

A full evidentiary hearing occurred on October 23, 2014. Claimant, the decedent's widow, sought an award of death benefits under D.C. Code § 32-1509. The issues raised were whether an Employer/Employee relationship existed between the decedent and Employer; whether the decedent's death is covered under D.C. Code § 32-1503; whether decedent's death arose out of and in the course of his employment; and, what was decedent's average weekly wage.²

On May 29, 2015, a Compensation Order (CO) was issued which granted Claimant's claim for relief. The CO further determined the decedent's average weekly wage with Employer at the time of his death was \$780.00.

Employer timely appealed. Employer argues the Administrative Law Judge (ALJ) erred in finding the decedent was on duty at the time of his death and that the ALJ erred in concluding the Decedent's average weekly wage was \$780.00. Employer did not appeal the findings that the decedent was an employee of Employer or that Claimant could pursue death benefits under D.C. Code § 32-1503.

Claimant opposes the appeal, arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB, 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 CO 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 to 32-1545 (2005) (the Act), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a CO 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 Int'l. v. DOES*, 834 A.2d 882 at 885(D.C. 2003).

ANALYSIS

Employer first argues the ALJ erred in determining the decedent was on duty at the time of his death. Employer argues that the ALJ's determination that the decedent was at Employer's premises in furtherance of his employment is not supported by the substantial evidence and was in error as he was there for reasons unrelated to his work. In support of this argument, Employer points this panel to select witness testimony. We reject Employer's argument.

² Employer also raised the issue of untimely controversion. As the ALJ stated in footnote 1 of the CO, Employer appears to have raised this in error. As it was not addressed by either party, the ALJ did not make any findings or conclusions regarding this issue. We find no error in this approach.

After acknowledging the “positional risk” test enunciated by the District of Columbia Court of Appeals in *Grayson v. DOES*, 516 A.2d 909 (D.C. 1986), the ALJ, referring to the decedent as “Claimant”, proceeded to analyze the evidence presented, stating:

Employer's position is that Claimant's death was not a compensable injury as Claimant: (a) was not an employee, or the alternative, (b) was not on-duty at the time of his death, or in the third alternative, (c) had the willful intention of injuring or killing himself and as such, contributed to his death. By Employer's own admission, it is established that Claimant was an employee of Employer. Credible testimony offered by Claimant's spouse, other Claimant witnesses and letters in evidence written on Employer letterhead and signed by Employer establish Claimant as a full time employee who worked from opening to closing of the repair shop.

* * *

Claimant served as Employer's trusted repair shop manager of many years. The evidence supports that his reason for being there was the fulfillment of his duty to close the repair shop. Fn13. He was not an active taxi driver during the period preceding his death. He had no other reason to be at the repair shop other than to honor his obligation and duty as a salaried employee of Employer. CE 5.

CO at 10 - 11.

Notably, in footnote 13, the ALJ gave credence to the testimony of Claimant’s witnesses, stating:

The credible testimonies of Mr. Babayale, Mr. Achempong and Claimant's spouse, all provided detailed recounts of routinely seeing, visiting and telephoning Claimant while he actively worked at the repair shop between the hours of 1pm and 8pm in July of 2012, the month of his death. HT at 36-39, 99, 123.

CO at 11, n. 13.

The ALJ found Claimant’s witnesses and Claimant, as decedent’s spouse, to be credible and relied on this credible testimony in determining that decedent was at the Employer’s premises in furtherance of his duty when he was killed. We affirm this conclusion.

What Employer is asking this panel to do is to reweigh the evidence in its favor, relying on Employer’s witnesses only, , a task we cannot do. As we stated above, we are constrained to uphold a CO 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.

Employer’s second argument is that by relying solely on a 2007 letter outlining the decedent’s salary of \$780.00 per week, the ALJ erred in ignoring the rest of the evidence submitted which showed the decedent’s salary at the time of his injury to be less. Employer argues the evidence in the record demonstrated the decedent earned \$400.00 every 15 days, pointing this panel to the decedent’s tax returns.

After reviewing the evidence and testimony, the ALJ noted:

In determining the Claimant's average weekly wage, we look to the record evidence in this case. Claimant's Exhibit 5, a letter of employment and salary verification, dated April 11, 2007, and signed by Employer stipulates that Claimant's weekly income is Seven Hundred and Eighty (\$780.00) Dollars. CE5. Claimant's spouse testified that Claimant's wages, in the amount corroborated by the salary verification letter, were contributed to a bank account for the purpose of paying bills and as contribution to the family unit. HT at 70 - 73.

Employer contends that Claimant was a part-time employee and was paid a salary of \$400 each fifteen-day period. HT at 139. Metered out, this equates to an average daily wage of approximately \$27. Employee-submitted exhibits also appear to list Claimant's Form W-2 Wage and Tax Statement reportable income at Forty Eight Hundred (\$4800) Dollars for the year 2012. EE 11. The authority used to execute this form in particular, and several of the other District of Columbia certified tax documents submitted as evidence, is questionable. Given Employer's informal paperwork practices and the overall lack of credibility of the Employer witnesses, the facts and evidence do not support the finding that Claimant's income level was as nominal as Employer attempts to document. HT at 156-160.

Two separate evidentiary documents submitted for review each refer to Claimant as 'Manager' and 'Service Manager' respectively. CE5. Moreover, a letter written on Employer letterhead, dated April 11, 2007, and signed and stamped by Employer, asserts Claimant's weekly wage to be \$780.00 per week, and his work week to be Monday through Saturday. These employee designations, the Employer-authored wage verification letter as well as Claimant witnesses' testimony hold the greater evidentiary weight. That Claimant requested, and that Employer obliged, to pay Claimant his wages in unverified amounts of cash and not by check is further circumstantial support for the higher average weekly wage determination in this matter.

Employer's categorical inquiry of Claimant's personal tax returns sought to establish that Claimant's failure to report a \$780.00 weekly salary on his tax return for calendar year 2012 bars the receipt of a death benefit award based on a \$780.00 average weekly wage determination. An evaluation of the federal and state tax codes, its' enforcement provisions, and any potential tax consequences to Claimant's estate is not within the purview of these proceedings.

The corroborating testimony of Claimant's spouse at the hearing, witness testimony and the array of evidence presented, does not support the finding that Claimant was only paid \$400 every 15 days; the equivalent of \$26 a day. Employer contends that Claimant did not "have any proof of income of \$780.00 other than an assertion, a verbal assertion." HT at 256. The evidence and record do not support this argument. Claimant's Exhibit 5, the employment verification

letter signed and stamped by Employer, is determined to be the true reflection of Claimant's weekly income and the basis for which any death benefits awarded hereunder will be calculated.

CO at 11-12.

Contrary to Employer's assertion that there was not credible evidence to support a finding decedent made \$780.00 per week, the ALJ relied upon the credible testimony of the decedent's spouse as well as the 2007 letter from Employer declaring the decedent's salary. The ALJ addressed Employer's arguments, discounted them, and concluded the decedent's salary at the time of his death was \$780.00. As stated above, we are bound to affirm this finding if there is substantial evidence to support the ALJ's conclusions, as here. We reject Employer's arguments.

CONCLUSION AND ORDER

The May 29, 2015 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is **AFFIRMED**.

So ordered.