

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-059

**ALICIA GARCIA DUBON, RONALD RODRIGUEZ GARCIA,
LILIAN RODRIGUEZ GARCIA, GLADIS RODRIGUEZ GARCIA
and BRENDA RODRIGUEZ GARCIA,
WIDOW AND SURVIVING CHILDREN OF
BASILIO RODRIGUEZ-DIAZ (DECEASED),
Claimants–Petitioners,**

v.

**SMZ MACOMB, LLC, and AJG, INC.
Employers-Respondents.¹**

Appeal from a March 27, 2015 Compensation Order on Remand by
Administrative Law Judge Gregory P. Lambert
AHD No. 12-549A, OWC No. 693698

(Decided August 27, 2015)

Neil Fagan for Claimants
Anthony Pagano for Employer SMZ Macomb, LLC
James J. Fitzgibbons for Employer AJG, Inc.

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

JEFFREY P. RUSSELL for the Compensation Review Board.

¹ This case was previously styled *Basilio Rodriguez-Diaz, Deceased, v. Zuckerman Partners, LLC, AJG, Inc., SMZ Macomb, LLC, and The Injured Workers' Insurance Fund (IWIF)*. Zuckerman Partners and IWIF (see, HT 15, 17-18)) were voluntarily dismissed at the formal hearing. As part of the proceedings in connection with the prior remand, Alicia Garcia Dubon, Ronald Rodriguez Garcia, Lilian Rodriguez Garcia, Gladis Rodriguez Garcia and Brenda Rodriguez Garcia were identified by stipulation between them and SMZ Macomb, LLC as being the Claimants. See Compensation Order on Remand, p. 2. There is no indication that AJG, Inc. was a party to this stipulation.

The description of the stipulation regarding the identity of the claimants contained in the Compensation Order on Remand does not adequately convey what their status is with respect to entitlement to death benefits. D.C. Code § 32-1509 governs claims for death benefits, and creates a variety of potential entitlement levels and recipients, depending upon marital status, age, dependency and other factors. In addition to addressing the issues discussed therein, this matter is remanded to the ALJ on remand who is further directed to either re-open the record to receive evidence sufficient to identify which claimants are entitled to receive death benefits, and under what provision of the Act they are so entitled, or to obtain further stipulation on the matter from the parties.

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DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The following background information is taken from the prior Decision and Remand Order. “Claimant” refers in this passage to the Decedent, Basilio Rodriguez-Diaz, and “Employer” refers to SMZ Macomb, LLC (SMZ):

The Claimant was working as a construction worker for AJG, Inc. (AJG) when on May 22, 2012, Claimant died after falling on the job. Claimant was a married man with several children.

AJG was in the business of framing homes. On the date of the accident, AJG was framing a home at 3036 Macomb Street, NW, Washington, D.C. This was the residence of Steven and Debbie Zuckerman. SMZ Macomb, LLC (SMZ), was incorporated to obtain financing for the construction of the home. On the date of the accident, AJG did not have workers compensation coverage in the District of Columbia.²

A full evidentiary hearing was held on June 26, 2013.³ At that hearing, Claimant’s beneficiaries sought an award of death benefits, payment of causally related medical bills, interest on accrued benefits, and funeral expenses. The issues presented were:

1. Whether there was an employer/employee relationship exist [sic] under the Act between Claimant and SMZ Macomb, LLC pursuant to D.C. Code, as amended, §32-1501?
2. What is Claimant’s average weekly wage?

Compensation Order (CO 1) at 2.

CO 1 was issued on September 13, 2014. The ALJ concluded that Claimant did not establish the existence of an employee/employer relationship with SMZ under the Act and denied Claimant’s claim.

Claimant timely appealed. Claimant argues the CO 1’s findings are not based upon the substantial evidence in the record. Claimant argues the ALJ made no findings regarding:

- The identity of the correct Employer;
- Average weekly wage;
- Amount of death benefits to be paid;
- The beneficiaries;
- The amount of funeral benefits to be paid;

² AJG did have workers compensation coverage in Maryland.

³ The CO erroneously refers to the date of the Formal Hearing as June 6, 2013.

- The amount of medical benefits to be paid; and,
- Interest.

Employer opposes the appeal, arguing the CO 1 should be affirmed as to SMZ. Specifically, Employer argues:

Contrary to Claimant's argument, whether or not there was also evidence that could support a contrary finding is irrelevant. The substantial evidence showed that SMZ had no employment relationship with the Claimant; is not a "contractor" because it is not "between contracts;" was not "in the business" of framing houses; and, in fact, had no regular business.

Employer's memorandum unnumbered at 1.

The CRB issued a Decision and Remand Order on January 26, 2015, ruling as follows:

At the Formal Hearing, the issue presented was whether or not SMZ was liable as a principle contractor and thus a statutory employer.

* * *

However, we cannot determine from the CO whether the ALJ found SMZ to be the general contractor and AJG to be the subcontractor as the ALJ did not conclude her analysis. The ALJ did not state whether or not SMZ was the contractor. The ALJ analyzed whether an employee/employer relationship existed between Claimant and SMZ, rather than the issue presented. As we stated above, the parties stipulated that Claimant was an employee of AJG. The question is whether or not SMZ is liable for worker's compensation benefits as a general contractor of AJG, pursuant to § 32-1503(c). Until the ALJ addresses SMZ's status, we are unable to determine whether or not the CO is supported by the substantial evidence in the record and in accordance with the law.

If the ALJ finds SMZ is a contractor and thus liable for compensation, then the ALJ shall determine not only Claimant's average weekly wage, but also who shall receive any death benefits.

* * *

CONCLUSION AND ORDER

The September 3, 2014 Compensation Order is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

Decision and Remand Order, p. 4.

The Administrative Law Judge (ALJ) who conducted the formal hearing and issued the Compensation Order left the employ of the Department of Employment Services (DOES) without issuing a new compensation order. The matter was re-assigned to a different ALJ, who, on March 17, 2015, issued a Compensation Order on Remand (CO 2).⁴

In it, the ALJ determined that SMZ was not a “contractor” under D.C. Code § 1503(c), and denied benefits. Because the Decision and Remand Order only required additional findings in the event that SMZ was liable, no further findings were made.

Claimants filed the present Application for Review and memorandum in support thereof (Claimants’ Brief) appealing CO2 to the CRB.

Claimants argue that CO2 is defective for numerous reasons: (1) it contains no findings concerning the identity of the Decedent’s employer⁵, average weekly wage, the amount of death benefits, funeral expenses and medical expenses owed, all of which are required regardless of whether SMZ is found liable; (2) it contains no finding that AJG was uninsured at the time of the accidental death; and (3) the ALJ’s analysis that SMZ is not liable because in order to be a “contractor”, SMZ must be “between two contracts”, which “is a requirement not found” in the Act, and the finding was an unsupported finding in any event.

Employer filed an Opposition to the Application for Review and memorandum in support thereof (Employer’s Brief).

Employer argues the “between two contracts” requirement is appropriate in workers’ compensation analysis and the finding that there was no contract between SMZ and AJG was supported by substantial evidence, relying, as did the ALJ, upon the case of *Director, Office of Workers’ Compensation Programs, U.S. Department of Labor v. National Van Lines, Inc.*, 613 F.2d 972 (D.C. Cir. 1979).

For the reasons set forth below, we vacate the CO 2 and remand the matter for further findings of fact and conclusions of law as set forth in this Decision and Remand Order (DRO 2).

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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.

⁴ The normal practice in such circumstances is for Administrative Hearings Division to issue an Order to Show Cause why the matter should not be decided by a new ALJ, and for the Compensation Order on Remand to give the particulars concerning the Show Cause Order and any responses to it from the parties. There is no mention of whether this transpired in the Compensation Order on Remand. However, neither party has raised that issue in this appeal, so we shall assume the parties were properly advised and consented to the re-assignment.

⁵ Although SMZ and Claimants stipulated to an employment relationship between Decedent and AJG, AJG was not present at the formal hearing and thus did not enter into such a stipulation.

See D.C. Code § 32-1521.01(d)(1)(A). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order 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 different conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

Inasmuch as this is an appeal from a Compensation Order on Remand, our substantial evidence review would normally be accomplished by reviewing the Compensation Order on Remand to determine whether it properly carried out the mandate stated in the prior Decision and Remand Order. However, because the prior Decision and Remand Order (DRO 1) contained some inadvertent omissions, we are compelled to do more than just review this Compensation Order on Remand for substantial evidence. By way of explanation, we shall preliminarily address a number of matters that are still unresolved regardless of the outcome of this appeal, which should have been addressed in CO 1 and DRO 1, but were not.

First, in DRO 1 the CRB directed that the claimants be specifically identified and named in the Compensation Order on Remand. The parties participating in the proceedings (but not AJG, which was absent from the formal hearing) entered into a stipulation as discussed in footnote 1, *ante*. However, the description of the stipulation regarding the identity of the claimants contained in CO 2 does not adequately convey what their status is with respect to entitlement to death benefits. That is, there is no finding concerning which of the identified claimants are minors, which, if any, are not minors but may be dependents entitled to death benefits under the Act.

D.C. Code § 32-1509 governs claims for death benefits, and creates a variety of potential entitlement levels and recipients, depending upon marital status, age, dependency and other factors. As will be discussed further below, this matter is being remanded for reasons as set forth in the body of DRO 2. In addition to addressing the issues discussed therein, the ALJ on remand is to make findings of fact sufficient to identify which claimants are entitled to receive death benefits, and under what provision of the Act they are so entitled. This may be done by re-opening the record or obtaining further stipulation on the matter from the parties.⁶

Second, we must acknowledge an oversight on the part of the CRB concerning DRO 1.⁷ Although the main matter in contention at that time was whether or not SMZ is liable as a general contractor for death benefits to which Claimants may be entitled, premised upon AJG's alleged uninsured status, Claimants are entitled to findings concerning what the level of benefits they are entitled to receive, regardless of what entity or entities may be liable to provide those benefits. DRO 1 made making these findings conditional upon finding that SMZ is liable for them. That was an omission which we must now correct.

From the record as it stands, AJG's liability for death benefits appears to be beyond dispute, and if so, the appropriate Claimants are entitled to an award so that further proceedings to enforce the award are possible. We say "appears", because the president and owner of AJG participated in a

⁶ All concerned should remain mindful that AJG was initially a party to these proceedings and if the ALJ finds that it remains so, AJG must be included in any discussions regarding additional stipulations.

⁷ We see no bar to our considering these additional issues at this time, inasmuch as Claimants repeat their arguments on these issues in this appeal as well.

deposition taken in conjunction with these proceedings, and AJG, Inc. is listed in the caption of that deposition as “employer”. Further, AJG was represented by counsel at that deposition, and represented at that time that he would be entering his appearance on AJG’s behalf following the deposition.

The following colloquy occurred at that deposition:

MR. FITZGIBBONS: [COUNSEL FOR AJG AND ANTHONY GENOVESE]: I’m James J. Fitzgibbons. I represent AJG, Inc. and Mr. Genovese. And we’ve agreed that I’m going to enter my appearance in this case representing AJG, Inc.

MR. FAGAN: [CLAIMANT’S COUNSEL]: Yes.

MR. FITZGIBBONS: We may or may not attend the hearing next week. We’ll make that determination later.

MR. FAGAN: Thank you Mr. Fitzgibbons. And based on that representation and our prior discussion, counsels are all agreeing that you can attend and participate in this deposition as counsel for AJG, Inc. and specifically the person being deposed, Mr. Genovese.

MR. ROBERSON [COUNSEL FOR IWIF]: Do you want to get our agreement on the record just to keep it clear?

MR. FAGAN: Yes. Let’s do that.

MR. ROBERSON: I’m Patrick Roberson, representing the Injured Workers’ Insurance Fund, and I agree with the representation made by Mr. Fagan.

MR. PAGANO [COUNSEL FOR SMZ, MACOMB, LLC AND ZUCKERMAN PARTNERS]: Anthony Pagano for SMZ Macomb and Zuckerman Partners. I also agree.

MR. FAGAN: Thank you.

[HT 6]

Nothing in this colloquy suggests that AJG was unaware of the pending claim; indeed, it confirms that fact and that it had legal counsel as well.

In DRO 1, the CRB noted that AJG did not appear at the formal hearing and did not execute the Joint Pre-Hearing Statement (JPHS). Neither of these facts rule out AJG’s being a proper party, nor do they represent an agreement by any party that AJG was not a proper party. In fact, another party present, IWIF, was truly not a proper party, yet it appeared at the formal hearing and was dismissed from the case by consent, and permitted to leave. See, HT 12 – 14. Similarly, another

party that Claimant and SMZ appear to believe was not a proper party also appeared and was dismissed by consent. See, HT 16 -17, dismissing Zuckerman Partners.

It was also noted in DRO 1 that AJG was not served with a copy of the Compensation Order on Remand (DRO 1). Although that clearly has an impact upon AJG's rights with respect to any appeal of DRO 1 that it may have wished to take, and any appeal of DRO 1 that it may have wished to take to the District of Columbia Court of Appeals, it would not appear to have any impact upon whether AJG is a proper party with notice of the claim and the pendency of the formal hearing, and was subject to the jurisdiction of DOES.

AJG will be provided and served with a copy of this Decision and Remand Order (DRO 2), as well as the prior Decision and Remand Order (DRO 1). On remand, among the other matters that the ALJ shall complete is seeing to service upon AJG of the Compensation Order (CO 1) and the first Compensation Order on Remand (COR 1). The CRB shall assure that a copy of this Decision and Remand Order (DRO 2) is served upon AJG, upon its president Anthony J. Genovese, and the attorney who represented Mr. Genovese and AJG at the deposition.

On remand there must be a determination as to whether AJG had proper notice of the proceedings in order for it to be held responsible for any award that may be entered against it.

We regret the CRB's oversight in not addressing these issues in DRO 1, but are heartened to note that no delay will result from that oversight, inasmuch as this matter must again be remanded for other substantive reasons, to which we now turn our attention.

In CO 2 the ALJ correctly recognized that the issue to be decided was whether SMZ was a contractor under the Act, and properly noted that a critical determination to be made was a finding as to with whom or with what entity did AJG contract to perform the framing work.

By reference and incorporation, the ALJ adopted the findings from CO 1, except to the extent that they were abrogated by CO 2). Thus, the following was adopted by reference from CO 1, as set forth by the CRB in DRO 1:

Therefore, SMZ if determined to be the general contractor, may be found liable for payment of all workers' compensation benefits since AJG's worker's compensation coverage only extended to the work performed in Maryland.

The Act does not define "subcontractor." However, Black's Law Dictionary defines subcontractor as:

One who is awarded a portion of an existing contract by a contractor, especially a general contractor. BLACK'S LAW DICTIONARY, p. 1464, 8th Ed. [2004].

DRO 1 p. 4, quoting CO 1, pp. 4 – 5.

The CRB found no fault with this first step in the analysis, and the adoption of it by the ALJ in this case is proper.

To further resolve this question, the ALJ referred to regulations governing the licensing and regulation of general contractors in the District of Columbia and the testimony of Mr. Zuckerman concerning with whom or with what entity did AJG contract to perform framing work on the property. The ALJ found:

SMZ was not licensed in D.C. as a general contractor. HT 131. And even if it were, under the District’s regulations, “[t]he term general contractor does not include: ... (d) any person who does general contracting work on property that constitutes his or her primary residence, if that primary residence is a single-family dwelling...” 17 D.C.M.R. §3999.1. The home in question was to be used by the Zuckermans as their personal residence. *See, e.g.*, EE 16; EE 18.

Although it is a business entity, it is not in the business of framing, building or selling homes. HT 131 – 132. SMZ did not contract with Claimant’s employer, AJG. Instead, Mr. Zuckerman did so directly. HT at 96. Not only that, but AJG’s president, Anthony Genovese, was unaware that SMZ even existed. Any business that might be attributable to SMZ centers on financing and holding title to the home during construction. CE 22 at 11 – 12. And although financing was directed through SMZ, Mr. Zuckerman and his wife gave personal guarantees to the bank. CE 22 at 12. The loan given to SMZ is temporary, and will eventually be taken over by the Zuckermans. CE 22 at 46; HT at 133 – 134.

Merely because SMZ is a business—that is, a legal entity—does not mean it is “in business”. For example, with no employees, SMZ was unable to hire individuals to work on the home. CE 22 at 16. ... SMZ was not in a position to meaningfully appreciate and control the risks of injury, supervise the work being performed, or voice an opinion on the hiring practices AJG.

SMZ was not between two contracts. ...

Although the failure to meet the first prong of the test is dispositive, I also note that the remainder of the *National Van Lines* inquiry is unsatisfied. SMZ did not hire AJG to perform work it would have otherwise assigned to its own employees. That is because SMZ had no employees and never would have employees. *See, e.g.*, HT at 132.

Because SMZ is not a contractor under the Act, I do not reach the remaining issues.

Compensation Order on Remand (CO 2), pp. 5 – 6.

First, we do not accept the ALJ’s assumption that the municipal regulations governing “contractors” are applicable or relevant to whether an entity is a contractor or sub-contractor under the Act. Even if they do have application, much of the above discussion deals with what SMZ was created to do, and what will happen at some time in the future. We do not agree, for example, that the fact that SMZ will, sometime in the future, transfer ownership to Mr. and Mrs. Zuckerman, renders the work being done at the time of the accident “work on their primary residence”, given that they were not yet the owners of the property and were not residing there at

the time of either the creation of the framing contract, the commencement of work, the date of the accidental death, or even as of the date of the formal hearing.

This ultimate issue regarding whether SMZ is liable for providing compensation under the Act was properly identified as turning on the presence or lack of any contract between SMZ and AJG. Absent such a contract, there is no liability on SMZ's part. If there was such a contract, and if that contract called for AJG to complete work which SMZ was obligated to carry out under a contract or agreement with some other party (such as the Zuckermans or Zuckerman Partners), SMZ was a contractor.

The ALJ's findings that "SMZ did not contract with Claimant's employer, AJG. Instead, Mr. Zuckerman did so directly. HT at 96. Not only that, but AJG's president, Anthony Genovese, was unaware that SMZ even existed", if supported by substantial evidence, support the conclusion that SMZ was not a general contractor in this case. We will therefore examine the evidence identified by the ALJ as supporting this finding.

In support of the finding on this critical point, the ALJ cites HT at 96.

Here is that testimony:

Q: [by Counsel for Claimants] And did SMZ Macomb, LLC make an agreement with AJG, Inc. to do that work?

A: [by Steven Zuckerman] Could you repeat that please?

Q: Did SMZ Macomb, LLC make an agreement with AJG, Inc. to do the work on the house where you now live?

A: No. I --- I made the arrangement with Tony [AJG's president and owner] myself.

At this point, one could argue that the cited testimony supports the finding that SMZ did not contract with AJG, and that Mr. Zuckerman did. If the evidence ended there, since Mr. Zuckerman is not personally obligated to any other entity to construct the house, the ALJ's finding would be supported by substantial evidence. But it does not end there. The colloquy continues:

Q: When SMZ Macomb, L – excuse me. When AJG, Inc. sent in invoices to bill for their work, did you tell them to bill SMZ, LLC?

A: I – they billed the wrong – they had billed Zuckerman Partners incorrectly, and I told them to bill SMZ Macomb.

Q: So if the –

JUDGE CALMEISE: So that's correct?

THE WITNESS: That's correct.

JUDGE CALMEISE: Okay.

BY MR. FAGAN:

Q: So why would SMZ Macomb – scratch that.
And didn't you tell AJG, Inc., to bill you or your wife personally; did you?

A: No.

Q: In fact, you told them they should bill SMZ Macomb, LLC; correct?

A: Yes.

Q: And SMZ Macomb, LLC paid them; correct?

A: SMZ Macomb paid them but it was our money. So –

Q: The money came from the SMZ Macomb, LLC bank account; is that correct?

A: It came from the SMZ Macomb bank account and it came from our account personally also.

Q: And the money that came from SMZ

[HT 97-98]

Macomb's bank account had some bank loan money in it at that time; is that right?

A: Yes, I – yes.

Q: And was this a written or oral agreement with AJG, Inc. to do the work.

A: Oral agreement.

Q: Are you the one that spoke to them to make the agreement?

A: Yes, I spoke to Tony Genovese myself.

[HT 97-98]

This presents a far fuller description of the dealings between AJG and Mr. Zuckerman, a man who operates in multiple capacities on behalf of multiple entities: himself, Zuckerman Partners, SMZ, and numerous other LLC's with whom AJG routinely contracted to frame houses (as will be shown below).

The ALJ further supports his finding and conclusion by stating "Not only that, but AJG's president, Anthony Genovese, was unaware that SMZ even existed. CE 21 at 10, CO 2, p. 3. This is only partially accurate. The cited source for the finding is the deposition testimony of Anthony Genovese (CE 21). That testimony is as follows:

Q: [by Claimant's Counsel] Did you have any papers that you signed to do the work?

A: No.

Q: There was no written contract or agreement?

A: There was no written contract. It was –

Q: What were the terms of the agreement?

A: I gave him a proposal, and he accepted it, and I went to work.

Q: How did you do the proposal?

A: He gave me a set of plans. He informed me that he was planning on building his personal home, and he wanted to know if I would build it for him.

Q: Were you aware that there was an entity called SMZ Macomb, LLC?

A: Not at that time, no.

Q: When did you become aware that there was such an entity?

A: When I asked Steve for a draw, and I invoiced him and he – I invoiced Zuckerman Partners, and he said “No, I need you to invoice this to the LLC.”

Q: And that was after your work had already started?

A: Oh, yes.

Q: How far into the work? How many days or weeks when that happened?

A: I don’t recall, but my guess would be two weeks. Because I pay my men every two weeks, and I need his help to pay my men.

[CE 21 at 10-11].

We must respectfully disagree with the ALJ that these cited testimonies, when read together and in complete form, lead to the conclusion that there was no contract between SMZ and AJG.

The only fair reading of the evidence cited is that AJG entered into an oral contract to frame a house. Although Mr. Genovese on behalf of AJG was aware that Mr. Zuckerman intended ultimately to live in the house⁸, there was no clarity as to with whom AJG was contracting. The most, reasonable reading of this evidence is that Mr. Genovese, on behalf of AJG, assumed initially that when he made his deal with Mr. Zuckerman that it was on behalf of Zuckerman Partners, the development company that Mr. Zuckerman is “a member” of (HT 106) and with which AJG had contracted numerous times on previous homes (CE 21 at 23), dealing with Mr. Zuckerman acting on Zuckerman Partners’ behalf (HT 107).

⁸ It is worth noting that as late as the time of the formal hearing, ownership and title to the house had not yet been transferred from SMZ to the Zuckermans, despite the fact that they had taken possession and were living in the house by that time. HT 95.

Mr. Genovese did not testify that he believed he was entering into an agreement with Mr. Zuckerman personally; if he had held that belief he would not have invoiced Zuckerman Partners, he would have invoiced Mr. Zuckerman. Thereafter, however, he was told by Mr. Zuckerman not to invoice Zuckerman Partners, but to invoice SMZ for the work. The only reasonable inference that can be drawn is that as of the re-invoicing of the first draw, at the latest, any contract that had originally been thought to exist with Zuckerman Partners (or Mr. Zuckerman personally) was reformed to substitute SMZ for whomever was originally the entity thought by Mr. Genovese to be engaging AJG's services.

Thus, by the time of the accident the evidence demonstrates that AJG was under contract with SMZ to do the framing work on the house.

What the ramifications of this may have for Mr. Zuckerman personally or for Zuckerman Partners is not before us, and is subject to the nature of SMZ as a corporate entity, and Mr. Zuckerman's and Zuckerman Partners' relationships to it. What is clear, though, is that at the time of the death in this case, AJG was supplying work to frame a house, which was legally owned by SMZ, under a contract that was being performed by AJG's doing the work, and performed by SMZ, by paying for that work when invoiced.

The ALJ proceeded to state that even if such a contract existed, SMZ still would not be a contractor, because it had no employees, and the framing work was not work that would otherwise be performed by SMZ employees, which the ALJ determined (and Employer argues in its Brief) represents a failure of the "second prong" of the *National Van Lines* test.

Assuming for the purpose of argument that we accept that *National Van Lines* ought to be adopted as the test in this jurisdiction, SMZ is a corporate entity distinct from Mr. Zuckerman personally, but on behalf of which Mr. Zuckerman carried out its operations, or "business". These included building a house using AJG and other trades, with the ultimate intention being for SMZ to transfer ownership to Mr. and Mrs. Zuckerman, personally, upon completion. On this record, SMZ is obligated to build the house, and then transfer ownership to the Zuckermans.

SMZ had undertaken to complete the house and to transfer it to the Zuckerman's personally. If, for some reason, SMZ fails to convey the property to the Zuckermans that failure would presumably be an actionable breach of its obligations.⁹

Returning to DRO 1, the CRB referred to Larson's treatment of the subject. The CRB wrote:

In his treatise, Professor Larson discussed statutes like D.C. Official Code §32-1503 (c):

Since one purpose of these statutes is to prevent evasion of compensation coverage by subcontracting of the employer's

⁹ We are cognizant of the fact that the Zuckermans and the ALJ didn't place much weight on the distinction between the Zuckerman's personally and SMZ, and as a *practical* matter there may be no such distinction. But as a legal matter, the Zuckermans are two separate individuals, and are not the same legal entity as SMZ. While the details of SMZ's operating structure are unknown to us, one can envision circumstances where the interests of one or the other Zuckermans personally might conflict with interests of SMZ the corporate entity, and if SMZ's current "commitment" to build the house and/or turn it over to Mr. and Mrs. Zuckerman, however it was made, is not accomplished, one of the three entities could be aggrieved.

normal work, the test of applicability is the question of whether the work being done would ordinarily have been done by employees, in view of this employer's past practices *and the practices of employers in comparable businesses...* The Case law interpreting such statutory provisions usually addresses one question: When is the subcontracted work part of the regular business of the statutory employer? LARSON'S WORKMEN'S COMPENSATION LAW, § 49.00, 49.16 (a) (1999).

Decision and Remand Order (DRO 1), pp. 3 – 4 (emphasis added).

Although the ALJ states that there is a difference between “being a business and being in business”, we are not certain what is meant by that statement. SMZ exists for a purpose or purposes. Among them in this case and on this record it appears that one purpose was to have a house constructed for the Zuckermans, and then to transfer ownership of that house to them. These purposes were carried out by SMZ through the actions of Steven Zuckerman.

Although the ALJ minimizes the significance and extent of Mr. Zuckerman's participation in the process of building the house, the record reveals that he engaged the services of other trades (other, that is, than AJG), including an architect, an engineer and “a number of different contractors” (HT 129). He acknowledged that he was on the work site for some amount of time every day, and that he conferred with AJG concerning progress, and on at least one occasion, expressed concern about the quality of lumber, and AJG had the lumber in question replaced. (CE 22 at 31- 32).

There is significant testimony in the record, including the testimony of Mr. Genovese in his deposition, and the testimony of Mr. Zuckerman at the formal hearing, describing Mr. Zuckerman's role as a developer at Zuckerman Partners and in his acting on behalf of SMZ, the types of tasks he performs on each of its development projects, the financial and corporate structuring of the individual projects, , and also discussing the same aspects of the financial and corporate structuring of the project at issue in this case.

As Larson suggests, the inquiry is not limited to “this employer's past practices”, but also to “the practices of employers in comparable businesses”. Since SMZ was created solely for this project, it has no “past practices”. But this is true for all of the projects undertaken by Zuckerman Partners, and each such other project, of which the record notes there were at least 10, are arguably “comparable businesses” against which SMZ's actions could be judged.

The ALJ undertook no such analysis. Although the ALJ asserts that SMZ conducted “no business” and had “no employees”, these are matters of semantics. Although he may not have been paid by SMZ, Mr. Zuckerman acted on its behalf, hiring and paying contractors, observing the progress of the project, etc. To some extent, and perhaps to a large extent, SMZ operated in the same manner and stood in the position to this project as the other entities which were created for each development project by Zuckerman Partners (*See* CE 22 at 25, where Mr. Zuckerman describes how each separate project undertaken by Zuckerman Partners is structured around a separate “LLC”). It may well be that the Zuckerman Partners other projects represent “comparable businesses” whose relationships to the other projects could be illuminating in ascertaining the status of SMZ.

Black's defines "general contractor" as "One who contracts for the completion of an entire project, including purchasing all materials¹⁰, hiring and paying subcontractors, and coordinating all the work." Black's *supra*, at 327.

It may or may not be that even given the contract between SMZ and AJG, SMZ is still not a general contractor under the Act. However, given the cursory treatment and analysis of the issue despite the significant amount of evidence in the record bearing on the question that is not addressed in CO 2, we are required to vacate the decision and remand the matter for further consideration of whether, in light of there being a contract between SMZ and AJG, SMZ is obligated to provide workers' compensation for this work-related death as the general contractor.

In closing we note that, while we understand that incorporating earlier findings of fact into a Compensation Order by reference is generally within the discretion of an ALJ, in this case because the earlier Compensation Order (CO 1) was vacated in its entirety, and because the ALJ caveats that the incorporation by reference is not complete, but rather is subject to any changed or new findings made by the new ALJ, as well as being subject to corrections made by the CRB, we must request that, if the ALJ chooses to incorporate factual findings from sources other than his own deliberations, that those facts be identified specifically by quotation and citation to the source. Otherwise, our task of assuring that the ultimate conclusions flow rationally from facts supported by substantial evidence is exceedingly difficult, if not impossible.

CONCLUSION AND ORDER

The finding that there was no contract between SMZ and AJG is not supported by substantial evidence and is REVERSED and the denial of the claim against SMZ is VACATED.

We remand the matter for further consideration of whether, in light of there being a contract between SMZ and AJG, SMZ is obligated to provide workers' compensation for this work related death.

In addition, CO 1 and CO 2 failed to adequately consider all contested issues presented by Claimants for resolution concerning the benefits due, if any, to Claimants, regardless of whether SMZ is liable for them. Accordingly the ALJ on remand shall:

1. Make additional findings of fact and a determination as to whether AJG had proper notice of the proceedings in order for it to be held responsible for any award that may be entered against it. This may be done by such reasonable means as the ALJ deems proper, including issuing an Order to Show Cause directing AJG to show cause why it is not a proper party and/or did not have sufficient notice of the proceedings to have participated and adequately protected its interests at the formal hearing.
2. If it is determined that AJG had sufficient notice of the proceedings, the ALJ on remand is directed to make findings of fact sufficient to identify which claimants are entitled to receive death benefits, and under what provision of the Act they are so entitled.

¹⁰ It is worth noting at this point that, according to AJG's president's deposition testimony, AJG did not purchase the building materials; rather, he testified that they were supplied by the entity engaging AJG to frame the house. CE 22 at 28.

3. If it is determined that AJG had sufficient notice of the proceedings, the ALJ on remand is directed to make findings of fact and conclusions of law concerning the amount of death benefits due to each claimant.
4. If it is determined that AJG did not have sufficient notice of the proceedings, the ALJ is to schedule a new formal hearing with notice to AJG, and either proceed with further testimony, examination of witnesses, cross-examination of witnesses, and entry into additional stipulations as are appropriate and consistent with foregoing DRO 2, or, alternatively
5. The ALJ shall convene a prehearing conference including notice to all parties in which a determination as to how to proceed in further considering this matter in a manner consistent with DRO 2.

So ordered.