

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



GERREN PRICE
INTERIM DIRECTOR

CRB No. 14-108

**BASILIO RODRIGUEZ-DIAS, Deceased¹,
Claimant–Petitioner,**

v.

**SMZ MACOMB, LLC,
Respondent.**

Appeal from a September 3, 2014 Compensation Order by
Administrative Law Judge Karen Calmeise
AHD No. 12-549A, OWC No. 693698

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JAN 26 PM 2 32

Neil Fagan for the Claimant
Anthony Pagano for the Employer

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges*, and LAWRENCE
D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

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 Mr. 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

¹ It is unclear who the dependents of the Decedent are, as they were not specifically identified in the record before us. We address this issue on page 5 of this Decision and Remand Order.

² AJG did have workers compensation coverage in Maryland.

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) at 2.

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

Employer opposes the appeal, arguing the CO 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.

STANDARD OF REVIEW

The scope of review by the CRB is generally 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm a Compensation Order that is supported by substantial evidence, even if there is also contained

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

within the record under review substantial evidence to support a contrary conclusion, and even where this panel might have reached a contrary conclusion. *Id.*, at 885.

ANALYSIS

Prior to addressing Claimant's arguments, we must first address several misstatement of facts pointed out by Claimant. As Claimant correctly notes, the parties stipulated that Claimant died because of an accident at work on May 22, 2012, and that there was not a claim for any benefits to be paid due to a January 3, 2013 injury. No evidence of any temporary total disability benefits was presented or was in issue for the dates of January 4, 2013 through April 15, 2013. As Claimant points out, these dates were after Claimant was deceased. As we are remanding the case, we direct the ALJ to strike any references to the January 2013 injury and any temporary total disability benefits thereafter.

We must also point out that the only parties in front of the ALJ and the only parties subject to the claim before the Administrative Hearings Division were the Claimant and SMZ.⁴ A review of the administrative file reveals AJG was not present at the Formal Hearing nor did it participate in the preparation of the joint pre-hearing statement. AJG was also not served with a copy of the CO. As AJG is not a party to prior proceeding the case, an award of compensation could not be enforced against AJG.

We disagree with the Claimant that the ALJ erred by not making findings against AJG in the order. We are cognizant that the owner of AJG, Mr. Anthony Genovese, was deposed on June 18, 2013 and that deposition was submitted by Claimant as exhibit 21. At that deposition, Mr. James J. Fitzgibbons represented AJG, Inc. It is clear by the discussion between Mr. Fitzgibbons and Mr. Fagan that no party thought Mr. Fitzgibbons was required to attend the Formal Hearing. Exhibit 21 at 5-6. Until such time as AJG is a party to the case, no award can be made against AJG.

At the Formal Hearing, the issue presented was whether or not SMZ was liable as a principle contractor and thus a statutory employer. A review of the CO reveals the following discussion:

When AJG began work at the Macomb Street construction, AJG had worker's compensation insurance however, the coverage was only for work in Maryland, and the insurance did not extend to work in the District of Columbia. Whether AJG is SMZ's subcontractor has significance because AJG, by not obtaining workers' compensation coverage, defaulted on its statutory obligation to secure the payment of benefits. Under our Act, a general contractor may be deemed the employer of a person working for one of its subcontractors if that subcontractor defaults on its statutory obligation to secure payment of workers' compensation benefits. D.C. Official Code §32-1503[c] states:

⁴ The Injured Worker's Insurance Fund and Zuckerman Partner's LLC were dismissed as parties at the Formal Hearing.

In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

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].

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 the subcontracting of the employer's normal work, the test of applicability is the question of whether the work being done under the contractor would ordinarily be 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].

CO at 4-5 (footnote omitted).

We first note the ALJ was in error when she stated in the first quoted paragraph above that a general contractor *may* be deemed the employer of a person working for one of its subcontractors if that subcontractor defaults on its statutory obligation to secure payment of workers' compensation benefits. As the statute states, in the case of an employer who is a subcontractor, the contractor *shall* be liable for and *shall* secure payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment. If AJG is determined to be a subcontractor of SMZ then SMZ shall be liable to pay compensation to Claimant. See *Judd v. American Stone Inc.*, CRB No. 09-021, AHD No. 06-328A (June 17, 2009).

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. As it stands, nothing in the transcript of proceedings specifically identifies who the Claimants are or might be, assuming liability is established. On remand, regardless of the outcome on liability, the identity of the proper claimants should be established, by stipulation if possible, but based upon competent record evidence if not. In any event, a determination as to who are the proper claimants under D.C. Code 32-1509(2) is required, in order that they be apprised of the proceedings and that their interests are adequately protected.

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.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE

Administrative Appeals Judge

January 26, 2015

DATE