COMPENSATION REVIEW BOARD

CRB No. 13-015

GUILLERMO BLANCO-REYES,
Claimant–Respondent,

v.

DISTRICT PROPERTIES, LLC and GUARD INSURANCE CO.,
Employer/Carrier-Petitioner

Appeal from a January 25, 2013 Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. 12-493, OWC No. 691626

Craig A. Rosenstein, Esquire, for the Claimant/Respondent
Joseph C. Tarpine, Esquire, for the Employer/Carrier-Petitioner

Before: HENRY W. MCCOY, HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND AND FACTS OF RECORD

This appeal follows the issuance on January 25, 2013 of a Compensation Order from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). In that Order, the Administrative Law Judge (ALJ) awarded Claimant temporary total disability (TTD) benefits from April 22, 2012 to the present and continuing and payment of causally related medical expenses.[1]

[1] *Blanco-Reyes v. District Properties, LLC*, AHD No. 12-493, OWC No. 691626 (January 25, 2013).

The ALJ found that Claimant had been working as a floor finisher/carpenter for Rogalio Juarez, a subcontractor of Employer. As a member of a "finishing team", Claimant did carpentry installing hardwood floors while the other team members performed other jobs including painting, drywall, trim, doors, handrails, kitchen cabinets, locks, knobs, and fixtures. Employer, as the general contractor, provided all the supplies and materials needed by Juarez's crew.

Employer entered into a verbal agreement with Mr. Juarez to perform finishing work on a house in Southeast, D.C. that it was building. Claimant was part of the work crew that Mr. Juarez used to work on the house. Claimant neither speaks nor reads English and is basically illiterate.

The ALJ found that it was not uncommon for Claimant and his co-workers to work seven days a week and more than eight hours per day in order to finish a job. After working on the house Employer was building all week, Juarez's finishing team continued working on Sunday in order to finish the job, although it was generally known that this was a violation of District of Columbia rules and regulations prohibiting construction work on a Sunday without a special permit.

On Sunday, April 22, 2012, Claimant was using a table saw at the house in Southeast, D.C. when he lacerated several fingers on his left hand. Claimant was taken to George Washington University Hospital where he underwent emergency surgery to the ring, middle, and index fingers of his left hand. As he was unable to work, Claimant filed a claim for disability compensation and causally related medical benefits.

At the formal hearing, the issues raised were whether an employee/employer relationship existed under the Act and whether Claimant's injury arose out of and in the course of his employment. In the resulting Compensation Order (CO), the ALJ found in Claimant's favor on both issues and granted the claim for relief. Employer has timely appealed with Claimant filing in opposition.

On appeal, Employer argues the ALJ erred in concluding there was an employee/employer relationship because Claimant was a "casual employee/independent contractor" and because Claimant was illegally working on a Sunday, this required application of the "right to control test" and not the "relative nature of the work test."[2] Employer also argues the ALJ erred in finding the injury arose out of and in the course of employment because a condition and obligation of the employment was not to work on Sundays. Finally, Employer argues that it was inappropriate to apply the "quantum theory" approach to the arising out of analysis and even if it was appropriate, the result reached is not supported by substantial evidence. Claimant counters that the findings and conclusions of the CO are supported by substantial evidence and should be affirmed.

[2] *Memorandum of Points and Authorities in Support of Employer/Administrator's Application for Review*, p. 9.

ANALYSIS

The scope of review by the Compensation Review Board (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 Compensation Order (CO) are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.[3] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 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*, 834 A.2d at 885.

Employer first argues that the ALJ erred in finding that an employee/employer relationship existed. Specifically, Employer asserts that the evidence and findings made by the ALJ do not support the establishment of that relationship under the "relative nature of the work test" and as Claimant was working illegally on a Sunday, this required application of the "right to control test" as opposed to relative nature of the work.[4] We disagree.

In assessing whether an employee/employer relationship exists under the Act, it is now generally accepted that the "relative nature of the work" test is to be applied.[5] The elements of the test are as follows:

> The relative nature of the work test has two parts: first, the character of claimant's work or business; and second, the relationship of claimant's work or business to the purported employer's business… With reference to the character of claimant's work or business, the factors are: (a) the degree of skill involved; (b) the degree to which it is a separate calling or business; and (c) the extent to which it can be expected to carry its own accident burden. The relationship of the claimant's work or business to the purported employer's business requires consideration of: (a) the extent to which claimant's work is a regular part of the employer's regular work; (b) whether claimant's work is continuous or intermittent; and (c) whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of particular job.[6]

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[3] "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. DOES*, 834 A.2d 882 (D.C. 2003).

[4] We note that during his opening and closing statements at the formal hearing, Employer's counsel was of the expressed opinion that had Claimant been injured during normal business hours and doing authorized work, the injury he incurred would be compensable and Employer would have paid benefits. Hearing Transcript (HT), p. 19 and p. 117.

[5] *Munson v. Hardy & Son Trucking Company, Inc*., Dir. Dkt. No. 97-23, OHA No. 96-176, OWC No. 029805 (April 19, 1999).

[6] *Munson v. Hardy & Son Trucking Company, Inc*., OHA No. 96-176, OWC No. 029805 (March 17, 2000), p. 2.

In addressing the first part of the test, the character of the claimant's work or business, the ALJ reasoned:

> There is no evidence in the instant record that the instant claimant possessed any specific skill which caused him to be in demand for his skill alone, nor has there been any testimony by claimant or Seek (sic) that Juarez and his crew had a specialized business or separate calling as electrical or plumbing work. To the contrary, Seek (sic) testified that Juarez and his group performed numerous jobs of the finishing work such as painting, carpentry, floor installation, bathroom fixture and cabinet door knob installation. Lastly, while based on the testimony of record, Juarez should be expected to carry its own accident burden, the unfortunate fact is that he did not, yet employer continues to subcontract work to Juarez.[7]

Employer argues that the ALJ erred in addressing the character of Claimant's work in that Claimant testified to specialized training in woodworking, that this was a specialized calling, and that Juarez, as a subcontractor, was expected to carry workers' compensation insurance. Again, we disagree.

In pointing to Claimant's testimony that he has training in woodworking and laying floors, Employer has made the leap to classify a skill gained through repetition as a specialized skill that makes Claimant less likely to be an employee. Employer makes the same leap that the record evidence shows the work performed by Juarez's crew was a separate calling and business from that of general contracting.

The interpretative analysis Employer would have us place on Claimant's skill level and the overall work performed by the other members of Juarez's crew is too narrow and restrictive to be a proper application of the first part of the relative nature of the work test when applied to the facts of this case. We agree with the ALJ's assessment in that there is no evidence in the record that Claimant's skill in laying hardwood floors caused him to be in demand for that skill alone. As with the members in the crew with training in installing kitchen cabinets, locks, doors, and other finishing work, Claimant's skill contributed to the crew skill-set that played a part in Employer engaging Juarez as a subcontractor to provide finishing work. In addition, the evidence supports the ALJ's determination that Juarez's finishing team performed this type of work on a regular basis for Employer, making it part of Employer's housing construction business.

As to the extent to which Claimant's work can be expected to carry its own accident burden, Employer acknowledges that subcontractors are expected to carry their own workers' compensation insurance. Under the Act, a general contractor may be deemed the employer of a person working for one of its subcontractors if that subcontractor defaults on its obligation to secure payment of workers' compensation benefits. D.C. Code § 32-1503(c) states:

[7] CO, p. 5.

> 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.

In the instant case, Claimant's skill at laying hardwood flooring is not so specialized that he would be expected to carry his own accident burden. Rather, the subcontractor, Juarez, had that obligation, which Employer does not dispute. As Juarez had this obligation but failed to meet it, it was left to Employer under the Act to carry the accident burden for Claimant. The ALJ's determination that Claimant met the first part of the nature of the work test is supported by substantial evidence in the record.

Moving to the second part of the test, Employer argues that no evidence was presented to show installing hardwood flooring was a regular part of its business, that the nature of Claimant's work was intermittent, and that Claimant was only hired for this particular job. We find no merit in these arguments.

The ALJ determined that the work Claimant performed was a regular part of Employer's housing construction business; that it was more continuous than intermittent; and, that but for the work injury, Claimant would have been employed on subsequent construction projects. As the ALJ noted, Claimant testified that over the past year he had worked on other houses Employer had under construction, and that he was part of Juarez's crew on those job-sites. The record evidence supports the ALJ's conclusion that Claimant has met the second part of the relative nature of the work test and that the evidence preponderates in Claimant's favor that an employee/employer relationship existed at the time of the work injury.

Moving to the second issue raised at the formal hearing, Employer argues that the ALJ erred in determining that the injury incurred by Claimant arose out of and in the course of his employment. While Employer does not dispute that the injury occurred on Sunday, April 22, 2012, it contends that the ALJ incorrectly found that the injury derived from a risk created by Claimant's employment because a condition and obligation of his employment was to not work on Sundays. As it was generally known that it was illegal to perform construction work in the District on Sunday without a special permit, Employer argues that its subcontractors were under express instructions not to work on Sundays. Therefore, by working on Sunday, Claimant was outside the time and space limits of his employment.[8]

The ALJ commenced her analysis with the proposition that on the issue accidental injury arising out of and in the course of employment, a claimant is entitled to a presumption that such a claim comes within the provisions of the Act, in the absence of evidence to the contrary.[9] The ALJ also acknowledged that it must be established that the claimant was an employee at the time of the injury and the injury arose out of the employment in order for the presumption to come into play.[10]

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[8] *Kolson v. DOES*, 699 A.2d 357, 360 (D.C. 1997).

[9] D.C. Code § 32-1521(1).

[10] *Gross v. DOES*, 826 A.2d 393, 399 (D.C. 2003).

The ALJ proceeded to a determination that the presumption was triggered based on evidence of an injury resulting from a work-related event that had the potential of resulting in or contributing to Claimant's current disability. The burden was then shifted to Employer whose evidence, regarding when construction was permitted on Sundays and the testimony from Employer's general manager, Mr. Seck, that all subcontractors were informed that Sunday work without a special permit was prohibited, was deemed sufficient to rebut the presumption. Accordingly, the presumption dropped out of the case and it became Claimant's burden to show by a preponderance of the evidence that his disability arose out of and in the course of his employment.

The ALJ determined the evidence supported a finding that Claimant's injury resulted from a risk created by his employment such that he established by a preponderance of the evidence that his injury arose out of his employment. However, the ALJ found no persuasive evidence to establish that Claimant's injury occurred within the time and space limits created by the terms of his employment given that the injury occurred on Sunday, and working on Sunday is prohibited in the District.

Instead of allowing the lack of persuasive evidence, on the element of whether the injury occurred in the course of employment, to terminate her analysis, the ALJ decided to apply the quantum theory of work-connection.[11] The ALJ reasoned that the unusual circumstances of this case when viewed in the context of the positional risk test and in the interest of the humanitarian purposes of the Act warranted application of the quantum approach. In doing so, the ALJ reasoned:

> As noted above, the facts presented herein present a strong "arising out of" prong under the quantum test as claimant would not have been at the place of the injury at the time that he was injured "but for" the fact of claimant's employment with Juarez who subcontracted with employer to perform finishing work at the Coll St. SE location.

[11] The "quantum" approach to analyzing the issue of arising out of and in the course of employment derives from Larson's Workers' Compensation Law § 29.01 (2000 Ed.), which includes the following:

> The discussion of the coverage formula, "arising out of and in the course of employment," was opened with the suggestion that, while "course" and "arising" were under separate headings [in the treatise] for convenience, some interplay between the two factors would be observed in various categories discussed [footnote omitted]. …the two tests, in practice, have not been kept in airtight 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.

> In keeping with Larson's treatise, "an injury is said to arise in the course of the employment when it takes place within the time period of the employment at a place where the employee reasonably may be and while the employee is fulfilling work duties or engaged in doing something incidental thereto." § 12 Larson's Workers' Compensation Law (2007). Of the three "course quantities", claimant's weakest element is the time period as claimant's work on a Sunday does not take place within the time period of his employment. However, the evidence establishes that the injury did take place were claimant reasonably was expected to work, (Coll St. SE) and while he was fulfilling work duties, the later (sic) two elements. Accordingly, it is the undersigned's conclusion that claimant has more than a minimal "in the course of" showing and when combined with the strong "arising out of" quantity which easily establishes more than a minimum of work-connection to establish without the benefit of the presumption that his injuries arose out of and in the course of his employment such that he is entitled to the benefits claimed.[12]

We find no fault in the ALJ reasoning and reject Employer's arguments that the quantum approach was unnecessary and not indicted by the facts of the case and even if applicable, the result reached was not supported by substantial evidence. Employer's argument fails to account for the fact that Claimant, as an employee, was obligated to show up for work when directed in order to keep his job, even though he was tired, as he testified, and even if he knew work was prohibited on Sundays. Claimant testified, without contradiction, that Juarez's crew often worked on Sundays. While Employer's general manager testified that he would have told a subcontractor found to be working on a Sunday to cease and go home, there was no evidence that he told Juarez on April 22, 2012, when Claimant was injured, to do so; or, of any specific time in the past when such an order was issued.

CONCLUSION AND ORDER

The ALJ's conclusions that an employee/employer relationship existed and that Claimant's injury arose out of and in the course of his employment are supported by substantial evidence and are in accordance with the law. Accordingly, the January 25, 2013 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

September 20, 2013
DATE

[12] CO, pp. 8-9.