GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB No. 09-021

BRIAN D. JUDD,

Claimant–Petitioner

v.

AMERICAN STONE, INC. / PEERLESS INSURANCE COMPANY

Employer/ Insurer–Respondent

AND

E. G. FARMER TRANSPORT, INC.

UNINSURED EMPLOYER- Cross-Petitioner

Appeal from a Compensation Order of
Administrative Law Judge Joan E. Knight
AHD No. 06-328 A; OWC No. 616222

Joseph T. Trapeni, Jr., Esq., for Claimant-Petitioner/Cross-Respondent (Claimant or Petitioner)

Michael S. Levin, Esq., for American Stone, Inc., and Peerless Insurance Company (Stone or Respondent)

Eugene I. Kane, Jr., Esq., for E. G. Farmer Transport, Inc., (Farmer or Cross-Petitioner)

Before E. COOPER BROWN, *Chief Administrative Appeals Judge,* JEFFREY P. RUSSELL, AND LAWRENCE D. TARR,[1] *Administrative Appeals Judges*

LAWRENCE D. TARR, *Administrative Appeals Judge,* for the Review Panel.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official

[1] Administrative Law Judge Tarr is appointed by the Director of the Department Of Employment Services (DOES) as an Interim Board Member pursuant to DOES Administrative Issuance No. 09-06 (May 20, 2009) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of Employment Services Director's Directive, DOES Administrative Policy Issuance No. 05-01 (February 5, 2005).

OVERVIEW

These appeals follow a Compensation Order and two Errata Orders issued by the Administrative Hearings Division (AHD), Office of Hearings and Adjudication, District of Columbia Department of Employment Services (DOES). The Compensation Order was issued on October 31, 2008. The first Errata Order was issued on November 7, 2008. The second Errata Order was issued on November 24, 2008.

In the October 31, 2008, Compensation Order, the Administrative Law Judge (ALJ) noted that the parties stipulated that the claimant, Brian D. Judd, a resident of Virginia, sustained an injury arising out of and in the course of his employment on March 26, 2007, while working in the District of Columbia. The ALJ found that the claimant was solely employed by E.G. Farmer (Farmer), a Virginia company that was uninsured in the District of Columbia and uninsured in Virginia and that the claimant was not an employee of American Stone, Inc. (American Stone), a Virginia company, when he was injured.The ALJ further held the claimant was working temporarily or intermittently for Farmer when he was injured and that he was continuously temporary totally disabled beginning March 27, 2007.

After the Compensation Order, the ALJ issued two Errata Orders.

In the November 7, 2008, Errata Order, the ALJ corrected the AHD and OWC case numbers.

In the November 24, 2008, Errata Order, the ALJ wrote that Farmer requested "correction" of the October 31, 2008, Compensation Order, to state that Farmer was a subcontractor to American Stone and that American Stone was liable for the compensation awarded.[2] The ALJ acknowledged that the Compensation Order erroneously omitted her finding that Farmer was not a subcontractor to American Stone. The ALJ amended her Findings of Fact in the Compensation Order to this effect and denied the request for correction.

The claimant filed an Application for Review on December 2, 2008. The claimant requests that we reverse the ALJ's finding that Farmer was not American Stone's subcontractor and impose liability on American Stone pursuant to D.C. Official Code §32-1503 (c).[3]

On December 12, 2008, Farmer filed a Cross-Application for Review. Farmer appeals the determination that it was not exempt from the District of Columbia's Workers' Compensation Act (Act) under the provisions of D.C. Official Code §32-1503(1)(a-3).

On December 17, 2008, American Stone filed its opposition to claimant's Application for Review, asserting that it was not timely filed. American Stone further asserted that the ALJ's finding that Farmer was not American Stone's subcontractor is supported by substantial evidence.

As will be discussed below, we find that the claimant's Application for Review was timely filed. We further find that the ALJ's decision that Farmer was not exempt from the Act under the provisions of D.C. Official Code §32-1503(1) (a-3) is supported by substantial evidence.

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[2] The ALJ mistakenly wrote that Farmer requested the correction. The claimant requested the correction.

[3] The claimant attached to, and referenced within, his Application for Review excerpts from a deposition of American Stone's owner, Dino Diana. American Stone objects to this evidence and asks that it be stricken from the record. While Mr. Diana testified at the Formal Hearing, this deposition evidence was not submitted as an exhibit nor introduced during Mr. Diana's testimony. Therefore, it will not be considered. *See*, 7 DCMR §259.2.

However, we must remand this case because we find that the ALJ's decision that Farmer was not American Stone's subcontractor is not supported by substantial evidence.

Analysis

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 Department of Employment Services*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, this Review Panel will uphold a Compensation Order 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.

Turning to the case under review, we first shall discuss Stone's assertion that the claimant's Application for Review was not timely filed.

D.C. Official Code § 32-1522(2A) (A) provides in pertinent part:

> [a] party aggrieved by a compensation order may file an application for review with the [CRB] within 30 days of the issuance of the compensation order

The applicable municipal regulations provide that the filing is effective when received by the Clerk of the CRB, that the Application for Review must be filed within 30 days run from the date shown on the certificate of service of the compensation order or final decision from which appeal is taken, and that the 30 days time limit D.C. Official Code § 32-1522 (2A) (A) refers to calendar days. 7 DCMR §§ 257.1, 258.2, and 299.

The Compensation Order's certificate of service shows it was issued on October 31, 2008. Thirty calendar days from October 31, 2008, was Sunday, November 30, 2008. The 30-day deadline is extended to the next business day if the last day for filing falls on a Saturday, Sunday, or legal holiday. *See, Jackson v. ECAB,* 537 A. 2d 576, 578 (D.C.1988).

Therefore, if the October 31, 2008, Compensation Order is the document against which timeliness is judged, the claimant had to file his Application by Monday December 1, 2008. The claimant's Application for Review was stamped as received on December 2, 2008.

However, the issue that the claimant appealed, whether Farmer was a subcontractor to American Stone, was not decided by the October 31, 2008, Compensation Order.

While the Compensation Order stated in the Background section that Farmer was hired by American Stone and in the Analysis section stated that Farmer's counsel argued that the claimant's injury arose out of and in the course of employment under a subcontract with American Stone, the issue

of whether Farmer was a subcontractor to American Stone was not listed in the Compensation Order's Issues section and, more significantly, was not among the matters decided in the Compensation Order's Conclusions of Law section.

The first time that the ALJ stated her finding with regard to whether Framer was a subcontractor to American Stone was in her November 24, 2008, Errata Order. Because this issue was not decided by the October 31, 2008, Compensation Order but by the November 24. 2008, Errata Order, and thus we find that the time for filing for review began after the ALJ issued the November 24, 2008, Errata Order. Claimant's Application for Review, was filed within 30 days of that Errata Order and is timely.

The claimant alleges that American Stone is liable for the payment of the awarded benefits under D.C. Official Code §32-1503 because Farmer was American Stone's subcontractor. Therefore we next shall address Farmer's assignment of error that it is exempt from the Act. If Farmer is exempt, then the issue of whether Farmer was American Stone's subcontractor is moot.

To help explain our analysis, a brief review of the facts is necessary.

The claimant, a resident of Virginia, worked as tractor trailer driver for Farmer, a transportation company located in Virginia. American Stone, also a Virginia company, is involved in the business of fabricating and installing stonework for office buildings. American Stone entered into a contract with Turner Construction Company (Turner) to provide architectural stone products to Turner.

American Stone hired Farmer as one of its several contract haulers. American Stone precasted stone products at its plant in Virginia and, when needed, hired Farmer to haul the stone to a project Turner was performing for the federal government at the National Defense University in the District of Columbia.

There was no formal written contract between American Stone and Farmer. Farmer was paid on an hourly basis to haul the stone to the job site and to return empty trucks to American Stone's plant. Farmer did hauling for American Stone at this job site for approximately eight months. During that time, Farmer went to the job site between 40 and 60 times. Farmer also worked for others during the time that it hauled for American Stone.

The claimant was injured on March 26, 2007, at the Turner work site in the District of Columbia when he was struck in the eye by a steel hook that he was using to strap down lumber. None of the parties has appealed the ALJ's finding that the claimant has been temporary totally disabled since the accident.

Because this case deals with nonresidents, the ALJ analyzed the facts of this case with reference to D.C. Official Code §32-1503(a-3). That section provides:

> An employee and his employer who are not residents of the District of Columbia and whose contract of hire is entered into in another state shall be exempted from the provisions of this chapter while such employee is temporarily or intermittently within the District of Columbia doing work for such nonresident employer, if such employer has furnished workers' compensation insurance coverage under the workers' compensation or similar laws of such other state, so as to cover such employee's employment while in the District of Columbia. The benefits under this chapter or similar laws of such state shall be the exclusive remedy against such employer for any injury,

whether resulting in death or not, received by such employee while working for such employer in the District of Columbia.

The ALJ held that the evidence was uncontroverted that the claimant and Farmer are not residents of the District of Columbia and that the claimant's contract of employment was entered into in Virginia. The ALJ held that the evidence established the claimant's employment in the District of Columbia was temporary or intermittent. None of the parties have appealed these findings. All of these findings are supported by substantial evidence.

The ALJ also held that Farmer was not exempt because it did not prove the fourth criteria of §32-1503(a-3); that it furnished worker's compensation coverage. Farmer argues that it qualifies for the exemption. In support of its argument, Farmer points to the fact that even though it was not required to carry Virginia workers' compensation insurance since it had less than three employees, it voluntarily paid benefits for approximately one week.

To be entitled to the statutory exemption, Farmer, a Virginia employer must have "furnished workers' compensation insurance" in Virginia. Under the Virginia Workers' Compensation Act, an employer furnishes workers' compensation insurance in one of four ways:

1. Purchase and maintain a workers' compensation policy from a company licensed in Virginia;
2. Apply to the Virginia Workers' Compensation Commission for approval as an independent self-insurer;
3. Become a member of a group self-insurance association licensed by the Virginia State Corporation Commission; or
4. Enter into an agreement with a professional employer organization.

Va. Code Ann. §65.2-801.

There was no evidence that Farmer purchased insurance, was a member of a group association, was certified as a self-insured employer, or had an agreement with a professional employer organization.

Farmer's argument that it met the requirements of §32-1503(a-3) because it is paid some money to the claimant and is willing to voluntarily pay all benefits to which the claimant may be entitled is without merit. Voluntarily paying benefits does not create coverage when there is no policy. Nor does voluntarily paying benefits make Farmer a self-insured employer under the Virginia Act. A company can only be self-insured in Virginia if the Virginia Workers' Compensation Commission certifies a company as such.

Similarly without merit are Farmer's other arguments: that it is exempt under the District's Act because it was not required to have insurance in Virginia, and that the claimant is barred from pursuing his claim because he filed, and later withdrew, a claim in Virginia. There is no authority that supports these arguments.

Having concluded that Farmer is not exempt under the Act, we now address the claimant's argument that the ALJ erred by finding that Farmer was not American Stone's subcontractor.

Whether Farmer is American Stone's subcontractor has significance because Farmer, 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:

> 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.

This obligation is the only exception to the rule that there is no statutory employer provision in the Act:

> Unlike Virginia, the District's workers' compensation scheme has no statutory obligation provision extending liability (and corresponding tort immunity) up the ladder of subcontractors to the owner or general contractor. Under the District's scheme, an "employer" is only the entity with whom the employee is in a direct employment relationship. *Dominion Caisson v. Clark,* 614 A. 2d 529,531 (D.C. 1992).
>
> The only exception to this rule arises from the "secondary liability (of a general contractor) to secure payment of workers' compensation when a subcontractor has not secured payment." A general contractor may be "deemed" the employer of a person who is not its employee, hence immune from suit, "only when the actual employer--the subcontractor—defaults on its statutory obligation, and the general steps in to secure payment." (citations omitted) *Id.* at fn.6.

If Farmer is American Stone's subcontractor then American Stone is liable for payment of all workers' compensation benefits since Farmer has not secured such payments.

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 statues 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).

The contract between American Stone and Turner (CE 2) stated that American Stone:

> shall provide all labor, material, equipment, supervision, engineering, hoisting, tools, scaffolding, taxes, safety, quality control, clean-up, burden, overhead, profit, fringe benefit, insurance, etc. necessary to provide the Architectural Precast Concrete.

This contract also stated that "the term 'provide' shall mean "furnish and install."

Thus, under the contract with Turner, American Stone contracted to furnish material, *i.e.* stone products. Utilizing the words of the definition, Farmer was awarded that part of American Stone's contract when American Stone hired it to deliver material to Turner.

Moreover, American Stone's President Dino Diana testified that "at some point" American Stone's employees made the deliveries of the stone products. Mr. Diana further testified that American Stone would supplement its deliverers with outside haulers when needed. (Transcript at 89).

Therefore, under both analyses, Black's and Larson's, Farmer was American Stone's subcontractor.

There also is no merit to American Stone's arguments that Farmer was not a subcontractor because it did not have a written contract with American Stone or that Farmer could not be a subcontractor because it did not have an exclusive contract to deliver the stone products. We know of no authority, and American Stone has not cited any, that has held there must be a written contract, or an exclusive contract, to establish a subcontractor-general contractor relationship.

The ALJ apparently relied on Mr. Diana's testimony that Farmer was a vendor not a subcontractor to reach her conclusion that Farmer was not a subcontractor. *See*, Compensation Order at p.5. While the parties' view of their legal statuses is relevant, it is not conclusive and is not dispositive when other evidence compels a different result.

For these reasons, the ALJ's determination that Farmer was not American Stone's subcontractor is not supported by substantial evidence or in accordance with law.

Therefore, American Stone is liable for the payment of workers' compensation benefits pursuant to D.C. Official Code §32-1503 (c).

CONCLUSION

For the foregoing reasons, we find that the claimant's Application for Review was timely filed, that substantial evidence supports the ALJ's finding that Farmer was not exempt under Code §32-1503(a-3) and that substantial evidence does not support the determination that Farmer was not American Stone's subcontractor.

ORDER

The Compensation Order of October 31, 2008, as amended by Errata Order of November 24, 2008, is AFFIRMED in part and VACATED in part, consistent with the foregoing discussion. This matter is REMANDED to AHD for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

Lawrence D. Tarr

LAWRENCE D. TARR
Administrative Appeals Judge

June 17, 2009

DATE