

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. 05-266

JERRY SHREWSBURY, JR.,

Claimant – Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
OHA No. 05-206, OWC No. 575751

David M. Schloss, Esquire for the Respondent

Sarah O. Rollman, Esquire, for the Petitioner

Before LINDA F. JORY, SHARMAN J. MONROE and FLOYD LEWIS, *Administrative Appeals Judges.*

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 32-1521.01 and § 32-1522 (2004), 7 DCMR § 230 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

Pursuant to 7 D.C.M.R § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on August 31, 2005, the Administrative Law Judge (ALJ), concluded Claimant – Respondent's (Respondent) income earned while employed by the Self-Insured Employer-Petitioner (Petitioner) is “combinable in computing the temporary total disability benefits under the Act” with his income with Telecom Depot where he worked concurrently as an electrician.

As grounds for this appeal, Petitioner alleges the Administrative Law Judge's finding of an average weekly wage of \$720 for work performed for Telecom Depot is not supported by substantial evidence and the decision is arbitrary, capricious, unsupported by substantial evidence and not in accordance with the law. Respondent has not filed an opposition to Petitioner's Application for Review.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. D.C. Official Code § 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 Int'l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this panel are bound to 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.

The procedural history of the formal hearing or lack thereof bears summarizing. According to the Compensation Order and Formal Hearing transcript, the parties appeared before the ALJ for a Formal Hearing as scheduled by the AHD May 19, 2005. The formal hearing convened with both parties present. The parties jointly requested to have the sole issue presented resolved based upon their written briefs and documentary evidence as opposed to an evidentiary hearing record. The parties agreed on the record that concurrent income calculation defined by the act as “wage stacking” is proper in the instant matter but disagreed as to what income from Respondent's alternative employment should be combined with the income earned with Petitioner. The Parties advised the ALJ that they would attempt to obtain additional documentation and to reach an

agreement on the correct combined average weekly or submit the additional documentation and brief the issue for the ALJ. The ALJ granted the parties joint request and provided the parties 2 weeks in which to submit their written submissions and evidence. The parties were advised that the record would close on June 2, 2005

According to the Compensation Order, neither party submitted any written briefs. The ALJ, however, included in a footnote that Petitioner's counsel was contacted regarding the status of its brief and the record closing date was extended, *sua sponte* by the ALJ until June 18, 2005. Neither party, however, filed any written brief or submitted additional evidence. The ALJ included in a footnote that on July 21, 2005, Respondent filed a request for a formal hearing, however, the ALJ found Respondent had not advanced "good cause". Although the ALJ stated [Petitioner] did not oppose [Respondent's] request, the ALJ did not reconvene the Formal Hearing and issued the Compensation Order based on the exhibits submitted at the May 19, 2005 hearing.

The Panel notes that although the parties indicated at the May 19, 2005 hearing, that they agreed wage stacking was appropriate, the ALJ entered into a discussion on that issue and concluded that Respondent's income from his second job was "combineable" and granted claimant's claim for relief.

Petitioner is not opposing the ALJ's conclusion, nor has the ALJ's decision not to hold a Formal Hearing been challenged by either party. Instead, Petitioner asserts that the ALJ's finding of an Average Weekly Wage of \$720.00 is not supported by substantial evidence. In support thereof, Petitioner incorrectly asserts that Respondent testified at the formal hearing that he worked approximately 24 hours per week for Telecom Depot and earned \$30.00 per hour. Petitioner asserts also that "actual payroll records were submitted from Telecom Depot" and that those records show that in the twenty-six week period immediately preceding the work accident, Respondent earned \$8,977.08 which equates to an average weekly wage of \$345.28, less than half of the amount found by the ALJ. Lastly, Petitioner asserts that Respondent's testimony is not sufficient to support the AWW finding and further asserts that Respondent's 1099 for 2001 shows he earned \$27,994.08 and since he missed five weeks of work during calendar year 2001 and based on his own testimony his wages should have been \$33,840.00 (24 x \$30 x (52 - 5)).

Contrary to Petitioner's assertion, a full evidentiary hearing was *not* held by the ALJ. *See* Self-Insured Employer's Memorandum in Support of Its Application for Review of Compensation Order at 2. Thus, any testimony relied upon by the ALJ was Respondent's testimony given at his deposition on March 14, 2005. *See* RE 3. Review of the deposition transcript reveals Respondent testified that he earned \$30.00 per hour and that most of the time he worked 6 hours for Telecom after he worked a full day for Petitioner. Nevertheless, Petitioner testified that his hours varied. If in fact he worked 5 days a week for 6 hours per day, he would work 30 hours a week as opposed to the 24 found by the ALJ. Accordingly, Respondent's testimony does not support the ALJ's finding that he worked 24 hours a week and earned \$30.00 per hour or an average weekly wage of \$720.00.

The actual reasons for the ALJ's denial to provide a formal hearing are not known nor does the panel know why good cause must be shown to have a formal hearing when an application for

formal hearing had been accepted by AHD. Nevertheless, the Panel notes no reason why Petitioner did not also request a formal hearing to take testimony before the ALJ as to the earnings for Telecom. Both parties however have submitted a letter from Telecom's president, Stanley Olenik into evidence wherein Mr. Olenik states, "Mr. Shrewsbury works a varying schedule and averages 24 hours a week. Mr. Shrewsbury bills at the rate of \$30 per hour, which is \$720.00 per week" CE 9; RE 2.

Despite Petitioner's insistence on appeal that Respondent has in his possession, payroll records from Telecom Depot which show in the twenty-six week period immediately preceding the work accident, Respondent earned \$8,977.08, the record created at the AHD level does not include such records. Actual payroll records were not submitted into the record by either Petitioner or Respondent. Although Petitioner had the opportunity to submit payroll records either at the first formal hearing with its written brief or at a formal hearing, Petitioner has failed to do so.

The ALJ accordingly based his finding that Respondent earned \$720.00 per week while working for Telecom on both Respondent's deposition testimony and the written evidence, specifically the letter sent from Telecom's president stating the same, which it is noted was placed into the record by both parties. Accordingly the Panel must conclude the finding made by the ALJ that claimant's weekly wages in his concurrent employment "would amount to \$720.00" is supported by substantial evidence in the record and the Panel will not disturb this finding.

CONCLUSION

The ALJ's conclusion that Respondent's weekly wage in his concurrent employment "would amount to \$720.00" is supported by substantial evidence in the record and the Compensation Order is accordingly in accordance with the law.

ORDER

The Compensation Order issued on August 31, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

February 2, 2006

DATE