

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

**Labor Standards Bureau**

**Office of Hearings and Adjudication  
COMPENSATION REVIEW BOARD**



**(202) 671-1394-Voice**

**(202) 673-6402-Fax**

**CRB. No. 07-107**

**LAVERN HICKS,**

**Claimant–Petitioner,**

**v.**

**DITTUS COMMUNICATIONS AND W. R. BERKLEY MID-ATLANTIC GROUP,**

**Employer–Respondent.**

Appeal from a Compensation Order on Remand of  
Administrative Law Judge Terri Thompson Mallett  
AHD No. 06-116, OWC No. Unknown

Eric May, Esquire, for the Petitioner

Howard P. Miller, Esquire, for the Respondent

Before, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges* and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

LINDA F. JORY, *Administrative Appeals Judge*, for the majority of Compensation Review Panel:  
JEFFREY P. RUSSELL, *Administrative Appeals Judges*, concurring.

**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, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).<sup>1</sup>

---

<sup>1</sup>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 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive

## BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand 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 April 30, 2007, the Administrative Law Judge (ALJ) denied Claimant-Petitioner's (Petitioner) claim for temporary total disability benefits as the ALJ determined Petitioner presented insufficient evidence of an injury that arose out of and in the course of her employment. Petitioner now seeks review of that Compensation Order on Remand.

The Compensation Order on Remand followed a Decision and Remand Order issued by the Compensation Review Board (the CRB) on April 25, 2007. In that Decision and Remand Order, the CRB remanded the matter to AHD for further proceedings, if necessary, further findings of fact and conclusions of law regarding the recognized exceptions to this jurisdiction's "off premises" cases utilizing the quantum analysis as set forth in *Lewis v. Finegan & Henderson*, CRB No. 04-50, AHD No. 04-130, OWC NO. 590009 (February 16, 2006)(*Lewis*).

As grounds for this appeal, Petitioner asserts the ALJ did not consider a well-recognized exception to the coming and going rule<sup>2</sup> recently endorsed by the Compensation Review Board in *Lewis*, specifically, per Petitioner, that there is a notable exception when the injury occurs within the employer's building.

Respondent opposes the appeal, asserting in its Opposition to Application for Review that while Respondent's office was located in the same building as the restaurant where Petitioner's injury occurred, Respondent did not own the building, nor did it have any control or connection with the restaurant as Respondent was one of numerous business in the building at 1150 17<sup>th</sup> Street, NW.

## ANALYSIS

As an initial matter, 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 Int'l. v. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by

---

Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

<sup>2</sup> *See Grayson v. District of Columbia DOES*, 516 A.2d 909 (D.C. 1986).

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 herein, the Panel assigned to review the Compensation Order in *Hicks v. Dittus Communications*, CRB No. 07-50, AHD No. 06-116, OWC No. Unknown (April 25, 2007) remanded the matter to the ALJ only to analyze this matter under the “quantum” approach suggested by Arthur Larson in his treatise, *Workers’ Compensation Law*, §28.01 (2000 Ed.) and adopted in *Lewis, supra*. The instant Panel acknowledges that the quantum approach is not often applied as it is best suited for cases where the exception to the existing “coming and going rule” is explored.

At this juncture, this panel finds it necessary to distinguish what factors are analyzed when considering whether an injury “arises out of” one’s employment and whether the injury arose in the “course of employment” prior to applying the quantum approach to both elements. Although *Lewis* infers otherwise<sup>3</sup>, the positional risk standard as set forth by Larson and the slightly varied standard suggested by the Director in *Grayson*, was accepted by the Court of Appeals. See *Grayson, supra* at 916. In affirming the Directors’ decision the Court stated that the positional risk standard is similar to a “but for” test and stated, “An injury *arises out of* the employment if it would not have occurred but for the fact that conditions and obligations of the employment placed claimant in a position where he was injured”.<sup>1</sup> *Larson, supra*; *Grayson, supra* at 913.(emphasis added) .

In keeping with Larson’s treatise “an injury is said to arise *in the course* of the employment when it takes place within the 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).

Pursuant to Larson’s quantum theory of connection, if the “course quantity” is very small but the “arising quantity” is large, the quantum will add up to necessary minimum and vice, versa, but if both “course” and “arising” quantities are small, the minimum quantum will not be met.

While the ALJ may not have set up her analysis with regard to the course quantity, i.e., outlining the three elements outlined by Larson, the ALJ found that Petitioner was within the time period of her employment (Petitioner was on a paid lunch break). The ALJ further determined, however, that Petitioner was not at a place where she should reasonably have been while fulfilling work duties, the later two elements. Accordingly, the ALJ properly found a minimal “course” showing.

On the “arising out of” showing, the ALJ did not repeat the positional risk test verbatim. The ALJ rejected Petitioner’s attempt to meet the “arising out of” quantity by asserting that “being in the [Respondent’s] building is sufficient for Petitioner to prevail and the fact that Petitioner did not return through the main entrance to the office is of no practical importance in this matter” *Hicks* on Remand at 6. The ALJ stated that despite Petitioner’s assertions, the law has defined an employer’s premises, and such definition does not include an area over which an employer has no control, such as a public roadway or a public restaurant. *Citing Grayson, supra*.

---

<sup>3</sup> The Panel in *Lewis* found the ALJ applied the “positional risk” aspect of the quantum analysis and presented a “very strong ‘course of’ showing”. *Lewis, supra* at 4.

With regard to the comments included in the attached concurrence, this writer must respectfully note that included in either the findings of fact of *Hicks 1*, incorporated by the Compensation Order on Remand, or *Hicks 2* are the ALJ's finding that Petitioner and the person who she was told would be her future supervisor each paid for their own lunch; Petitioner was not directed to take this person to lunch; that he was not yet employed by Respondent; but that she wanted to get to know him. The Panel must agree that the ALJ could properly conclude that she was not obligated to either take this person to lunch with her; to travel into another restaurant after lunch; or that the lunch would have benefited Respondent.(i.e., Respondent certainly would not have benefited from the lunch if the two had an unpleasant conversation during lunch).

With regard to the workplace the ALJ explained in a footnote:

The workplace includes locations where 'employer has some right of passage, as in the case of common stairs, elevators, lobbies, vestibules . . . or passage ways through which the employer has something equivalent to an easement, *citing Lewis, supra* CRB No. 04-50, (quoting Larsons §13.04[3]). There is insufficient evidence for this trier of fact to infer that employer had an easement through the California Grill.

Accordingly, the ALJ gave the "arising out of" quantity a minimal amount, therefore, the minimum quantity of the quantum analysis was not met. We agree with the ALJ's assessment and application of the law with regard to the classification of the California Grill, the restaurant located in the building, at 1150 17<sup>th</sup> Street, NW. While it is clear Respondent's operations were located in this building there is no evidence that the entire building was owned by Respondent or as properly stated by the ALJ, that there was an easement through the California Grill. Thus, this Panel concludes that the ALJ's conclusions are supported by substantial evidence in the record. In so concluding, the Panel does not agree with Petitioner's assertion that he meets an exception to the "coming and going rule" because the injury occurred in employer's building. Accordingly, the ALJ was not in error.

#### CONCLUSION

The Compensation Order on Remand of April 30, 2007 is supported by substantial evidence in the record and is in accordance with the law.

JEFFREY P. RUSSELL, *concurring*:

I reluctantly concur, but am concerned that this decision risks creating confusion in the law. My concurrence is due to the apparent steadfastness with which the ALJ maintains that Petitioner's presence in the California Grill was of no use or benefit to her employer, and as the finder of fact, the ALJ's determination in this regard must be credited.

My reluctance is due to the persistence of the ALJ in analyzing the presence or absence of Petitioner in the California Grill by reference to whether Petitioner was "obligated" or required to be there, as

opposed to whether her presence in the California Grill was of some benefit to the employer. It is not the possibility of recrimination for declining the invitation to lunch, or the request to familiarize her future supervisor with the neighborhood, including eating establishments in proximity to the work place, that is at issue. Rather, the proper inquiry is whether the excursion into the California Grill was of some benefit to the employer generally. I certainly can not fathom how it could have been of benefit to Petitioner, given that the actual eating part of the lunch trip, at the Daily Grill, had concluded, and there was no personal reason, personal that is to Petitioner, for her to have been in the California Grill, and but for the request of the person selected by the employer to become Petitioner's boss to be shown local eateries in proximity to the office, she would not have been.

Nonetheless, whether Petitioner's conduct in this case was of benefit to Respondent is a factual matter about which the ALJ is apparently convinced, based upon the record evidence, and the evidence appears to be as the ALJ described it. Thus, I concur in the result.

**ORDER**

The Compensation Order of April 30, 2007 is hereby affirmed.

FOR THE COMPENSATION REVIEW BOARD:

---

LINDA F. JORY  
Administrative Appeals Judge

\_\_\_\_\_  
June 28, 2007  
DATE