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 (Dir. Dkt.) No. 07-04

HENRY LOPEZ,

Claimant - Petitioner

v.

D. C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT,

Employer - Respondent

Appeal from a Compensation Order of
Administrative Law Judge Robert R. Middleton
OHA No. PBL 04-015, DCP No. LT5-EMS004227

Henry Lopez, *pro se*[1]

Pamela Smith, Esquire, for the Respondent

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

LINDA F. JORY, *Acting 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 §1-623.28, §32-1521.01, 7 DCMR § 118, Department of Employment Services (DOES) Director's Directive, Administrative Policy Issuance 05-01(February 5, 2005).[2]

[1] Although represented by counsel at the Formal Hearing, claimant's appeal was not filed with the representation of any legal counsel.

[2] 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, 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 D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of

BACKGROUND

This appeal follows the issuance of a Final Compensation Order by the Assistant Director for Labor Standards of DOES, approving and adopting a Recommended Compensation Order from the former Office of Hearings and Adjudication (OHA). In that Recommended Compensation Order, (the Compensation Order) which was filed on August 13, 2004, the Administrative Law Judge (ALJ), denied Claimant-Petitioner's request for an increase in his disability compensation rated based upon his reliance on D.C. Code §§1-623,14(a)(1), 623.14(e)(1) and his conclusion that overtime pay is not to be considered when calculating an injured workers' computation of pay. At the time of the Formal Hearing, Claimant-Petitioner, an EMS or paramedic evaluator, was receiving temporary total disability benefits from the third party administrator for an injury he sustained to his lower back while in the course of his employment on January 1, 2003.

Claimant-Petitioner filed an Application for Review (AFR) and Memorandum of Points and Authorities in Support of the Application for Review. As grounds for this appeal, Claimant – Petitioner alleges as error that the ALJ's determination that claimant was not entitled to augment his disability compensation rate via the consideration of, what he identified as, mandatory overtime hours worked, as a part of his normal tour of duty, was not in accordance with the Act.

Employer – Respondent filed no response to the AFR, and has not participated in this appeal.

ANALYSIS

As an initial matter, the scope of review by the 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. *See* D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.01, *et seq*., at §1-623.28 (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. App. 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.

Turning to the case under review herein, Claimant-Petitioner asserts the ALJ erred in relying solely on §1-623.14(e)(1) (overtime pay is not included in the calculation of the disability compensation rate) and rejecting his arguments that the requirements of the emergency field are unique; and that overtime if mandatory should be treated differently than regular overtime.

1978, as amended, D.C. Official Code §1-623.1 *et seq*., 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.

Claimant-Petitioner also asserts the ALJ's reliance on §1-623.14(e)(1) results in an outcome that is contrary to another provision of the Act, specifically §1-623.14(d)(3).

D. C. Code §1-623.14(d) begins with a subtitle "Average annual earnings are determined as follows" while §1-623.14(d)(3) provides in pertinent part:

> If either of the foregoing methods of determining the average annual earnings cannot be applied reasonable and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he or she was working at the time of the injury having regard to the previous earnings of the employee in District of Columbia government employment, and of other employees of the District of Columbia government in the same or most similar class working in the same or most similar employment in the same or neighboring location . . .

After a thorough review of Claimant-Petitioner's unopposed arguments on appeal, the pertinent provisions of the Act and the record created at the AHD level, the Board agrees generally with all of claimant's three arguments.

The Act, specifically §1-623.14(a)(1), defines overtime pay as "pay for hours of service in excess of a statutory or other basic workweek or other basic unit of work time, as observed by the employing establishment". Claimant presented the testimony of Ms. Hattie Thompkins, D.C. Fire EMS captain and commander of Platoon 1. Captain Thompkins testified that she works the same schedule as the paramedics she supervises and in fact: "Everybody works the same schedule. All employees that work in the field work the same schedule". She testified that the schedule everyone works is:

> . . . two days, two nights, three pay periods. It's 48 hours, which is built in overtime. The other time that we work, it's 72 hours, and if we don't work overtime, we only get paid for 72 hours that pay period".

Hearing Transcript at 40. Captain Thompkins explained that in a basic workweek they work 48 hours or two day shifts and two night shift 12 hours per shift on 4 consecutive days. After that they have four days off and then they are back on for two days and two night shifts. For three pay periods they work 48 hours per week consecutively and receive 8 hours of built in overtime per week but the fourth pay period they only get paid for 72 hours.

The Board takes note that the reason the 4th pay period results in no overtime pay is because of the way in which the pay periods end. While an employee may be working 4 consecutive days, the 4 days may not end up in the same pay period, therefore, since an employee does not end up working more than 80 hours during the 4th pay period, his hours are paid at regular wages for that period.

The details of claimant's workweek are obviously not the crux of the claimant's appeal, nor did Captain Thompkin's description of the tour of duty contradict claimant's version. However, Captain's Thompkins' explanation along with her testimony that the schedule as described above

does not differ for any employee nor does any employee have any choice in how the schedule is administered does support claimant's argument that the hours worked are mandatory and part of claimant's basic workweek "as observed by the employing establishment" pursuant to §1-623.14(e)(1).

In his only reference to Captain Thompkins' testimony in the Compensation Order the ALJ accepted her affirmance that employer-respondent's rotating 12 hour shift system has been in place all 29 years of her years with the agency and that all of the EMS workers were considered to be essential employees. Thus, while the rate of pay for 8 hours during some weeks is paid at the standard time and a half rate, the pay claimant receives is not in excess of any other EMT's basic unit of work time as set forth by the employer. Therefore, the mere labeling of the wages as overtime should not automatically bring claimant's wages within the "overtime pay" exclusion. This is a basic fairness concept which actually overlaps with claimant's third argument that excluding this amount of claimant's wages results in a compensation rate that does not "reasonably represents the annual earning capacity of the injured employee" pursuant to §1-624.14(d)(3).

Moreover, the Act's intent, through D.C. Code §1-624.14(d)(3), of reasonably reflecting the annual earning capacity of the injured employee when computing an injured worker's compensation rate, is consistent with the guidelines set forth by Professor Arthur Larson, in his authoritative work on workers' compensation law. *See* Larson, The Law of Workers' Compensation §93.01 "The Concept of Average Weekly Wage". Professor Larson includes in his Scope of Chapter 93 entitled Calculation of Wage Basis and Benefits:

> The computation of average weekly wage is frequently based upon actual wages during the preceding year, if claimant's employment has been substantially continuous and upon the wages of employees in similar work if it is not. Since the entire objective is to arrive at as fair an estimate as possible of claimant's future earning capacity, a claimant who has made only part-time earnings should have his or her wage basis figured on part-time wages only if the employment itself or his or her relation to it is inherently a part-time one and likely to remain so; otherwise the claimant's earnings should be converted to a full-time basis.

Professor Larson stresses that the fairness and reasonableness test can be applied by answering one question, "Does it produce an honest approximation of claimant's probable future earning capacity? The evidence of record, particularly Captain Thompkin's testimony, establishes that claimant was not receiving pay in excess of an EMS employee's "basic workweek or other basic unit of work time as observed by the employing establishment". Moreover, there is no evidence that any of employer's EMS workers, particularly this claimant, will not continue to work the same shift that the EMS workers have worked for at least the last 29 years.

The Board concludes that excluding the additional pay which every EMS worker receives as a result of working their regular tour of duty of rotating 12 hour shifts does not produce an honest approximation of claimant's probable future earning capacity. The Board is further of the opinion that by carving out an exception to §1-623.14(e)(1) for employees such as EMS workers who work rotating 12-hour shifts, the calculation, with the excess pay included, will produce a

sum that reasonably represents claimant-petitioner's annual earning capacity. Based on the foregoing analysis, the Board is of the opinion that the ALJ's conclusions based upon the evidence of record does not comport with the above quoted statutory scheme.

CONCLUSION

The Compensation Order of August 20, 2004, which denied Claimant-Petitioner an adjustment to his compensation based on his actual annual earnings as an EMS evaluator is not in accordance with the law.

ORDER

The Compensation Order of August 13, 2004 is hereby REVERSED. Claimant's claim for relief is hereby GRANTED.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Acting Administrative Appeals Judge

March 25, 2005