

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

**MURIEL BOWSER**  
MAYOR



**DEBORAH A. CARROLL**  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-122**

**PAUL McDONALD,**  
**Claimant-Respondent,**

**v.**

**TOMPKINS MID-AMERICAN and**  
**LIBERTY MUTUAL INSURANCE CO., et al.,**  
**Employer/Insurer-Petitioner.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 APR 28 AM 8 45

Appeal from a September 30, 2014 Compensation Order by  
Administrative Law Judge Gerald D. Roberson  
AHD No. 14-215, OWC No. 699998

Allen J. Lowe for Claimant  
Joseph F. Giordano for Employer Mid-American Elevator  
Christopher R. Costabile for Tompkins Mid-American Joint Venture  
Sarah M. Burton for Barbee-Curran Elevator Company

Before MELISSA LIN JONES, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

On September 11, 2012, Mr. Paul McDonald injured his left shoulder while working as a vertical transportation mechanic. Mr. McDonald never worked for Mid-Atlantic Elevator, but Mid-Atlantic Elevator began paying Mr. McDonald workers' compensation benefits based upon an administrative error.

A dispute arose over the identity of Mr. McDonald's employer, and on August 25, 2014, Barbee-Curran Elevator Company, Mid-American Elevator, Mid-Atlantic Elevator, and Tompkins Mid-American Joint Venture participated in a formal hearing before an administrative law judge ("ALJ"). Mr. McDonald, Barbee-Curran Elevator Company, Mid-American Elevator, Mid-

Atlantic Elevator, and Tompkins Mid-American Joint Venture were all represented by counsel at the formal hearing, and although only Mid-American Elevator is included in the caption of the resulting compensation order, it appears the truncated caption was adopted as a space saving measure, not as an indication that Mid-American Elevator was the sole defendant.

In a Compensation Order dated September 30, 2014, the ALJ ruled Mid-American Elevator was Mr. McDonald's employer. *McDonald v. Tompkins Mid-American*, AHD No. 14-215, OWC No. 699998 (September 30, 2014). Mid-American Elevator appeals that ruling to the Compensation Review Board ("CRB"); no other issue has been appealed.

Mid-American Elevator raises several purported errors in its application for review:

1. Judge Roberson's legally erroneous application of the "relative nature of the work" test rather than the correct "right to control" test.
2. The finding that the claimant had an employer-employee relationship with Mid-American Elevator on the date of accident.
3. Judge Roberson's failure to make complete findings of fact with respect to Jack Litschewski's testimony.
4. Judge Roberson's failure to make findings of fact or conclusions of law on the contested issue of whether the Tompkins/Mid-American Joint Venture was the proper employer.
5. Judge Roberson's failure to make findings of fact or conclusions of law on the contested issue of whether Barbee Curran Elevator was the proper employer.

Mid-American Elevator and Strategic Comp's Application for Review, unnumbered page 2. However, Mid-American Elevator only briefed one issue, namely "Judge Roberson used the incorrect legal standard when he applied the 'relative nature of the work' test in addressing the issue of who was the claimant's employer." Memorandum of Points and Authorities in Support of Mid-American Elevator and Strategic Comp's Application for Review, p. 6. Because the only contested issue was identification of Mr. McDonald's employer, Mid-American Elevator asserts the "right to control" test, not the "relative nature of the work" test, applies. Mid-American Elevator requests the CRB remand the matter for application of the "right to control" test.

Mid-American Joint Venture asserts the ALJ's decision "should be affirmed by application of the plain meaning of the definition of 'employee' to the facts of the case." Memorandum of Points and Authorities in Support of Opposition to Application for Review, unnumbered p. 3. Whether applying the "relative nature of the work" test or the "right to control" test, Mid-American Joint Venture asserts the CRB should affirm the Compensation Order.

Mr. McDonald argues the ALJ applied the proper test to determine his employer; Mr. McDonald also argues that if the "right to control" test is the proper test, it was not necessary to apply that test under the facts of this case. In the alternative, if the ALJ did not apply the proper test, Mr.

McDonald requests the matter be remanded without vacating the Compensation Order because doing so would result in his not receiving benefits.

Barbee-Curran Elevator Company asserts that under the “relative nature of the work” test or under the “right to control” test, Mr. McDonald is an employee of Mid-American Elevator. Barbee-Curran Elevator requests the CRB affirm the Compensation Order.

#### ISSUE ON APPEAL

Is the ALJ’s ruling that Mid-American Elevator was Mr. McDonald’s employer supported by substantial evidence and in accordance with the law?

#### ANALYSIS<sup>1</sup>

With exceptions, the Act defines “employee” as “every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, in the District of Columbia.” D.C. Code § 32-1501(9). With so little guidance provided by such a broad definition, resort must be made to other sources for assistance in assessing who qualifies as an employee’s employer.

When assessing whether a workers’ compensation claimant is an employee or an independent contractor, the District of Columbia applies the “relative nature of the work test.” *Gross v. DOES*, 826 A.2d 393 (D.C. 2003).

There are two parts to this test. First, one must examine the nature and character of the claimant’s work or business. There are three factors to consider under this first prong: 1) the degree of skill involved; 2) the degree to which it is a separate calling or business; and 3) the extent to which it can be expected to carry its own accident burden. The second prong focuses on the relationship of the claimant’s work to the purported employer’s business and looks at three factors as well: 1) the extent to which claimant’s work is a regular part of the employer’s regular work; 2) whether claimant’s work is continuous or intermittent; and 3) whether the duration is sufficient to amount to the hiring of continuing services, as distinguished from contracting for the completion of a particular job. See generally 3 ARTHUR LARSON & LEX K. LARSON, LARSON WORKERS’ COMPENSATION LAW, 1990 §60.05 (2002).

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<sup>1</sup> The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers’ Compensation Act of 1979, as amended, D.C. Code § 32-1501 *et. seq* (“Act”). Consistent with this standard of review, the CRB is constrained to uphold a compensation order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

*Id.* at 396, nt. 5. Both the nature of the claimant's work as well as the relationship between the claimant's work and the employer's work are considered, and the CRB finds no reason why the "relative nature of the work test" should not apply to assess Mr. McDonald's employment status with Mid-American Elevator; the same factual elements required to determine if a worker is an employee versus an independent contractor apply to the ALJ's analysis of whether Mr. McDonald was Mid-American Elevator's employee.

CONCLUSION AND ORDER

The ALJ's ruling that Mid-American Elevator was Mr. McDonald's employer is supported by substantial evidence and is in accordance with the law. The September 30, 2014 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

  
MELISSA LIN JONES  
*Administrative Appeals Judge*

April 28, 2015  
DATE