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 (Dir. Dkt.) No. 04-91

ALEXANDER ROBERTS,

Claimant–Petitioner,

v.

PSYCHIATRIC INSTITUTE OF WASHINGTON AND LIBERTY MUTUAL INSURANCE GROUP,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 04-293, OWC No. 585919

Frank R. Kearney, Esquire, for the Petitioner

Chanda W. Stepney, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation 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, 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 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 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'

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 30, 2004, the Administrative Law Judge (ALJ) granted Respondent's request that Petitioner's average weekly wage (AWW) for compensation purposes be calculated by including within the calculation weeks, during the 26 weeks preceding the stipulated date of injury, in which Petitioner did not work and did not earn wages. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges that the ALJ's dividing by 26 the total gross wages earned in the 26 weeks preceding the date of injury as the basis for determining Petitioner's AWW was error, where Petitioner did not work and earn wages during some of those weeks, due to a previous injury. Respondent opposes this appeal, asserting that strict application of the 26 weeks identified as the appropriate period for consideration is in accordance with D.C. Code § 32-1511 (4), regardless of whether a given employee did not work those weeks due to a disability.

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 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, Petitioner alleges that the ALJ's decision to divide the gross wages earned in the 26 calendar weeks preceding the stipulated date of injury by 26 in order to determine Petitioner's AWW for compensation purposes is not in accordance with the Act, as interpreted by the Court of Appeals, because of the undisputed fact that Petitioner was injured and earned no wages for significant periods during those 26 weeks. Petitioner cites in support of this argument *George Hyman Construction Co. v. District of Columbia Dep't. of Employment Serv's*., 497 A.2d 493 (D.C. 1985), wherein the Court of Appeals interpreted the predecessor version of the Act's AWW provision (identical to the current version except that at that time the statute mandated a 13 week rather than a 26 week base period) to require a lesser number be used as the divisor where the injured worker had not actually worked the statutorily prescribed number of weeks prior

---

Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

to becoming injured. Petitioner relies further upon the more recent case of *United Parcel Service v. District of Columbia Dep't. of Employment Serv's.*, 834 A.2d 868 (D.C. 2003), in which the Court of Appeals held that where an injured worker had been unable to work due to a strike, the time lost due to the strike should not be included within the calculation of the worker's AWW.

The guiding principal in the interpretation of the AWW provision is that it is supposed to yield the best available computation of the injured worker's earning potential, in order to arrive at the best available computation of what wages an injured worker has lost because of injury. Consequently, where the failure to work significant parts of the prescribed period are due to factors beyond the voluntary control of the worker, and consistent with the Act those circumstances are not a general unavailability of work, including the weeks where no wages were earned in the calculation artificially and inaccurately reduces the AWW, consequently reducing the compensation payable as wage replacement benefits. See, *George Hyman Construction, supra*, at 109, and *United Parcel Service, supra*, at 872. To do otherwise would be inconsistent with the humanitarian purposes of the Act. *Id*.

While the ALJ appears to have been familiar with both these cases (see, Compensation Order, page 4, in which both are cited), he distinguished this case from those because he found that "unlike the claimant in *UPS* [and, presumably in the ALJ's view, *George Hyman Construction*,], the instant claimant received disability benefits of $216 per week during the missed period. Thus, the rationale in *UPS* is unavailing …". Compensation Order, page 5.

This rationale by the ALJ represents a misapplication of the fundamental principal at work in this area. The fact that this claimant received wage replacement benefits during the period that he did not work does not change the fact that he did not earn wages for work, and thus including those weeks did not accurately represent the value of the loss in earnings that his work injury in the instant case caused. Although it is not entirely clear to us how the $216 per week figure was determined (either in connection with arriving at that figure as being what he was paid in connection with the prior disability, or how the ALJ in this case determined that Petitioner was paid that amount), and it is also unclear to us whether the ALJ considered the $216 per week figure to be wages, thus including them in the gross figure that was then divided by 26 weeks, or were omitted altogether, in any case, the use of 26 weeks as the divisor is, in this case, is inconsistent with *George Hyman Construction, supra*, and *United Parcel Service, supra*, and is erroneous as a matter of law.

Accordingly, the Compensation Order must be reversed and remanded to the ALJ for computation of the proper AWW, which computation shall not include either the $216 per week in disability benefits in the calculation of the gross dollar amount from which the AWW is derived, and further the period of time during which Petitioner did not work due to the prior injury shall not included in arriving at the number by which the gross wages in the statutory 26 week period are divided.

CONCLUSION

The Compensation Order of August 30, 2004 is not in accordance with the law.

ORDER

The Compensation Order of August 30, 2004 is hereby REVERSED AND REMANDED with instructions, that the ALJ calculate the appropriate AWW in accordance with the aforegoing discussion.

FOR THE COMPENSATION REVIEW BOARD:

_____

JEFFREY P. RUSSELL
Administrative Appeals Judge

December 29, 2005
DATE