

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-053

**SHAUN GROSSMAN,
Claimant-Petitioner,**

v.

**U.S. ALUMINUM, INC., d/b/a/ RENEWAL BY ANDERSEN and
OHIO CASUALTY INSURANCE Co.,
Employer/Third-Party Administrator-Respondent.**

Appeal from a January 27, 2016 Compensation Order
by Administrative Law Judge Joan E. Knight
AHD No. 13-216B OWC No. 700641

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 SEP 26 AM 8 30

(Decided September 26, 2016)

Robin Cole for Employer
Bruce M. Bender for Claimant

Before GENNET PURCELL, HEATHER C. LESLIE, and JEFFREY P. RUSSELL *Administrative Appeals Judges.*

GENNET PURCELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Shaun Grossman (“Claimant”) currently works as a sales representative for U.S. Aluminum, Inc., d/b/a Renewal by Andersen (“Employer”). Claimant works pursuant to the terms of a Direct Seller’s Agreement whereby he is paid bi-weekly, on a commission-only basis, to sell window and door products to businesses and homeowners in the District of Columbia and surrounding metropolitan area.

Pursuant to the Direct Seller’s Agreement governing the terms of Claimant’s service for Employer, Claimant was available to work Mondays through Fridays, from 10:00 a.m. until late in the evening. Claimant was also obligated to sell Employer’s products under established Employer’s procedures, to attend installation and sales technique training at Employer’s corporate headquarters, to use Employer-approved forms, business cards, email, contact information and an approved Employer “pitch book”, to maintain his own workers’

compensation insurance policy and to wear Employer-logo clothing. To document his income, Employer provided Claimant with an IRS Form W-9 annually and Claimant filed yearly IRS 1099 Forms.

On December 26, 2012, while stopped at a light on his way to a scheduled sales appointment, Claimant sustained a work-related injury to his back when he was hit from behind by another vehicle.

On December 26, 2012, Claimant was seen at George Washington University Hospital for headaches, neck and back pain where he was issued pain medication and discharged. On or about January 7, 2013, Claimant emailed Employer and telephoned his direct manager to inform them about the accident and tell them he would not be taking any more sales appointments due to his injuries.

Claimant first filed an Employee's Notice of Accidental Injury with the D.C. Office of Workers' Compensation for his injuries on January 25, 2013, listing himself as the "employer" and the Hartford Insurance, his private carrier, as the "carrier". He filed an amended claim on December 23, 2013 listing Employer as the "employer" and seeking temporary partial disability benefits from April 2, 2013, to the present and continuing.

On October 2, 2014, a formal hearing was held by the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES"). The issues to be determined at the hearing were:

1. Does an employer-employee relationship exist under the Act?
2. What is the nature and extent of Claimant's disability?

CO at 2.

On March 23, 2016, an administrative law judge ("ALJ") issued a Compensation Order ("CO") determining that there was no employee/employer relationship between Claimant and Employer, and denying Claimant's claim for benefits related to the 2013 injury. *Shaun Grossman v. U.S. Aluminum, Inc., d/b/a Renewal by Andersen*, AHD No. 13-216B, OWC No. 700641 (March 23, 2016).

Claimant timely appealed the CO to the Compensation Review Board ("CRB") by filing Claimant's Application for Review and Memorandum of Points and Authorities in Support of Application for Review ("Claimant's Brief") arguing that the ALJ erred in reaching the legal conclusion that no employment relationship existed by "misapplying the applicable test to determine whether an employee/employer relationship existed, by ignoring the particular emphasis that the DC Court of Appeals has demanded be applied when engaging in the 'relative nature of work' test, and by making factual findings that are not supported by substantial evidence." Claimant's Brief at 2.

Employer opposed the appeal by filing Employer/Carrier's Opposition to Claimant's Application for Review ("Employer's Brief"), arguing that the ALJ properly applied the relative nature of the work test and correctly concluded that the Claimant is not an employee of Employer and

therefore, no employer/employee relationship exists under the District of Columbia's Workers' Compensation Act (the "Act"). Employer's Brief at 7.

ANALYSIS¹

We begin with Claimant's first assertion that the ALJ made an error of law in finding that no employment relationship existed by misapplying the "relative nature of the work test" pursuant to the Act and District of Columbia law.

Claimant argues:

Using the "relative nature of the work" test [sic], [the ALJ] found that [Claimant] satisfied the first two factors of the first prong of the two-pronged test, but found that [Claimant] did not satisfy the third factor since [Claimant] carried his own workers' compensation insurance. (CO, pp. 7) Notably, some of the factors of the second prong of the test were never addressed and no conclusions of law were expressly made as to them, such as whether the duration was sufficient to amount to hiring of continuous services and whether [Claimant's] work was a regular part of the employer's regular work.

Claimant's Brief at 7.

The purpose of the relative nature of work test is to determine whether an employer/employee or independent contractor relationship exists, and the test focuses on whether the worker is hired to do work in which the company specializes. *Gross v. DOES*, 826 A.2d 393, 396 n.5 (D.C. 2003). The relative nature of the work test requires a very fact-specific analysis, consisting of two parts. *Reyes v. DOES*, 48 A.3d 159, 164 (D.C. 2012). 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 the work in question 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. *Id.*

Our review of the CO leads us to conclude that Claimant is correct. While the ALJ offered a brief analysis of the specific factors of the second prong of the relative nature of the work test, a

¹ The scope of review by the CRB 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 a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code §32-1521.01(d)(2)(A). "Substantial evidence" as defined by the District of Columbia Court of Appeals ("DCCA"), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES*, 834 A.2d 882 (D.C. 2003) ("*Marriott*"). Consistent with this scope of review, the CRB is also 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

clear and thorough analysis of each of the second prong's three factors was not included in her rationale.

The CO states:

Even under the second prong, Claimant's [sic] worked on an exclusive basis for Company, and Claimant's [sic] was hired to perform on a continuing basis from 2004 to 2012, Claimant selected the days, times and territories he wanted to work. Further, the unlimited commissions enjoyed by Claimant, as opposed to Company's regular salaried employees, mitigates against a finding of an employer/employee relationship in that Claimant was paid on a commission only basis for business that he closed to suggest Claimant was paid by the job rather than on an hourly or salary basis. And, finally, Company's ability to call upon Claimant on specific days, times and territory was conditional in that Claimant was under no obligation to oblige Company on any particular day or time in which he was to go on sales calls.

CO at 7.

The ALJ properly discussed the extent to which Claimant's work was a regular part of the Employer's regular business, however missing from her analysis is a clear discussion of whether Claimant's work is continuous or intermittent; and whether the duration of Claimant's work was sufficient to amount to the "hiring of continuing services", as distinguished from "contracting for the completion of a particular job." Accordingly, we remand for a clear discussion of these factors.

Claimant also argues that the ALJ failed to place the appropriate emphasis on the second prong of the test, and made factual findings unsupported by substantial evidence in the record.

The CO provides:

The record evidence supports the conclusions that Claimant has not met the third factor of the relative nature of the work test and that the evidence does not preponderate in Claimant's favor that an employee/employer relationship existed at the time of the December 2012 accidental injury. When viewed in its totality, the weight of the evidence does not sustain a finding Claimant was an employee for purposes of coverage under the Act.

CO at 7.

Although both parts of the test must be analyzed before an employer/employee relationship is established, the first part is indeed, accorded less weight, because as the DCCA has stated,

The emphasis, [of the ALJ's analysis] should be on the second part of the test, which examines the relationship of the claimant's work to the purported

employer's business. Although several factors are considered under this part of the "relative nature of the work" test, no one factor is dispositive.

Reyes, supra 48 A.3d at 165.

The ALJ determined that although the weight of the evidence considered under the first prong of the test favored coverage of Claimant as an "employee" of Employer under the Act, Claimant had not "met the third factor of [the first part of] the relative nature of the work test" and as such, did not establish by a preponderance of the evidence that an employee/employer relationship existed at the time of Claimant's injury.

We determine that this conclusion, while supported by the facts of the case, is not the proper sole and/or final determining factor of employee/employer relationship under the law. As the Court in *Reyes* noted, "both parts of the test must be analyzed before an employee/employer relationship is established." *Id.* Given the ALJ's incomplete analysis under the second prong of the relative nature of work test as mandated by *Reyes*, and undue weight placed on the first prong, third factor-analysis, the CO prematurely arrives at a conclusion rejecting an employer/employee relationship factor, and does so without the required supporting evidentiary-based analysis under the remaining factors/prong of the test.

Claimant's final argument details his disagreement with the ALJ's characterization and discussion of factual evidence submitted to establish Claimant's commission-based income structure and work schedule. Outside of a review of the factual evidence, we decline to accept Claimant's argument as to the ALJ's weighing of these matters. As the fact-finder in AHD formal hearing proceedings, it is squarely within the authority of the ALJ to make findings of facts and in the analysis thereof, arrive at legally-based conclusions substantially supported by those facts.

We find no error in the specific conclusions reached on the issues of Claimant's income structure and work schedule in the CO. Any re-evaluation on these matters would amount to a reweighing of the facts in evidence, a task that we are not at liberty to pursue.

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant is not an employee of U.S. Aluminum, Inc., d/b/a/ Renewal by Andersen is not supported by the substantial evidence in the record and is not in accordance with the law. The Compensation Order is VACATED and REMANDED for reconsideration of the "relative nature of work test" in accordance with the applicable legal framework.

So ordered.