

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-074

DAVID YOUNG,
Claimant–Petitioner,

v.

THE INSTITUTE FOR PUBLIC-PRIVATE PARTNERSHIP AND TRAVELERS INDEMNITY CO. OF
AMERICA,
Employer/Carrier-Respondent

Appeal from a Compensation Order on Remand by
The Honorable Jeffrey P. Russell
AHD No. 10-265, OWC No. 629016

Benjamin T. Boscolo, Esquire, for the Claimant/Petitioner
Roger S. Mackey, Esquire, for the Employer-Carrier/Respondent

Before: HENRY W. MCCOY, HEATHER C. LESLIE,¹ AND LAWRENCE D. TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

¹ Judge Leslie has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-04 (October 5, 2011).

OVERVIEW AND FACTS OF RECORD

This appeal follows the issuance on April 18, 2012 of a Compensation Order on Remand (COR) from the Hearings and Adjudication Section, Office of Hearings and Adjudication in the District of Columbia Department of Employment Services (DOES). In that COR, the Administrative Law Judge (ALJ) held that Claimant was permanently and totally disabled and that his average weekly wage (AWW) was \$1,016.71.

Claimant, having worked for Employer from 2003, was promoted on January 1, 2006 to Regional Representative for Middle East Business Development, which required his relocation from Washington, D.C. to Amman, Jordan effective April 15, 2006. Claimant's base yearly salary became \$48,000 with a housing allowance of up to \$1,200 per month.

Upon his promotion, Claimant immediately flew overseas traveling to various cities and countries, including Cairo, Jordan, Zambia, and Malawi to learn the territory for which he was now responsible. While in Malawi, Claimant was involved in a motor vehicle accident on March 26, 2006 that caused damage to his spinal cord leaving him with the complete loss of both legs and limited use of both arms. While Employer voluntarily paid temporary total disability benefits, a dispute arose over Claimant's AWW and the beginning date that Claimant was permanently and totally disabled.

At the ensuing formal hearing, the ALJ adopted a formula for calculating Claimant's AWW in which he added Claimant's salary after his promotion (\$48,000) to the annual amount of the housing benefit he would have received (\$14,400) and divided the total by 52 to arrive at an AWW of \$1,200. Employer appealed. The CRB held that while the ALJ correctly included in Claimant's AWW an amount for lodging, the ALJ erred in using the annual equivalent of the cost of the apartment divided by 52.² Specifically, the CRB stated

The ALJ, consistent with D.C. Code § 32-1511 (a)(3), properly divided the employer's (sic) annual salary divided by 52 but only should have added the actual cost of the hotels paid for by the employer prior to the accident in calculating the average weekly wage.³

On remand, the ALJ, in noting the "unambiguous instructions" given by the CRB, found the actual cost of housing paid to Claimant prior to his accident to be \$4,869.02, which was then added to the annual salary of \$48,000. The resulting total of \$52,869.02 was divided by 52 to produce an AWW in the amount of \$1,016.71. This was so ordered by the ALJ on remand.⁴ Claimant filed a timely appeal with Employer filing in opposition.

² *Young v. The Institute for Public/Private Partnership*, CRB No. 10-171, AHD No. 10-265, OWC No. 629016 (August 19, 2011).

³ *Id.* at 6.

⁴ *Young v. The Institute for Public/Private Partnership*, AHD No. 10-265, OWC No. 629016 (April 18, 2012) (COR).

On appeal, Claimant argues that the ALJ AWW calculation produces an inequitable and distorted result. It is Claimant's position that the approach taken by the ALJ actually yields a housing allowance considerably less than the allowance Employer agreed to pay. Claimant also argues that a reasonable calculation of his AWW and probable future wage earning capacity was as originally found by the ALJ and is supported by the testimony in the record and the applicable law for determining the AWW of an employee whose wages are fixed by the year.⁵ In opposition, Employer argues the COR should be affirmed as the ALJ followed the law in calculating the AWW.

STANDARD OF REVIEW

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 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.⁶ See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). 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.

ANALYSIS

When this matter initially came on appeal, the CRB determined that while the ALJ was correct to include the cost of housing in the calculation of Claimant's AWW, it was error to use the annual cost of the apartment, divided by 52, as the weekly amount for lodging insofar as Employer had only paid for lodging for the period Claimant traveled in February and March before the accident. Thus, in the COR, the ALJ, pursuant to a footnoted observation made by the CRB in its remand order of there being nothing in the record of what this amount was, made a specific finding, based on submissions by both parties, that Employer paid Claimant \$4,869.02 for housing in the weeks prior to the work accident.

The Act, at D.C. Code § 32-1501 (19) defines "wages" in part to include "the reasonable value of board, rent, housing, lodging or similar advantage received from the employer...." In the instant matter, we don't have to assign a "reasonable value" because the ALJ found what the actual value of the housing was that Claimant "received from the employer." On appeal, Claimant argues that the improper manner in which the ALJ has added the lodging cost to the annual salary to calculate the AWW warrants reversal of the COR. We disagree.

⁵ Claimant's *Memorandum of Points and Authorities in Support of Application for Review*, p. 6-8.

⁶ "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 International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

In its remand to the ALJ, the CRB affirmed his decision that insofar as Claimant's wages were fixed by the year, D.C. Code § 32-1511 (a)(3), which states in part "[I]f at the time of injury the wages are fixed by the year, the average weekly wage shall be the yearly wage so fixed divided by 52." And, under the Act, the reasonable value of housing was to be included. The CRB only faulted the ALJ's calculation for including the annual equivalent of the cost of the apartment Claimant had yet to occupy or Employer to pay for instead of the actual cost of the hotels paid for by Employer prior to the accident, divided by 52.

In following the CRB's instructions on remand, the ALJ reasoned:

The CRB has instructed that on remand, the \$48,000.00 annual salary shall have to it added "the actual cost of the hotels paid for by the employer prior to the accident", which is \$4,869.02, which combined total should be divided by 52.

Thus, in accordance with the unambiguous instructions from the CRB, I find that \$48,000.00 plus \$4,869.02 is \$52,869.02, which divided by 52 yields and (sic) average weekly wage for compensation purposes in the amount of \$1,016.71.⁷

Claimant's arguments that the ALJ's calculation constitutes an improper distortion of his wage earning capacity are without merit. Claimant first argues that if the lodging figure of \$4,869.02 were taken separately it would yield a monthly amount of \$374.54 which would not cover the monthly housing allowance Employer agreed to pay. Claimant also argued in the alternative that if the ALJ properly followed the CRB's instructions, it would yield an AWW of \$1,870.36. Finally, Claimant also argues that a reasonable calculation of his AWW and future wage earning capacity, predicated upon Employer's agreement to pay a monthly housing allowance up to \$1,200, should be \$1,200 when the total housing allowance for year was added to annual salary and divided by 52.

Claimant's wages are combination of his salary plus the reasonable value of housing received from Employer. Claimant misinterprets the amount to be included for housing. In the instant case, there is an actual amount that Employer paid for Claimant's housing prior to his accident. It is this amount that is factored into the AWW calculation; not an average of that amount. The amount for housing is also not the amount Employer would have paid starting April 15, 2006, in an amount up to \$1,200.

The ALJ adhered to our instructions and performed the appropriate calculation of Claimant's AWW. As it is supported by substantial evidence in the record and in accordance with the law, it shall not be disturbed.

⁷ COR, at 3.

CONCLUSION AND ORDER

The findings of fact and the conclusions of law in the April 18, 2012 Compensation Order on Remand are supported by substantial evidence and are in accordance with the applicable law. The Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

June 19, 2012
DATE