

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-014

DYLAN LILLIE,
Claimant-Petitioner,

v.

CAPITAL CONCERTS, INC. and
LIBERTY MUTUAL INSURANCE CO.,
Employer and Carrier-Respondents.

Appeal from a January 15, 2015 Compensation Order by
Administrative Law Judge Lilian Shepherd
AHD No. 15-439

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JUN 17 AM 8 28

(Decided June 17, 2016)

Steven H. Kaminski for Claimant
Robin Cole for Employer and Carrier

Before: LAWRENCE D. TARR, *Chief Administrative Appeals Judge* and JEFFREY P. RUSSELL and
HEATHER C. LESLIE *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Chief Administrative Appeals Judge* for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, Dylan Lillie, filed an Application for Review of the January 15, 2016, Compensation Order (“CO”) issued by an Administrative Law Judge (“ALJ”) in the Administrative Hearings Division in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (“DOES”). Claimant appeals the ALJ’s determination that he was not entitled to penalties for the alleged bad faith delay in paying compensation.

On May 24, 2015, Claimant was employed as a utility stagehand at the Smithsonian Mall working on the Memorial Day concert. Employer hired Claimant for a short-term contract position through Claimant’s union; Employer contracted with Claimant’s union and the union referred the position to Claimant. Claimant did not have any direct contact with Employer with respect to his being hired. Claimant was employed to do various tasks such as setting up

monitors, pulling signal, power and hammer cables, and following behind a camera operator while holding cable.

After the two-hour show on May 24, 2015, Claimant felt sore in his left arm and shoulder and attempted to take care of the soreness on his own. When it continued for several days he made an appointment to see a doctor.

Claimant also advised his union steward, Mr. Corbin, of his injury and Mr. Corbin sent him the forms for filing a workers' compensation claim. Claimant completed the forms and returned them to the union. The union, in turn, sent the forms to Employer.

On June 3, 2015, Claimant filed Forms 7 and 7A with the DOES Office of Workers' Compensation. On June 5, 2015, Dr. Douglas Frankel, his primary care physician, examined Claimant. Dr. Frankel wrote a note that said Claimant should not work. Claimant gave a copy of Dr. Frankel's note to union steward Corbin. Claimant also sent Employer medical reports on July 8, 2015 and a HIPAA (Health Insurance Portability & Accountability Act) release on July 22, 2015. Employer filed a Notice of Controversion on July 23, 2015 and made its first payment of indemnity benefits on October 6, 2015.

At the formal hearing on December 14, 2015, Claimant sought imposition of penalties on Employer for not timely controverting his workers' compensation claim and for the unreasonable delay in paying benefits. The ALJ found that Employer did not timely controvert the claim and imposed penalty required by D.C. Code § 32-1515. Employer has not appealed this determination.

The ALJ further determined that Claimant did not prove that he was denied any benefits to which he was entitled and denied his claim for penalties for the unreasonable delay in making payments. Claimant has timely appealed this determination.

ANALYSIS

The sole issue before the CRB is whether the ALJ's determination that Claimant did not prove Employer unreasonably delayed paying him compensation benefits is supported by substantial evidence and in accordance with the law.

In reaching her decision, the ALJ cited the controlling authority that identified the analysis to be used in a case claiming unreasonable delay:

In *Bivens v. Chemed/Roto Rooter Plumbing Services*, CRB No. 05-215, AHD No. 01-002B (April 28, 2005) (Bivens), the CRB adopted the three prong test utilized in *Robinson v. Brooks Hair Design*, OWC No. 220370, OHA No. 92-481 (March 2, 1994), to establish a *prima facie* showing of bad faith in contravention of the § 32-1515 of the Act.¹ Pursuant to that test, a Claimant must show:

(1) entitlement to a benefit;

¹ Although the ALJ cited D.C. Code § 32-1515, it is clear that this is a typographical error as both the Issue and Decision sections of the CO cite the correct statute that relates to this claim, D.C. Code § 32-1528.

(2) knowledge by the employer of a claim to the entitlement;
and

(3) failure to provide the benefit or to controvert the claimed entitlement within a reasonable time.

"Once the injured worker makes this showing, the burden shifts to the employer to produce evidence indicating a good faith basis for not paying the benefits." *Gonzales v. Asylum Co.*, CRB No. 08-077, AHD No. 06-224, OWC No. 617421, 200B DC Wrk Comp LEXIS 352 at 10 (Aug. 22, 2008), this issue affirmed in *Asylum Co. v. DOES*, 10 A.3d 619, 634-45 (D.C. 2010). "Upon such production by the employer, the injured worker has the additional burden of proving the said evidence is pretextual." *Id.*

CO at 4.

The ALJ concluded that Claimant proved the first two prongs of the *Bivens* test, but he did not prove the third prong; that the Employer provided the benefit in an unreasonable time. The ALJ found that the delay in payment until October 6, 2015 was reasonable because (1) Claimant's Form 7A did not describe a specific incident, (2) that Employer needed time to investigate the circumstances of the accident in light of the lack of details on the Form 7A, and (3) Claimant did not work directly with Employer but instead gave notice to his union which notified Employer:

After Employer concluded its investigation, Employer paid Claimant temporary total disability from the date of injury and has paid the medical bills submitted by Claimant. Claimant has satisfied the first two elements of the test and although Employer delayed in paying Claimant, given the contractual relationship between Claimant and the Union and then the Union and Employer, I do not find that the delay was unreasonable.

Id. at 5.

The issue before the CRB is not whether there is contrary evidence in the record to reach a different conclusion than that reached by the ALJ. The CRB's responsibility is to judge whether the ALJ's factual findings and legal conclusions are supported by substantial evidence and in accordance with the law.

When judged against this standard, the ALJ's decision must be affirmed. The ALJ properly analyzed the evidence in accordance with the established legal standard and stated legitimate reasons why she found the 5-month delay in paying benefits was reasonable.

CONCLUSION AND ORDER

The ALJ's determination that Claimant did not prove Employer unreasonably delayed paying him compensation benefits is supported by substantial evidence and in accordance with the law. Therefore, the January 15, 2015 Compensation Order is AFFIRMED.

So ordered.