

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB No. 07-017

KEVIN A. MUNSON,

Claimant – Petitioner

v.

HARDY & SON TRUCKING, INC. and TRAVELERS INSURANCE COMPANY,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Reva M. Brown
OHA/AHD No. 96-176B, OWC No. 029805

Benjamin T. Boscolo, Esq., for the Petitioner

Michael D. Dobbs, Esq., for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, and FLOYD LEWIS and
LINDA F. JORY, *Administrative Appeals Judges*

E. COOPER BROWN, *Chief Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND REMAND 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 No. 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaced the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This proceeding arises out of a claim for retaliatory discharge under the D.C. Workers' Compensation Act. *See* D.C. Official Code § 32-1542. The claim was originally denied by the Office of Hearings and Adjudication (now the Administrative Hearings Division) based upon a determination by the then-presiding Administrative Law Judge that Petitioner had failed to present sufficient evidence to establish the necessary showing of a *prima facie* case of retaliatory discharge. Appeal of that Compensation Order to the Office of the Director resulted in reversal of the ALJ's determination. The Director held that Petitioner had established a *prima facie* case of retaliatory discharge against Respondent, and remanded to the Administrative Hearings Division (AHD) for further proceedings consistent with the Director's Remand Order, *Munson v. Hardy & Sons Trucking*, Dir. Dkt. No. 01-53 (June 3, 2002).

Subsequently, upon remand to AHD the presiding ALJ held, as had the previously presiding ALJ, that the evidence of record did not support the conclusion that Petitioner had made the necessary *prima facie* showing of retaliatory discharge. By Compensation Order on Remand issued November 1, 2006, AHD dismissed Petitioner's claim, and the instant appeal to the Compensation Review Board (CRB) followed.

As grounds for this appeal, Petitioner asserts, *inter alia*, that in revisiting upon remand the issue of whether Petitioner had established a *prima facie* showing of retaliatory discharge, the ALJ committed reversible error by ignoring the law of the case as established in the Director's Remand Order of June 3, 2002.

ANALYSIS

The standard of review by the 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 from which appeal has been taken are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. D.C. Official Code § 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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this standard, this Review Panel is 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 a contrary conclusion might have been reached had the Review Panel served as the original trier of fact. *Marriott*, 834 A.2d at 885.

Establishing a claim of retaliatory discharge under D.C. Official Code § 32-1542 involves a process of evidentiary burden shifting. The initial burden of proof is upon the employee to

establish a *prima facie* showing of retaliatory discharge on the part of the employer.² Once a *prima facie* showing has been established, “the burden of production shifts to the employer to articulate a legitimate, non-retaliatory reason for the discharge.” *Children’s Defense Fund v. D.C. Department of Employment Services*, 726 A.2d 1242, 1248 (D.C. 1999). In the absence of such evidence, the employee prevails. However, where the employer meets its burden of production, the evidentiary burden returns to the employee to prove, by a preponderance of the evidence, that he/she was fired by the employer “wholly or in part, for pursuing [his/her] rights under the Act and not for the legitimate reasons asserted [by the employer].” *Abramson Associates v. D.C. Dept. of Employment Services*, 596 A.2d 549, 554 (D.C. 1991).

Upon appeal of the initial compensation order in the instant case, the Director rejected the ALJ’s determination that Claimant-Petitioner had failed to establish a *prima facie* showing of retaliatory discharge, expressly holding to the contrary that “[Petitioner] established a *prima facie* case of retaliatory discharge against the employer.” Accordingly, the Director remanded the case for further proceedings and disposition consistent with his ruling.

The Director’s legal determination that Petitioner met the initial burden of establishing a *prima facie* showing of retaliation constitutes the “law of the case” with regard to the instant proceedings. This well-recognized doctrine holds that “once the court has decided a point in a case, that point becomes and remains settled unless or until it is reversed or modified by a higher court. [citation omitted]. The doctrine serves the judicial system’s need to dispose of cases efficiently by discouraging ‘judge-shopping’ and multiple attempts to prevail on a single question.” *Kritsidimas v. Sheskin*, 411 A.2d 370, 371 (DC 1980). The doctrine is equally applicable in the administrative adjudicatory context. See e.g., *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998); *Law v. Medco Research, Inc.*, 113 F.3d 781, 783 (7th Cir. 1997); *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991); *Chicago & Northwestern Transportation Co. v. United States*, 574 F.2d 926, 929-30 (7th Cir. 1978); *Brachtel v. Apfel*, 132 F.3d 417, 419-420 (8th Cir. 1997); *Rios-Pineda v. United States Dep’t of Justice, I.N.S.*, 720 F.2d 529, 532 (8th Cir. 1983), *rev’d on other grounds*, 471 U.S. 444, 105 S. Ct. 2098, 85 L. Ed. 2d 452 (1985). See also, *Chicago & N. W. Transp. Co. v. United States*, 574 F.2d 926, 930 (7th Cir. 1978).

The “law of the case” doctrine admits of two exceptions. The doctrine does not apply where the first ruling has little or no “finality” to it. See e.g., *United States v. Davis*, 330 A.2d 751, 755 (D.C. 1975). Secondly, even where the ruling does constitute the “law of the case” because it has sufficient finality, courts have found it appropriate to depart from the doctrine where the first ruling is clearly erroneous in light of newly-presented facts or a change in substantive law. *Kritsidimas, supra*, 411 A.2d at 372. Finding that neither of these exceptions is applicable to the instant case, we are left with no alternative but to vacate the Compensation Order upon Remand from which the instant appeal was taken, and remand this matter to the Administrative Hearings Division for further proceedings consistent with the Director’s previous Remand Order. It is

² The requirements for meeting this initial burden have been amply discussed in a series of D.C. Court of Appeals decisions, including the necessity of reliance upon circumstantial evidence given the nature of retaliatory discharge claims. See, *Children’s Defense Fund v. D.C. Dept. of Employment Services*, 726 A.2d 1242 (D.C. 1999); *St. Clair v. D.C. Dept. of Employment Services*, 658 A.2d 1040 (D.C. 1995); *Abramson Associates v. D.C. Dept. of Employment Services*, 596 A.2d 549 (D.C. 1991); *Lyles v. D.C. Dept. of Employment Services*, 572 A.2d 81 (D.C. 1990). See also, 6-104 *Larson’s Workers’ Compensation Law* § 104.07[3] (2006).

neither the role of AHD, nor of the CRB at this juncture in the proceedings, to substitute its judgment for the legal determination that the Director has made with regard to the issue of whether Petitioner has established a *prima facie* showing of retaliatory discharge. The propriety of that legal determination must be left to the Court of Appeals, should this matter eventually rise to that level.³ Upon remand, the ALJ is to determine whether Respondent had a legitimate, non-discriminatory reason justifying Petitioner's discharge, and if so, whether the preponderance of the evidence nevertheless supports the conclusion that Petitioner was fired, wholly or in part, for pursuing his rights under the Act notwithstanding the reasons asserted by Respondent.⁴

Finally, in light of the Board's disposition remanding this case to AHD, we briefly address two additional issues that have been raised by the instant appeal. The first involves Petitioner's motion that as part of the CRB's remand we order that this case be reassigned to a new Administrative Law Judge, citing what Petitioner characterizes as the presiding ALJ's "repeated refusal" to adhere to remand orders and/or instructions issued by the CRB or its predecessor, the Office of the Director, including the ALJ's decisions upon remand in *Ward v. D.C. Water & Sewer Authority*, OHA No. 03-355 (October 31, 2006), and *Reyes v. Bogart Properties*, OHA No. 02-234 (February 11, 2004). This is, however, a matter beyond the jurisdiction of the Compensation Review Board; instead a subject that is within the exclusive province of the Administrative Hearings Division upon remand.

The second matter involves the notice the CRB received from AHD in connection with the Board's evidentiary record request in the instant appeal. See 7 DCMR 259.1. The Chief Administrative Law Judge of AHD informed the CRB that the evidentiary record transmission provided by AHD pursuant to 7 DCMR § 259.4 did not contain the exhibits referenced in the Compensation Order on Remand, and questioned the CRB's need for such exhibits in light of the fact, as indicated by the Chief Judge, that the Compensation Order On Remand did not rely on said exhibits. In light of this Review Panel's disposition of the current Application for Review, which is based upon a legal determination, transmission of the full evidentiary record was obviously unnecessary. Nevertheless, the willingness of this Review Panel to entertain and dispose of the instant matter without the entire evidentiary record must be viewed as a unique exception to the requirement that AHD, as custodian of the record (7 DCMR § 259.3), timely certify and provide the CRB with the *entire* official record of the case upon request. It is not merely for the benefit of the CRB in its review of an Application For Review, or the protection of the parties' interests, that this obligation is mandated. Should a disposition by the CRB result in an appeal to the D.C. Court of Appeals, the CRB will be required to transmit the *entire* case record to the court without exception. Fortunately in that regard, the disposition herein reached remanding this matter to AHD precludes any appeal at this time to the Court of Appeals.

³ It is indeed this Review Panel's opinion that were it to ignore the Director's prior legal pronouncement on the subject of *prima facie* showing in favor of the ALJ's reassessment upon remand, and as a result affirm the Compensation Order Upon Remand herein appealed to the CRB, a subsequent appeal of such an affirmation to the D.C. Court of Appeals would surely result in a summary reversal in light of the dictates of the "law of the case" doctrine.

⁴ Upon remand there is nothing in the instant Decision and Remand Order that should be interpreted to preclude the ALJ from again taking into consideration the credibility of Petitioner's testimony at hearing in making this ultimate determination.

CONCLUSION

The Compensation Order on Remand herein appealed is not in accordance with law, having failed to adhere to the "law of the case" as established by the Director in his Remand Order of June 3, 2002.

ORDER

The Compensation Order on Remand issued November 1, 2006, is VACATED and this matter is REMANDED for further proceedings before AHD consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

E. COOPER BROWN
Chief Administrative Appeals Judge

February 5, 2007
DATE