

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-060

**PALEMON CASARRUBIAS GONZALEZ,
Claimant-Petitioner,**

v.

**THE ASYLUM COMPANY T/A MCCXXIII and
INSURANCE DESIGNER OF MARYLAND,
Employer/Insurer-Respondent.**

Appeal from a March 20, 2015 Order By
Administrative Law Judge Donna J. Henderson
AHD No. 06-224A, OWC No. 580453

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 AUG 19 AM 10 05

(Decided August 19, 2015)

Manuel Rivera for Claimant

Before MELISSA LIN JONES and HEATHER C. LESLIE, *Administrative Appeals Judges* and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge.*

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On June 30, 2005, Mr. Palemon Casarrubias Gonzalez worked at a restaurant and bar owned by The Asylum Company (“Asylum”). On that night, he was struck in the right eye by a bottle thrown by a customer.

Mr. Gonzalez’s injury required surgery, and his hospital bills showed his name as “Palemon Casarrubias Gonzalez.” At work Mr. Gonzalez had been known as “Armando Casarrubias” or “Armando Casarrubias Gonzalez.”

When Mr. Gonzalez tried to return to work against his treating physician’s advice, Asylum refused to permit Mr. Gonzalez to return to work because he was an unauthorized alien. Mr. David Karim, an owner of the restaurant, gave Mr. Gonzalez money to help pay his expenses.

When Mr. Gonzalez filed his workers’ compensation claim, Asylum neither began paying benefits nor filed a notice of controversion. The parties proceeded to a formal hearing.

In August 2007, an administrative law judge (“ALJ”) awarded Mr. Gonzalez temporary total disability benefits and bad faith penalties from June 30, 2005 to January 26, 2006 and penalties for Asylum’s failure to timely controvert his claim. *Gonzalez v. Asylum Company*, AHD No. 06-224, OWC No. 617421 (August 1, 2007). The Compensation Review Board (“CRB”) affirmed the Compensation Order; the CRB held that the Federal Immigration Reform and Control Act of 1986 (“IRCA”) does not excuse an employer from compliance with the District of Columbia Workers’ Compensation Act, as amended, D.C. Code §32-1501 to 32-1545 (“Act”). Consequently, the CRB affirmed that Asylum had acted in bad faith by delaying payment of Mr. Gonzalez’s workers’ compensation benefits on the grounds that Mr. Gonzalez’s status as an unauthorized alien prevented Asylum from paying workers’ compensation benefits. *Gonzales [sic] v. Asylum Company*, CRB No. 08-077, AHD No. 06-224, OWC No. 617421 (August 22, 2008).

Asylum appealed to the District of Columbia Court of Appeals. The Court affirmed that an unauthorized alien may qualify as an employee under the Act and as a result may be entitled to medical and wage loss benefits following an incapacitating workplace injury; however, because Asylum’s argument that it could not lawfully pay Mr. Gonzalez wage loss benefits was not sufficient to conclude it had acted in bad faith, the matter was remanded for further analysis of the imposition of bad faith penalties:

The Employer contends that the CRB erred in affirming the finding of bad faith, because the ALJ did not consider the Employer’s evidence of good faith and failed to shift the burden back to Claimant to show that petitioners’ reasons for nonpayment were pretextual. We agree. As shown by the quoted material from the compensation order, the ALJ did not shift the burden back to Claimant because he found “no record or evidence anywhere as to the employer’s reasons for not paying or else controverting the claimant’s claim.” In making that statement, the ALJ appears to have assumed -- incorrectly in either case -- that filing a notice of controversion is sufficient to negate bad faith or that failure to file a notice of controversion is sufficient by itself to demonstrate bad faith. In addition, in finding that there was no evidence in the record of a reason for the Employer’s delay in paying or controverting the claim, the ALJ ignored Karim’s testimony that he did not know what a notice of controversion was (an assertion that, if credited, would make it inappropriate to treat the failure to file such a notice as evidence of bad faith). In addressing the issue of bad faith failure to pay wage-loss benefits, the ALJ also did not take into account Karim’s testimony about his “confusion” and did not discuss the significance of Karim’s testimony that his “understanding of the law was that [Claimant] was an illegal, and I cannot hire an illegal.” Nor did the ALJ assess the (undisputed) evidence about Karim having voluntarily paid Claimant \$1,000. Another fact that potentially was relevant to the issue of bad faith, but which the ALJ did not discuss, is Claimant’s attempt to return to work on July 17, 2005 -- an effort that the ALJ found was contrary to medical advice, but that may be relevant to whether the Employer was aware of, or had a reason to be skeptical about, Claimant’s ongoing physical incapacity. At least arguably, all of this evidence was pertinent to whether the Employer acted in bad faith -- i.e., to whether the Employer effected a “delay of payment of compensation which [was] not warranted by fact, existing law, or a

good faith interpretation of the law,” Report on Bill 8-74 at 24, or acted with “dishonesty of . . . purpose,” or made an “unreasonable and unfounded . . . refusal to provide coverage.” BLACK’S LAW DICTIONARY 149 (8th ed. 2004). The ALJ correctly perceived that factors such as those listed above did not excuse the Employer from the ten percent penalty for failure to pay promptly or to file a timely notice of controversion, because that penalty applies without regard to bad faith. However, the factors cited above may be relevant to bad faith *vel non*, and thus to whether the Employer should be required to pay the average-weekly-wage penalty.

The CRB did not focus on the evidence cited above or on the ALJ’s finding about “there being no record or evidence anywhere as to the employer’s reasons for not paying.” Instead, the CRB was satisfied that rejection of the Employer’s IRCA preemption argument sufficed as a basis for accepting the ALJ’s determination that the Employer acted in bad faith in not paying benefits. We do not accept that logic. Heretofore, this court has not addressed the issue of the eligibility of undocumented alien workers for wage-loss benefits under the Act, and, as the Court of Appeals of Maryland has observed, the Supreme Court’s opinion in *Hoffman* “provided the foundation for arguments by employers that undocumented/illegal workers are ineligible for workers’ compensation benefits because such benefits are pre-empted or because employment contracts with such workers are illegal.” *Design Kitchen & Baths*, 882 A.2d at 829. The fact that the ALJ and the CRB rejected the Employer’s argument that IRCA precluded the payment of wage-loss benefits to Claimant was not a sufficient basis for holding that the Employer acted in bad faith by withholding payment of such benefits at a time when the law in this jurisdiction was unsettled.

Asylum Company v. DOES, 10 A.3d 619, 635-637 (D.C. 2010) (Footnotes omitted.) The CRB remanded the matter to the ALJ for further proceedings consistent with the Court’s opinion. *Gonzalez v. Asylum Company*, CRB No. 08-077(R) (January 25, 2011).

On remand, the ALJ found that Asylum had refused to make payment of compensation because Mr. Gonzalez was an unauthorized alien and that Asylum’s mistaken understanding had no basis in fact, law, or a reasonable interpretation of the law. Nonetheless, the ALJ accepted that Asylum’s failure to file a notice of controversion on the grounds that it did not know what a notice of controversion is sufficed to shift the burden back to Mr. Gonzalez. Then, because Mr. Gonzalez was unable to show that Asylum’s reason was a pretext, the ALJ ruled Asylum’s failure to pay Mr. Gonzalez benefits was not in bad faith. *Gonzalez v. Asylum Company*, AHD No. 06-224, OWC No. 580453 (October 14, 2011).

After the CRB affirmed the October 14, 2011 Compensation Order on Remand, *Gonzalez v. Asylum Company*, CRB No. 11-126, AHD No. 06-224, OWC No. 617421 (September 6, 2012), the Court issued an unpublished decision remanding the matter for an ALJ to address the third step in the *Bivens* test:

As stated, the shifting burdens of the *Bivens* test describe three distinct stages of a proceeding. First, the claimant must make a *prima facie* case. In this instance, there is no dispute that Gonzalez has accomplished that much. Then, however, the employer must have an opportunity to produce evidence

demonstrating a good faith basis for failing to make payments. Again, at the initial hearing held in this case, Karim testified and explained his ignorance of the requirements of the workers' compensation procedures, his confusion over the interaction between workers' compensation and Federal immigration law, and his interactions with Gonzalez that could have caused him to doubt Gonzalez's medical condition. However, a third and final burden shift must be made, and we find no findings in this record which address whether the employee proved that the reasons given by Asylum were pretextual.

* * *

Many of the factual questions remaining in this case require credibility determinations that should not be made on a cold record alone, and in light of the procedural history of this case, we think a new hearing before a new ALJ is the quickest and fairest route to a final resolution of this matter. Accordingly, we vacate the final order and remand with instructions that a new evidentiary hearing be held in front of a different ALJ to resolve the factual questions underlying the third prong of the *Bivens* test.

Gonzalez v. DOES, No. 12-AA-1603 Mem. Op. & J. at 3-4 (D.C. August 7, 2013). Consequently, the CRB remanded the case to the Office of Hearings and Adjudication, Administrative Hearings Division ("AHD").

In response, on March 20, 2015, a different ALJ issued an Order Staying Proceedings. Mr. Gonzalez appeals that order on the grounds that his claim for bad faith penalties is against the employer, not the insurer that has filed for bankruptcy in the U.S. Bankruptcy Court for the District of Delaware and that as a matter of law the ALJ should have granted him summary judgment because the employer and the carrier failed to appear at a scheduled hearing to rebut evidence of bad faith. For these reasons, Mr. Gonzalez requests the CRB vacate the Order Staying Proceedings and remand the matter for further proceedings on the issue of summary judgment as a matter of law.

No opposition was filed in this appeal.

ISSUE ON APPEAL

Is the March 20, 2015 Order Staying Proceedings arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law?

ANALYSIS¹

On February 1, 2015, Mr. Gonzalez appeared before Judge Donna J. Henderson to adjudicate his entitlement to bad faith penalties pursuant to the Court's remand. No other party appeared, and Mr. Gonzalez moved for summary judgment.

On March 12, 2015, Judge Henderson issued an Order to Show Cause directing Mr. Gonzalez to show why the proceedings before AHD are not subject to an October 24, 2014 Liquidation and Injunction Order with Bar Date in *In the Matter of Indemnity Insurance Corporation, RRG, in Rehabilitation* (C.A. No. 8601) in the Court of Chancery of the State of Delaware. After receiving a response from Mr. Gonzalez, Judge Henderson issued the Order Staying Proceedings which is on appeal in this matter.

Mr. Gonzalez relies upon the Act's provisions establishing the Special Fund and the regulations' authorization for Special Fund payments to assert Judge Henderson is required to conduct a formal hearing in his case. Mr. Gonzalez's argument that "the Order Staying Proceedings due to the Carrier/Insurance company filing for bankruptcy in the U.S. Bankruptcy Court for the District of Delaware is improper because the District Of Columbia Special Funds [sic] protects employees from uninsured employers," Appellant's Application of Review, p. 6, is rejected.

The provisions Mr. Gonzalez relies upon do not create an entitlement to a formal hearing. They create an opportunity for payment pursuant to a duly issued Compensation Order under specific circumstances. Once Mr. Gonzalez secures a Compensation Order awarding bad faith penalties, if Mr. Gonzalez secures a Compensation Order awarding bad faith penalties, he may find the Act and its regulations provide him with a source of income for payment of his award. In the meantime, Mr. Gonzalez must prove his entitlement to an award. As Mr. Gonzalez wrote, "special funds do not become liable until there has been a definitive holding on the employer's liability." *Id.* at p. 5.

Mr. Gonzalez also asserts he is entitled to summary judgment because "there is only a potential liability against the employer." *Id.* at p. 6. There has been no such ruling by an ALJ. Mr. Gonzalez appears to raise an insurance coverage issue regarding indemnification by the insurer for the employer's alleged bad faith, and the CRB declines to address that issue for the first time on appeal. *See Transportation Leasing v. DOES*, 690 A.2d 487 (D.C. 1997).

Finally, Mr. Gonzalez asserts Judge Henderson erred as a matter of law by failing to grant summary judgment because Asylum and Insurance Designers of Maryland

wholly failed to appear to participate in the burden-shifting analysis, and as such, the burden never shifted back to the Claimant to show pretext. Lacking Employer/Insurance-produced convincing evidence of good faith, there is no need to reach the pretext argument at all, and summary judgment as a matter of law should have been granted for the claimant.

¹ Because the Order on review is not one based on an evidentiary record produced at a formal hearing, the applicable standard of review by which we assess the determination reached by the Administrative Hearings Division is whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezines, *Administrative Law*, § 51.03 (2001).

Id. at pp. 7-8. Judge Henderson neither granted nor denied Mr. Gonzalez's motion for summary judgment; therefore, the law requires we remand this matter for her to do so.

To avoid unnecessary issues on remand or in a future appeal, the CRB is compelled to point out that contrary to Mr. Gonzalez's assertion, the Court did not remand this matter to AHD for "Employer/Insurance-produced convincing evidence of good faith." *Id.* at 7. The Court remanded this matter to AHD

with instructions that a new evidentiary hearing be held in front of a different ALJ to resolve the factual questions underlying the **third prong** of the *Bivens* test.

Gonzalez v. DOES, No. 12-AA-1603 (D.C. June 12, 2013) (Emphasis added.)

CONCLUSION AND ORDER

The March 20, 2015 Order Staying Proceedings is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law; therefore, it is VACATED, and this matter is REMANDED for the ALJ to analyze whether summary judgment is appropriate (1) because Mr. Gonzalez's claim for relief applies exclusively to The Asylum Company t/a MCCXXIII and, therefore, is not incorporated into *In the Matter Of: Indemnity Insurance Corporation, RRG, In Rehabilitation* in the Court of Chancery of the State of Delaware (C.A. No. 8601) and (2) because Mr. Gonzalez has or has not proven entitlement to summary judgment under the circumstances of his claim.

So ordered.