

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-076

THOMAS NADE PETERS,
Claimant-Respondent/Cross-Petitioner,

v.

NATIONAL ORGANIZATION FOR MARRIAGE and
HARTFORD INSURANCE GROUP,
Employer/Insurer-Petitioner/Cross-Respondent.

Appeal from an May 28, 2014¹ Compensation Order by
Administrative Law Judge Karen R. Calmeise
AHD No. 14-142, OWC No. 709020

DEPT. OF EMPLOYMENT,
SERVICES
COMPENSATION REVIEW
BOARD
2014 OCT 29 AM 11 22

Rebekah A. Miller for the Respondent/ Cross-Petitioner
Shawn M. Nolen for the Petitioner/Cross-Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In July 2013, Mr. Thomas Nade Peters was employed as the communications director for the National Organization for Marriage (“NOM”). He was responsible for all aspects of NOM’s public contact with the media.

On July 16, 2013, Mr. Peters attended an off-site meeting in Newburg, Maryland. Employees from Rhode Island, Pennsylvania, and the District of Columbia came together to discuss a pertinent Supreme Court decision and other organizational business. Mr. Peters arrived at the

¹ Although the body of the Compensation Order is undated, the Certificate of Service indicates it was mailed on May 28, 2014.

meeting at noon. He drank 2 alcoholic beverages but fully participated in the discussions until the meeting adjourned for the day.

The meeting was scheduled to continue the next morning, and several attendees participated in water-related activities on the property such as fishing, swimming in an inflatable swimming pool, and swimming in a river accessible from a dock located on the property. After jumping or diving off the dock several times, Mr. Peters' final entrance into the river resulted in his hyperextending his neck and fracturing his C5 vertebrae.

Mr. Peters asserted an entitlement to temporary total disability benefits from October 17, 2013 to the date of the formal hearing and continuing. In a Compensation Order dated May 28, 2014, an administrative law judge ("ALJ") ruled Mr. Peters' injury is compensable and awarded ongoing temporary total disability benefits based upon a stacked average weekly wage of \$2,730.76; the ALJ denied Mr. Peters' request for penalties based upon untimely controversion and bad faith.²

On appeal, NOM asserts the ALJ applied an incorrect standard to reach the conclusion that Mr. Peters' injury arose out of and in the course of his employment. NOM also asserts it rebutted the presumption that an injury is not occasioned solely by intoxication because Mr. Peters "admitted to drinking alcohol on the day of his injury, several witnesses observed him drinking and he cannot recall the amount he may have consumed after losing his memory of events."³ Next, NOM argues the ALJ erred in not awarding it a credit for long-term disability benefits paid to Mr. Peters because the ALJ applied outdated law. NOM also argues the ALJ miscalculated Mr. Peters' average weekly wage because Mr. Peters did not hold concurrent employment at the time of his injury. The details of each argument are set forth in the Analysis section of this Decision and Remand Order. NOM requests the Compensation Review Board ("CRB") reverse the Compensation Order.

In his cross-appeal, Mr. Peters only contests the ALJ's denial of penalties. Initially, Mr. Peters asserts the ALJ should not have admitted NOM's Notice of Controversion as a post-hearing exhibit because there are no unusual circumstances warranting acceptance of post-hearing evidence. Mr. Peters also asserts he is entitled to timely-controversion penalties because NOM only submitted the Notice of Controversion post-hearing and to bad faith penalties because NOM's Notice of Controversion is merely pretextual. For these reasons, Mr. Peters requests the penalties portions of the Compensation Order be reversed.

In response to Mr. Peters' penalties argument, NOM argues "the filing of the Notice of Controversion is irrelevant to the Claimant's burden and the Claimant is only attempting to shift its burden to the Employer."⁴ At the formal hearing, Mr. Peters did not know whether NOM had

² *Peters v. National Organization for Marriage*, AHD No. 14-142, OWC No. 709020 (May 28, 2014).

³ Memorandum of Points and Authorities of Employer/Insurer in Support of Application for Review and in Opposition to Claimant's Cross-Application, pp. 15-16.

⁴ Memorandum of Points and Authorities of Employer/Insurer in Support of Application for Review and in Opposition to Claimant's Cross-Application, pp. 22-23.

filed a Notice of Controversion; therefore, NOM asserts he did not satisfy his burden of proof for timely controversion penalties or for bad faith penalties and the CRB should affirm the ALJ's ruling denying both types of penalties.

In opposition to NOM's appeal, Mr. Peters contends that but-for the obligation he had to attend the off-site meeting as a traveling employee, he would not have been injured; therefore, his injury sustained during a recreational or social activity arises out of and in the course of employment. Furthermore, Mr. Peters reiterates, "In order to avoid liability for compensation, the Employer must not merely prove the Claimant had consumed alcohol prior to his accident, but they must also prove Claimant was intoxicated and that Claimant's injury was solely occasioned by the intoxication,"⁵ and although Mr. Peters admits he consumed alcohol at the event, he asserts he was not intoxicated at the time of his injury. Next, Mr. Peters contends NOM is not entitled to a credit for long-term disability payments because there is no evidence the plan was governed by ERISA, contains language authorizing a credit, or was funded solely by NOM. In addition, Mr. Peters asserts his average weekly wage should be based upon his concurrent, contract employment with NOM and Catholic Vote regardless of the non-employee designation on Mr. Peters' Form 1099 from Catholic Vote. Mr. Peters requests the CRB affirm the Compensation Order on these issues.

Finally, Mr. Peters goes to great lengths to attack Dr. Ross S. Myerson's opinions. On March 18, 2014, Mr. Peters raised an objection to Dr. Myerson's report in Claimant's Objection to Employer's Exhibit of Dr. Myerson's Independent Medical Examination Report; however, the ALJ did not rule on this motion, on Claimant's Motion to Compel Response to Request for Production of Documents, or on Mr. Peters' Motion to Deem Requests for Admission Admitted.⁶

ISSUES ON APPEAL

1. Did the ALJ apply the correct standard when analyzing whether Mr. Peters' injury arose out of and in the course of his employment?
2. Did the ALJ properly evaluate whether Mr. Peters' injury was occasioned solely by intoxication?
3. Is NOM entitled to a credit for long-term disability benefits paid to Mr. Peters?
4. Is Mr. Peters entitled to wage-stacking for concurrent employment?

⁵ Memorandum of Points and Authorities of Claimant/Respondent in Opposition to Employer/Insurer's Application for Review, pp. 8-9.

⁶ The CRB takes official notice of the administrative record created by both the Office of Administrative Hearings, Administrative Hearings Division and the Office of Workers' Compensation.

5. Did the ALJ err by accepting NOM's Notice of Controversion after the conclusion of the hearing?
6. Did the ALJ err by not ruling on Claimant's Objection to Employer's Exhibit of Dr. Myerson's Independent Medical Examination Report, on Claimant's Motion to Compel Response to Request for Production of Documents, or on Mr. Peters' Motion to Deem Requests for Admission Admitted?

ANALYSIS⁷

To begin, Mr. Peters was employed by NOM as a communications director. He is not a traveling employee *per se*; however, on July 16, 2013, his job required he attend a meeting off-site, and under the right circumstances, even if he "was not engaged in the duties of his employment at the exact moment of the incident,"⁸ he still may be entitled to workers' compensation benefits.

NOM argues that the positional risk test that the ALJ applied must have some limits including "a specific analysis of how the employment obligation exposed the employee to danger by putting them in a specific place at a specific time."⁹ The CRB disagrees with NOM's argument that the limit should be a geographic one with "conservative boundaries,"¹⁰ but it does agree that there are limits. The positional risk test applies to neutral risks, not personal risks and not risks "distinctly associated with the employment."¹¹ Furthermore, once it has been determined that the positional risk test does apply, the conditions and obligations of employment must have placed the claimant in the position where the injury was sustained.¹² In this case, the ALJ has not made any findings regarding the nature of the underlying risk, and as a result, this case must be remanded to analyze whether Mr. Peters' injury arises out of and in the course of his employment. To that end, if Mr. Peters' work-duties had concluded, the ALJ may need to

⁷ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁸ Memorandum of Points and Authorities of Claimant/Respondent in Opposition to Employer/Insurer's Application for Review, pp. 4-5.

⁹ Memorandum of Points and Authorities of Employer/Insurer in Support of Application for Review and in Opposition to Claimant's Cross-Application, p. 9.

¹⁰ *Id.* at p. 10.

¹¹ *Clark v. DOES*, 743 A.2d 722, 727 (D.C. 2000) quoting A. LARSON, 1 LARSON'S WORKERS' COMPENSATION LAW, §3.05 (1999).

¹² *Grayson v. DOES*, 516 A.2d 909, 911 (D.C. 1986).

consider whether the event following the business discussions qualify as a compensable social event.

An activity is related to employment if it carries out the employer's purposes or advances its interests directly or indirectly, and in cases where an employee is injured at a social or recreational activity, there are special rules to determine whether the injury arose out of and in the course of the employment. Recreational or social activities may be within the course of the employment when:

- (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
- (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
- (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.^[13]

Although some jurisdictions require proof of every prong in order to establish an employment connection, the rule in the District of Columbia is that there are three independent links by which recreation can be tied to employment. Thus, if one prong is proven, the absence of the others is not fatal.¹⁴ To be clear, the CRB makes no determination regarding the merits of the resolution of this issue; however, under the circumstances, the ALJ may need to consider the application of this test to the facts.

Moving on to the issue of Mr. Peters' intoxication, NOM asserts it rebutted the presumption against intoxication. Importantly, there is no presumption that a claimant was or was not intoxicated, there is a presumption "[t]hat the injury was not occasioned solely by the intoxication of the injured employee."¹⁵ Furthermore, recovery is not barred merely by showing that a claimant was intoxicated at the time of injury; in order to bar recovery, the intoxication must be the sole cause of the injury,¹⁶ and

[b]ecause of the statutory presumption that an injury is not occasioned solely by an employee's intoxication or malicious intent, an employer has a heavy burden in attempting to prove such misconduct (and thus preclude recovery) in a proceeding before the agency. *See* I A. LARSON, *supra* §34.34, at 6-88.

¹³ Larson's *Workers' Compensation Law* §22.01.

¹⁴ *Charles v. Apple Hospitality, LLC*, CRB No. 13-007, AHD No. 12-394, OWC No. 688990 (July 24, 2013).

¹⁵ Section 32-1521(3) of the Act.

¹⁶ Section 32-1503(d) of the Act.

Although many courts have denied recovery when an employee's injury stemmed from his own attack on another, *see generally* I A. LARSON, *supra* § 11.15(d), a few courts have been WILLING TO GRANT COMPENSATION EVEN IN EGREGIOUS CASES OF THIS SORT. *Id.* For example, a Louisiana court, dealing with a similar statute, held that a claimant could receive compensation even though he had initiated a fight and was injured when another retaliated with excessive force. *Landry v. Gilger Drilling Co.*, 92 So.2d 482, 484 (La.Ct.App. 1957). Similarly, the Massachusetts Supreme Judicial Court approved compensation for an employee who was injured in a struggle that began when he struck a co-worker who had been annoying him with a pipe which the claimant had hidden for that purpose. *In re Tripp's Case*, *supra* at 518, 246 N.E.2d at 451.

As to the question whether an employee's injury was occasioned solely by his or her own intoxication, most courts have concluded that a claim was compensable even though the drunkenness was a major cause of the injury. *See* IB A. LARSON, *supra* §34.34. For example, the United States Court of Appeals for the District of Columbia Circuit has held that injuries sustained by an employee when he was assaulted by persons who found him drunk on a street corner were not caused solely by intoxication, because murderous assault was also a cause. *See Maryland Casualty Co. v. Cardillo*, 71 App. D.C. 160, 163, 107 F.2d 959, 962 (1939). [Footnote omitted.]^[17]

In this case, the ALJ applied the burden-shifting test of the presumption and concluded that not only was Mr. Peters not intoxicated at the time of the accident, intoxication is not the sole cause of Mr. Peters' injury:

Employer argues that Claimant was intoxicated and that his permanent cervical spine injury on July 16, 2013 was solely caused by his intoxication therefore liability does not lie with the Employer. To rebut the presumption, Employer submitted the records review report of Dr. Ross Myerson, occupational and environmental specialist, dated March 27, 2014. Dr. Myerson reviewed the Claimant's discharge summary from his hospitalization at the University of Maryland Medical System from July 16, 2012 through August 28, 2013. Dr. Myerson noted that the Claimant's ethanol level from the admitting lab tests was reported at 234 mg/dl (converted to 0.234 g/dl). Dr. Myerson opined that, taking into consideration that a period of time had passed between the injury and the time that his blood was drawn, Claimant would have exhibited physical effects of intoxication and impaired judgment and increased risk-taking. (EE 1 p. 2) Dr. Myerson opined that, according to the admitting lab report Claimant was significantly intoxicated at the time of the accident and that the injury was the result of Claimant's intoxicated state. (EE 1)

¹⁷ *Harrington v. Moss*, 407 A.2d 658, 662-663 (D.C. 1979). Although this case adjudicates a workers' compensation claim under the Longshore and Harbor Workers' Act, the applicable language is the same as the language in the Act.

Although Employer's IME was not rendered as a result of a physical examination the opinion, generated solely for the purpose of offering proof of intoxication, is sufficient to rebut the presumption and therefore the evidence must be weighed.

Claimant admits that he imbibed two alcoholic drinks on the afternoon of July 16, 2013. He testified that, although it was a hot day, he drank only the two drinks; a beer and a mixed drink, before the meeting concluded and before he entered the water to swim. Although Claimant could not recall the events following the injury, he credibly testified that he was conscious that he was in a work environment and that he would never become "inebriated in front of his boss". (HT 65) Claimant witness, Brian Duggan testified that he was present at the retreat and he saw Claimant drinking a beer. (HT 107) Mr. Duggan further testified that, during the meeting, Claimant was fully engaged and he initiated discussion during the meeting, that he was business like, his speech was not slurred, his eyes were not red, and he had no trouble walking. (HT 115) Mr. Duggan credibly testified that Claimant did not appear to be intoxicated during or after the meeting. (HT 109-110)

The witness statements conducted in October and December 2013, which were jointly submitted by Employer and Claimant, also corroborated Brian Duggan's testimony that Claimant was not intoxicated during the business meeting. The witnesses that were interviewed and present that afternoon, did not witness him drinking while he was swimming off the dock. (JE 1)

Claimant also introduced the medical opinion statement of Dr. Nicholas T. Lappas, forensic toxicologist. In a letter dated April 1, 2014, Dr. Lappas reviewed the hospital discharge summary for Claimant and in a letter dated April 1, 2004, he expressed an opinion that the ethanol levels in the blood tests were lower than represented by the notation of "Ethanol level 234". (CE 8)

In weighing the record evidence without the benefit of presumption I find the Claimant and witness testimony and the observations related in the jointly submitted witness statements to be of more import than the medical opinion of a non-treating, non-examining physician who conducted a medical records review six months after Claimant was air lifted for emergency medical treatment. Employer's evidence may confirm the uncontested fact that Claimant ingested alcoholic beverages on the day of accidental injury however I find the March 2014 record review, without further corroborating evidence, does not prove by a preponderance of the evidence that the Claimant was intoxicated and that the accidental injury resulted from the intoxication. [Footnote omitted.]^[18]

¹⁸ *Peters, supra*, at pp. 7-8.

The ALJ was free to draw the inference that despite Mr. Peters' post-injury memory problems, "he credibly testified that he was conscious that he was in a work environment and that he would never become 'inebriated in front of his boss.'"¹⁹ Although the record may support inferences and conclusions contrary to those the ALJ reached, the CRB lacks authority to reweigh the evidence,²⁰ and frankly NOM's dispute that

[w]ithout a memory, the Claimant cannot attribute the incident to anything other than his intoxication. The Claimant had extensive experience swimming and diving, he appreciated the danger of diving into shallow water and he had been in the exact same water shortly before his injury. He can not [*sic*] and has not offered any explanation as to why this incident occurred, but for his intoxication.^[21]

is an inappropriate attempt to argue Mr. Peters assumed the risk, a defense not available in workers' compensation cases.²²

As for NOM's request for a credit for long-term disability benefits paid, after NOM filed its Memorandum of Points and Authorities of Employer/Insurer in Support of Application for Review and in Opposition to Claimant's Cross-Application, the District of Columbia Court of Appeals confirmed that short-term disability benefits paid to a claimant pursuant to an employer-funded policy qualify as advance payments of compensation entitling the employer to a credit against workers' compensation benefits:

An employer that makes disability payments under the [Act] is entitled to credit for any advance payments of compensation the employer has made. D.C. Code §32-1515(j). This case presents a single legal issue: whether payments made from an employer-funded short-term disability policy to an employee who suffers a work-related injury are advance payments of compensation. The CRB concluded that such payments are advance payments of compensation, and we are required to defer to that conclusion as long as it is reasonable. See generally, *e.g.*, *Colbert v. District of Columbia Dep't of Emp't Servs.*, 933 A.2d 817, 820 (D.C. 2007) ("We will defer to the agency's interpretation of the statute . . . it administers unless its interpretation is unreasonable or in contravention of the language or legislative history of the statute . . .") (internal quotation marks omitted). We find the CRB's conclusion reasonable.^[23]

¹⁹ *Id.* at p. 7.

²⁰ *Marriott, supra.*

²¹ Memorandum of Points and Authorities of Employer/Insurer in Support of Application for Review and in Opposition to Claimant's Cross-Application, p. 17.

²² See §§32-1503(b) and 32-1504(b) of the Act.

²³ *Felder v. DOES*, 97 A.3d 86, 88 (D.C. 2014).

The CRB finds no reason to distinguish between payments made from an employer-funded, short-term disability policy and payments made from an employer-funded, long-term disability policy; therefore, if an employer has funded a long-term disability policy and payments have been made pursuant to that policy, the employer is entitled to a credit against workers' compensation benefits. In this case, the ALJ denied NOM a credit based upon its failure to meet its burden of proof:

Employer is entitled to a reduction in benefits when the Employee receives money from either an employment benefit plan subject to ERISA or an income maintenance plan solely funded by the Employer. *Cathy Davis v. Washington Metropolitan Area Transit Authority*, Dir Dkt. No. 96-37 (February 18, 1997). *Mushroom Transportation and National Union Fire Insurance Company of Pittsburgh v. District of Columbia Department of Employment Services*, 698 A.2d 430 (D.C. 1997).

It is uncontested that Claimant has received long term disability payments from private insurance at the rate of \$5,000 per month. In the instant case, Employer has not demonstrated the long disability plan in question was solely funded by Employer. In order for employer to be eligible for a credit when an employee receives benefits under such a plan, the benefit plan must be both subject to ERISA and solely funded by employer. In the absence of evidence to indicate those circumstances are applicable to Claimant's plan, Employer's claim must fail. See *Ira D. Scott v. Mushroom Transportation*, Dir. Dkt. No. 95-38, H&AS No. 88-44A, OWC No. 74896 (Director's Decision, August 17, 1998). On July 17, 1997, the Court in *Mushroom Transportation* remanded the case to the Director to interpret the Act to determine whether, for credit to be available to employer, the benefit plan must be both subject to ERISA and funded solely the employer. *Mushroom Transportation*, supra at 432.

Based on the evidence presented, Employer is not entitled to credit for disability payments received pursuant to the long-term disability benefits plan.^[24]

As NOM points out in its Memorandum of Points and Authorities of Employer/Insurer in Support of Application for Review and in Opposition to Claimant's Cross-Application, the ALJ did not rely on *Felder*, to reach her conclusion; however, the ALJ's determination that NOM failed to meet its burden of proof regarding the funding of the policy is not contested.

Turning to the wage-stacking issue, NOM asserts Mr. Peters did not hold concurrent jobs on July 16, 2013:

Here, the Claimant did not hold concurrent jobs. The Claimant has submitted two 1099 Miscellaneous Income tax forms. One reports that he

²⁴ *Peters, supra*, at p. 10.

received \$1,000.00 in the year 2013 from JRM Enterprises for compensation received, without reference to date, as a “non-employee.” (Claimant’s Exhibit 2, p. 10). According to the Claimant’s testimony, this was payment for a one time event that occurred in June of 2013. (HT at p. 71). The second reports the receipt of \$24,500.00 from FIDELIS for compensation also received as a “non-employee”. An invoice accompanying the Fidelis 1099 suggests this payment was for an event that occurred on January 19, 2013. Since the Claimant did not earn these amounts pursuant to concurrent jobs held at the time of an injury, but rather for singular events, and as a “non-employee”, pursuant to the Act, these wages should not be included in any calculation of wage loss.^[25]

As evidence to permit wage-stacking, the ALJ wrote:

After weighing the parties’ arguments and reviewing the evidence of record, I am persuaded that Claimant has met his burden of establishing that he was employed concurrently by Employer and by Catholic Vote on the date of his compensable injury and that the income received from the second employer was paid in the 26 weeks prior to the work injury.

Claimant’s evidence of his wages from Catholic Vote is an income tax 1099 form from FY 2013 that reflects he received \$24,500.00 in compensation in that year. Serving alone, the 1099 tax form provides no information of when or what the Claimant was paid for services. However, Claimant testified that he was paid weekly for his services as a blog director. The check statement date of service is January 18, 2013, and it reflects no monthly or weekly amount paid. However, the check was issued within the 26 week period of time prior to the work injury. No evidence was submitted to prove that Claimant had terminated his employment with Catholic Vote at the time of the work injury. As such, he is entitled to computation of his average weekly wage based upon his job with Employer and his earnings from Catholic Vote.^[26]

In order to be entitled to wage stacking, a claimant must hold concurrent jobs at the time of an injury;²⁷ it is not enough that Mr. Peters may have received compensation during the 26 weeks preceding his injury. The ALJ failed to make a specific finding that Mr. Peters held concurrent jobs at the time of his injury.

NOM’s argument that Mr. Peters is not an employee of Catholic Vote as defined in §32-1501(9) of the Act is of no moment. In order for wage-stacking to apply, the claimant must receive compensation for working concurrent jobs on the date of injury; that Mr. Peters may or may not

²⁵ Memorandum of Points and Authorities of Employer/Insurer in Support of Application for Review and in Opposition to Claimant’s Cross-Application, p. 21.

²⁶ *Peters, supra*, at p. 8.

²⁷ *MCM Parking Co. v. DOES*, 510 A.2d 1041 (D.C. 1986)

qualify as an employee of a concurrent employer for purposes of obtaining workers' compensation benefits does not change that he may have received pay for concurrent employment, even for work performed as an independent contractor.²⁸

Turning to the issues raised by Mr. Peters, the CRB has thoroughly reviewed the Office of Workers' Compensation's administrative file in this matter to ascertain whether it contains NOM's Notice of Controversion. The CRB takes official notice that a Notice of Controversion was filed with the Office of Workers' Compensation on August 22, 2013.²⁹ Based upon the date of filing, that Notice of Controversion was included in the Office of Workers' Compensation's administrative file before the ALJ conducted the formal hearing on April 2, 2014,³⁰ and given that the ALJ (1) had an obligation to ensure a complete hearing record in order to reasonably rule upon the issue of penalties for untimely controversion and (2) should have retrieved the Office of Workers' Compensation's administrative file in the absence of a Notice of Controversion in evidence, NOM's providing a copy of the Notice of Controversion post-hearing is a matter of convenience, not an action requiring exclusion.

Finally, on the issue of bad faith penalties, Mr. Peters asserts NOM's Notice of Controversion is a pretext and penalties are due. It is well settled that in order to be entitled to bad faith penalties, the claimant must establish (1) entitlement to a benefit, (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.³¹ If the claimant makes a *prima facie* showing of these 3 requirements, the burden shifts to the employer to produce evidence of a good faith basis for not paying the benefits. Only if the employer meets that burden does the claimant have the additional burden of proving that said evidence is pre-textual.³² In addition,

[i]n cases where a controversion is filed, the claimant has an additional burden to establish that the controversion was filed in bad faith. Absent a controversion, bad faith may be inferred from a showing of entitlement, knowledge by the employer of the entitlement, and failure to pay or unreasonable delay in paying, since employer, by failing to controvert, has offered no explanation whatsoever for its failure to pay, and where the Act requires such an explanation (as it does by requiring that controversion notice be filed), it is fair to infer that no good reason exists in the absence thereof.^[33]

²⁸ *Romero v. Romero Construction, Inc.*, CRB No. 10-167, AHD No. 10-115, OWC No. 657033 (October 31, 2011).

²⁹ See footnote 6, *supra*.

³⁰ Although the Compensation Order indicates the formal hearing was held on April 2, 2013, the hearing transcript, consistent with the Scheduling Order included in the Administrative Hearing Division's administrative file, indicates the formal hearing actually took place on April 2, 2014.

³¹ *Bivens v. Chemed/Roto Rooter Plumbing Services*, CRB No. 05-215, AHD No. 01-002B (April 28, 2005)

³² *Id.*

³³ *Id.*

Before denying bad faith penalties, the ALJ made only cursory findings and did not apply the *Bivens* test at all:

I find Claimant is not entitled to the penalty described in D.C. Code §32-1528. Prior to the instant Formal Hearing proceedings, no Compensation Order was issued judging Employer liable for payment of benefits. Employer has not demonstrated bad faith in failing to pay benefits, in that Employer had comprehensible reasons to deny the compensability of this claim. Employer has argued defenses against liability as provided in the Act. That the facts in this case do not support a finding in favor of Employer does not constitute bad faith.

Where employer is able to articulate cognizable bases for its refusal to pay disability benefits, bad faith will not be found. *John McCarthy v. Greater Southeast Community Hospital*, H&AS No. 92-410, OWC No. 214791 (Compensation Order on Remand, January 4, 1994).^[34]

The ALJ failed to make the necessary findings of fact or to apply the appropriate test.

Nonetheless, Mr. Peters requests a bad faith penalty because

Employer/Carrier's subsequent actions demonstrate they fear no reprisal from this Agency for ignoring their duties under the Act.

Claimant did all that the D.C. Workers' Compensation Act required of him to pursue his claim in an amicable fashion. He timely filed his claim. When no response was received, he filed for a Formal Hearing on December 4, 2013. On or about December 20, 2013 Claimant propounded discovery requests which were ignored. On February 7, 2014 the Claimant propounded additional discovery requests, including Requests for Admissions to the Employer/Carrier, which were again ignored. Over the next 5-6 weeks, Claimant made repeated good faith attempts to contact counsel and resolve the matter of outstanding discovery requests, yet no responses were provided. In accordance with the Scheduling Order, on February 18, 2014, Claimant drafted the [Joint Pre-Hearing Statement] and Stipulation Form and sent it to Employer/Carrier requesting that they provide their contested issues of fact and law, as well as a list of the witnesses and exhibits they intended to present at the hearing. This, too, was ignored and on February 19, 2014, Claimant was forced to file the [Joint Pre-Hearing Statement] without any input from the Employer/Carrier and without knowledge of the defenses the Employer/Carrier intended to present against him at the Formal Hearing. On March 18, 2014, Claimant filed a Motion to Compel responses to discovery requests. Employer/Carrier neither filed a response to this Motion nor provided the requested responses to discovery. On March 19, 2014, pursuant to

³⁴ *Peters, supra*, at pp. 9-10.

the Scheduling Order, Claimant's Exhibits were filed. Claimant did not receive Employer's exhibits until the day of the Formal Hearing. At 12 Noon on Friday, March 28, 2014, with only 2 business days left before the Formal Hearing on Wednesday, April 2, 2014, the Employer/Carrier for the first time disclosed Dr. Myerson's report and that it would be denying the claim based upon an "intoxication" defense. Thereafter, after 5 p.m. on Friday, Employer provided documents which Claimant had requested through discovery over the past 4 months. These documents did not include a Notice of Controversion.

Employer/Carrier flagrantly disregarded the Scheduling Order issued in this matter. Specifically, time frames for responding to discovery and deadlines for completing the Joint Pre-Hearing Statement and Stipulation Form and filing exhibits were ignored.

First, the Employer's complete disregard for the pre-hearing Scheduling Order completely voids the Order and sets a precedent that Scheduling Orders are meaningless. Either the Scheduling Order means something or it means nothing. The outcome of this matter tells employers that disregarding the Act, disregarding the Scheduling Order, and ignoring pre-hearing discovery requests is okay to do if you are on the employer side of a claim. Claimant submits that this is not the message that the agency intends to convey.

* * *

[After the claimant has made a *prima facie* showing of bad faith, t]he burden then shifts to the employer to produce evidence of a good faith basis for denial of the benefits. Even if the Notice of Controversion is considered, the summaries of witness statements demonstrate that the Employer's investigation disclosed that Claimant was injured at a work-related event and that he was not intoxicated at the time of his injury. A summary of President Brown's statement and that of all the statements of the seven (7) other employees who attended the retreat were also provided to the Employer and are consistent in that the retreat was an employer-sponsored event, attendance by Claimant and others was expected, an overnight stay was planned so the meetings could continue the next morning, socializing and recreation were part of the retreat plans, and, most importantly, even though they were specifically asked, not one attendee of the retreat observed Claimant to be intoxicated at any time. These statements demonstrate that Employer's investigation failed to provide any evidentiary support to allege that Claimant's injury did not arise out of or in the course of his employment. As such, Employer/Carrier does not have sufficient evidence to prove that it had a good faith basis for denial of the benefits in this matter as set forth in the Notice of Controversion. Thus, the reasons for denial set forth in the Notice of Controversion are merely pretextual.

Even after the Employer investigated and determined it did not have a legal or factual basis to deny the claim, compensation benefits were not paid.

Rather, Employer/Carrier hired Dr. Ross Myerson, who is well-known to this agency as a doctor who has created his own business solely for the purpose of providing reports on injured workers (that he does not examine or treat) that favor employers and insurance companies. Employer/Carrier cannot rely upon the eleventh hour flawed analysis by Dr. Myerson to assert they had a good faith basis for denial of this claim. [Footnote omitted.] Dr. Myerson's report, dated March 27, 2014, was procured less than a week before the Formal Hearing, so it cannot be used as the basis for a "good faith" reason for denial of the claim for the preceding 35 weeks. Dr. Myerson's report is more than a pretext, it is a sham, a last minute attempt to create a modicum of an excuse for denying benefits to a seriously injured worker. The Claimant trusts that the Court will recognize Dr. Myerson's report to be so thoroughly biased as to be unreliable.^[35]

To the extent that any of this information is relevant to the issues on appeal, the CRB has reviewed the Administrative Hearings Division's administrative file and notes that on March 18, 2014, Mr. Peters filed Claimant's Motion to Compel Response to Request for Production of Documents, Claimant's Objection to Employer's Exhibit of Dr. Myerson's Independent Medical Examination Report, and a Motion to Deem Requests for Admission Admitted. The ALJ failed to rule on any of these motions, and as a result, the Compensation Order may be based upon evidence that should have been excluded. Because the ALJ failed to rule on these motions, the entire Compensation Order must be vacated.

CONCLUSION AND ORDER

The ALJ failed to rule on several motions filed by Mr. Peters, therefore, the entire Compensation Order may be based upon evidence that should have been excluded and must be VACATED. This matter is REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Melissa Lin Jones
MELISSA LIN JONES
Administrative Appeals Judge

October 29, 2014
DATE

³⁵ Claimant/Respondent's Notice of Cross Appeal, pp. 5-9.