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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
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CRB No. 05-035

TERENCE K. WOLFE,

Claimant – Petitioner

v.

WASHINGTON SPORTS AND ENTERTAINMENT AND AIG CLAIM SERVICE,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Jeffrey P. Russell
OHA/AHD No. 04-405, OWC No. 590946

Terence K. Wolfe, *Pro Se*, for the Petitioner

Joel E. Ogden, Esq., & Anthony Zaccagnini, Esq., for the Respondent

Before LINDA F. JORY, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND 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 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 replaces 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

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on December 20, 2004, the Administrative Law Judge (ALJ) awarded temporary partial disability benefits from August 10, 2004 through August 31, 2004 in the amount of $113.77 with interest thereon plus the payment of expenses listed in Claimant Exhibit T which remains unpaid.[2] The ALJ denied the requested relief for a finding that the average weekly wage was $850.00, for additional disability benefits based upon an underpayment, for penalties based upon a failure to controvert and upon a bad faith nonpayment of benefits, and for benefits based upon a wage loss from continuing from October 17, 2003. The ALJ ordered that temporary partial disability from and after September 21, 2004 be suspended until the Claimant-Petitioner (Petitioner) submits to an independent medical evaluation (IME) requested by the Employer-Respondent (Respondent). The Claimant-Petitioner now seeks review of that Compensation Order.[3] On March 22, 2005, the Respondent filed a Memorandum in Opposition to Claimant's Petition for Review. On June 30, 2005, the Petitioner filed a Memorandum in Rebuttal.

As grounds for this appeal, the Petitioner alleges that the Compensation Order is not supported by substantial evidence and is not in accordance with the law.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (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 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. 2003). 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

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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.

[2] Claimant Exhibit T is a spreadsheet showing the Petitioner's expenses for mileage incurred attending medical and physical therapy appointments, and for the cost of prescriptions and medical supplies.

[3] Along with his Application for Review, the Petitioner requested additional time to submit a Memorandum in support thereof. Although the regulations previously governing appeals required that the memorandum be filed with the Application for Review, it was the policy of the Director, Department of Employment Services to routinely grant requests for extension of time to file a memorandum. However, the policy was abolished with the institution of the CRB, which assumed the appellate responsibilities of the Director in light of the new statutorily imposed time constraints for issuing decisions. Nevertheless, as the Petitioner is appearing *pro se*, was in the process of relocating to another state during the 30-day period for filing an appeal and his memorandum was received before this matter was assigned for review, the Petitioner's request is granted and his memorandum is accepted as filed.

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.

Turning to the case under review herein, the Petitioner alleges that the ALJ committed the following errors:

1. not citing to the evidence in the record which supported his findings of fact thereby rendering review of the Compensation Order difficult;
2. finding that the Respondent was notified of his work injury on October 30, 2003 when the evidence shows that the Respondent was notified on October 17, 2003, the date of injury;
3. finding that the Respondent had an independent medical examination (IME) conducted in Hagerstown, Maryland when the evidence shows that the IME was conducted in Frederick, Maryland;
4. finding that the issue of his average weekly wage was *res judicata* despite the issuance of a Final Order by the Office of Workers' Compensation (OWC) addressing that issue because at the time the calculation was made, Petitioner was *pro se* and was following the direction of an OWC Claims Examiner (CE), and his later retained counsel neglected to reexamined the issue as he should have done;
5. failing to find that his average weekly wage should be $850.00 under D.C. Official Code § 32-1511 (a)(6);
6. failing to award temporary partial disability benefits continuing from December 17, 2003 although there was no evidence in the record indicating that he was able to work in his usual employment during said period;
7. finding that the Respondent was not liable for a bad faith penalty although the Respondent refused without a legitimate basis to pay benefits and submitted a frivolous controversion;
8. failing to rule on the Claimant's Motion in Limine in a timely manner and then denying the motion, thus allowing the Respondent to admit the transcript of a deposition that was not properly noticed, to use an illegal subpoena and to "play fast and loose" with the rules of discovery; and
9. finding that the Respondent's controversion in letter format met the statutory requirements of D.C. Official Code § 32-1515(d).

The Petitioner maintains that the ALJ abused his discretion, thereby allowing the Respondent to evade its statutory obligations to pay benefits under the Act, and that the Compensation Order must be reversed. In its Memorandum in Opposition, the Respondent asserts that the Compensation Order is supported by substantial evidence and is in accordance with the law and then specifically addresses the Petitioner's arguments on appeal. In his Memorandum in Rebuttal, the Petitioner points to errors in the Respondent's Opposition and maintains that the Compensation Order is riddled with factual and legal errors thus requiring that it be vacated. The Panel will address each alleged error separately.

With respect to the first alleged error, failure to cite to the evidence, the Petitioner does not cite to, nor is the Panel aware of any, statutory or regulatory provision mandating that an ALJ specify the evidence relied upon in making a finding of fact. Under the Act, an ALJ is simply required to make findings of fact and conclusions of law on each materially contested issue in a case. *See King v. D.C. Department of Employment Services*, 742 A.2d 460 (D.C. 1999); D.C. Official Code § 2-509. While it may be true that citations to the record evidence may make the review of a decision easier, review without such citations is not impossible. The Petitioner's first alleged error is rejected.

The Petitioner asserts that finding that the Respondent was notified of his work injury on October 30, 2003 is contrary to the evidence. He maintains that the Respondent was informed on October 17, 2003, the date of his injury via report from Seth Jason, the IATSE[4] steward, who was at the worksite that day and that this evidence stands uncontradicted.

The records shows that the Petitioner was injured on October 17, 2003, that he reported the injury to Seth Jason on October 17, 2003, and that Mr. Jason completed an Employer's First Report of Injury or Occupational Disease on that day. Further, the record shows that the Petitioner filed a Notice of Accidental Injury or Occupational Disease on October 22, 2003. Claimant Exhibit A; Employer Exhibit No. 1a; Hearing Transcript (HT) at p. 98. Thus, the ALJ's finding that the Respondent was first advised of the Petitioner's injury on October 30, 2003 is not supported by substantial evidence. However, a remand for correction is not required because there is no evidence in the record to support a finding other than that the Respondent received notice of the Petitioner's injury on October 17, 2003.[5]

It appears from a reading of the Petitioner's brief, that the Petitioner is also arguing that, contrary to the ALJ's determination, the Respondent is liable for penalties under D.C. Official Code § 32-1515 because the Respondent knew of his injury on October 17, 2003 and did not file a controversion until November 24, 2003. Claimant Memorandum at p. 3. In the decision below, the ALJ determined that the Respondent had nothing to controvert until a specific claim for benefits was made. The ALJ found that the November 24, 2003 controversion was filed within 14 days after the Petitioner's November 24, 2003 request for five weeks of temporary total disability benefits. In doing so, the ALJ rejected the Petitioner's argument that the time for filing a controversion begins to run on when an employer receives notice of an injury and reasoned that unless an employer is protesting the compensability of an injury *ab initio*, there is no reason for an employer to file a controversion until a specific claim for a contested benefit is made. The Panel agrees with the ALJ's reasoning.

The evidence shows that the Petitioner filed an Employee Claim Application on October 22, 2003 and on the same day, sent an e-mail to the Respondent requesting payment of a medical bill for treatment stemming from the work injury. Claimant Exhibits A and B. As of October 22, 2003, the Respondent knew that the Petitioner was requesting medical benefits for a work-related

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[4] IATSE, International Alliance or Affiliation of Theatrical Stage Employees, is the union through which the Petitioner was assigned work. TR at pp. 86-87.

[5] *See St. Clair v. D.C. Department of Employment Services*, 658 A.2d 1040, 1044 (D.C. 1995).

injury. However, the Act indicates that penalties are assessable for the late payment of compensation. *See* D.C. Official Code §§ 32-1515(e) and (f). Compensation is defined as the money allowance paid for wage loss; it does not encompass medical benefits or attorney's fees. *See* D.C. Official Code § 32-1501(6). *See also Stepherson v. Sears, Roebuck and Company*, H&AS No. 84-508A, OWC No. 0044726 (September 6, 1988). Herein, there is no evidence in the record that the Petitioner made a request for disability compensation to the Respondent until November 24, 2003.[6] The Respondent filed a controversion on November 24, 2003, clearly within fourteen (14) working days from the Petitioner's request. The Respondent is not liable for penalties.

The Petitioner next asserts that the ALJ erred in finding that the Respondent had an Independent Medical Examination (IME) conducted in Hagerstown, Maryland when the evidence shows that the IME was conducted in Frederick, Maryland. In the Compensation Order, the ALJ found that the Petitioner's September 21, 2004 refusal to attend an IME was unreasonable under the circumstances of this case. In so finding, the ALJ determined that although the Petitioner lives in Falling Waters, West Virginia, approximately 85 miles from the District of Columbia (D.C.), the Petitioner works in the D.C., has attended two proceedings related to this claim in D.C., that the Petitioner did not cite any hardship in attending the IME, and that the Petitioner's basis for refusal were inconvenience and the Respondent's failure to pay him $50.00 per hour for attending the first IME. The ALJ also found:

> Claimant has previously attended an IME with the same physician [Dr. Clifford Hinkes] as requested by Employer, and at the same location in Hagerstown, Maryland.

Compensation Order at p. 6.

A review of the record evidence demonstrates that this finding is not based upon substantial evidence. The evidence shows that while the Petitioner had attended an IME with Dr. Hinkes, that IME was performed in Frederick, Maryland. Employer Exhibit No. 2al; HT at p. 74. This incorrect finding, however, is a harmless error and does not cause the ultimate finding, unreasonable refusal to attend an IME, to fall. On review, the other determinations upholding the ultimate finding are supported by substantial evidence and, without the finding on the location of the IME, are sufficient to support the ultimate finding that the Petitioner unreasonably refusal to attend an IME.

On appeal, as he did at the formal hearing, the Petitioner argues that D.C. Official Code § 32-1520 (f) requires that a physical examination be conducted in a place "reasonably convenient" for the employee and that that language means the employee's local community. Claimant Memorandum p. 10. The Petitioner cites no authority, nor is the Panel aware of any, for his argument. Further as stated by the ALJ, D.C. Official Code § 32-1520 (f) governs the Mayor's authority to order an IME. *See* Compensation Order at pp. 11-12. The provision governing an

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[6] The evidence shows that the Petitioner submitted his October 22, 2003 request for the payment of a medical bill to Donna Henderson, whom he identified as the point person for workers' compensation matters for the Respondent. Claimant Exhibit B; HT at p. 111. There is no evidence that the Petitioner submitted any disability slips to Ms, Henderson, whom he knew was the appropriate contact person, before November 24, 2003.

injured employee's obligation to attend an IME requested by an employer is governed by D.C. Official Code § 32-1507(d).[7] D.C. Official Code § 32-1507 (d) provides that if an injured employee unreasonably refuses to submit to a medical examination by a physician selected by the employer, then benefits shall be suspended. As stated earlier herein, the ALJ's finding that the Petitioner unreasonably refused to submit to an IME is supported by substantial evidence in the record and the Panel will not disturb it.[8]

With respect to his average weekly wage, the Petitioner asserts the finding that the issue was barred by the doctrine of *res judicata* was an error. He asserts that the principle of *res judicata* did not apply to his case because this administrative proceeding is not final. He further avers that, when his average weekly wage of $486.65 was calculated, he was without legal counsel, that he relied upon the OWC CE for guidance and that when he did retain counsel, the counsel negligently failed to reopen the issue. The Petitioner does not deny that the calculation of his average weekly wage was encompassed in a Final Order from OWC was not appealed. Rather, he avers that the earlier calculation of his average weekly wage was based upon mutual mistake, *i.e*., using D.C. Official Code § 32-1511 (a)(4) to calculate his average weekly wage. The Petitioner maintains that since he did not work as a professional stagehand for 20 out of the 26 weeks preceding his injury, he did not work in "substantially the whole of the period" and his average weekly wage should be calculated using D.C. Official Code § 32-1511 (a)(6), producing an average weekly wage of $850.00.

As an initial matter, the judicial principle of *res judicata* is applicable to administrative proceedings. *See Oubre v. D.C. Department of Employment Services*, 630 A.2d 699 (August 26, 1993). In applying *res judicata* herein, the ALJ indicated that there was no evidence of manifest error in this case. On review, the Panel discerns no error, factual or legal, in the original calculation of the Petitioner's average weekly wage.

D.C. Official Code § 32-1511(a)(6) states:

> If the injured employee has not worked in *this employment* during substantially the whole of the period, the employee's average weekly wage shall consist of 130 times the average daily wage or salary, divided by 26 weeks, which an employee of the same class working substantially the whole of the immediately preceding period in the same or similar employment, in the same or a similar

[7] The evidence shows that the Respondent offered to pay the Petitioner mileage expenses and one day of temporary total disability benefits to attend the first IME. Employer Exhibit No. 2i. The evidence does not indicate if this offer was accepted.

[8] The Panel rejects the Petitioner's argument that the Respondent never relied upon, or argued for, the application of D.C. Official Code § 32-1507(d). Claimant Memorandum at p. 11, n. 7. The record shows that unreasonable refusal to attend an IME was submitted as an issue to the ALJ for resolution at the hearing. *See* Compensation Order at p. 3; HT at pp. 74, 216. The Petitioner further argues that the Respondent could not unilaterally suspend his benefits under this provision. Under the Act, once an employer files a controversion under D.C. Official Code § 32-1515, an employer is relieved from further payment of benefits until the matter raised in the controversion is resolved. The record shows that on September 21, 2004, the Petitioner refused to attend an IME and that the Respondent timely filed a controversion under D.C. Official Code § 32-1515 in relation thereto on September 24, 2004. Employer Exhibit No. 1v. The Respondent's right to stop paying benefits after September 24, 2004 derives from the controversion.

> neighboring place, shall have earned in the employment during the days when so employed.

[emphasis added].

The key to understanding the application of this section turns on the terms "this employment". The first step in analyzing the meaning of these terms is to examine the language in the Act. We first look at the language of the statute by itself "to see if the language is plain and admits of no more than one meaning." *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979). When the language of a statute is plain and unambiguous, the plain meaning of that language is binding. *See Hudson Trail Outfitters v. D.C. Department of Employment Services*, 801 A.2d 987, 990 (D.C. 2002) (citation omitted). "However, 'even where the words of a statute have a 'superficial clarity,' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve.'" *Hively v. D.C. Department of Employment Services*, 681 A.2d 1158, 1161 (D.C. 1996) (citation omitted). In that event, the court will "look to policy and the statute's 'manifest purpose' in order to assist" in the interpretation of ambiguous statutory language. *Hively*, at 1163.

Both the Supreme Court and the D.C. Court of Appeals have recognized that "words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.'" *Harrison v. Northern Trust Co*., 317 U.S. 476, 87 L. Ed. 407, 63 S. Ct. 361 (1943) (citations omitted); *Davis, supra*, 397 A.2d at 956; *see Sanker v. United States*, 374 A.2d 304, 307 (1977) (quoting *Lynch v. Overholser*, 369 U.S. 705, 710, 8 L. Ed. 2d 211, 82 S. Ct. 1063 (1962) ("The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, . . . for 'literalness may strangle meaning.'") (citations omitted)).

As the D.C. Court of Appeals has explained, it is appropriate to look beyond the plain meaning of statutory language in several different situations. "First, even where the words of a statute have a 'superficial clarity,' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve. *Sanker, supra*, 374 A.2d at 307 (quoting *Barbee v. United States*, 392 F.2d 532, 535 n. 4 (5th Cir.), *cert. denied*, 391 U.S. 935, 20 L. Ed. 2d 855, 88 S. Ct. 1849 (1968) ('Whether or not the words of a statute are clear is itself not always clear')); accord Davis, supra, 397 A.2d at 956. Second, 'the literal meaning of a statute will not be followed when it produces absurd results.' *Varela, supra*, 424 A.2d at 65 (quoting *District of Columbia National Bank v. District of Columbia,* 121 U.S. App. D.C. 196, 198, 348 F.2d 808, 810 (1965) (citations omitted)); *Berkley v. United States*, 370 A.2d 1331, 1332 (D.C. 1977) (*per curiam*) ("statutes are to be construed in a manner which assumes that Congress acted logically and rationally"). Third, whenever possible, the words of a statute are to be construed to avoid "obvious injustice." *Metzler v. Edwards*, 53 A.2d 42, 44 (D.C. Mun. App. 1947); *see Center for National Policy Review on Race & Urban Issues v. Weinberger*, 163 U.S. App. D.C. 368, 372, 502 F.2d 370, 374 (1974) ('[a] court may qualify the plain meaning of a statute" to avoid consequences that would be "plainly . . . inequitable').

Finally, a court may refuse to adhere strictly to the plain wording of a statute in order "to effectuate the legislative purpose," *Mulky v. United States*, 451 A.2d 855, 857 (D.C. 1982), as determined by a reading of the legislative history or by an examination of the statute as a whole. *Floyd E. Davis Mortgage Corp. v. District of Columbia*, 455 A.2d 910, 911 (D.C. 1983) (per curiam) ("a statute is to be construed in the context of the entire legislative scheme"); *Dyer v. D.C. Department of Housing and Community Development*, 452 A.2d 968, 969-70 (D.C. 1982) ("the use of legislative history as an aid in interpretation is proper when the literal words of the statute would bring about a result completely at variance with the purpose of the Act"); *District of Columbia v. Orleans*, 132 U.S. App. D.C. 139, 141, 406 F.2d 957, 959 (1968) ("the 'plain meaning' doctrine has always been subservient to a truly discernible legislative purpose however discerned, by equitable construction or recourse to legislative history")." *Peoples Drug Stores v. District of Columbia*, 470 A.2d 751, 753-754 (D.C. 1983) (en banc).

D.C. Official Code § 32-1511 establishes the methods to calculate the average weekly wage of an injured employee at the time he sustains a work-related injury while working for, or in the employ of, the employer from whom the injured employee is seeking disability benefits. Bearing in mind the purpose of D.C. Official Code § 32-1511, and the principle of construction that statutory provisions should be read to effectuate the purpose of the Act, it is reasonable to construe the terms "this employment" in D.C. Official Code § 32-1511(a)(6) to mean the job the employee held when he was injured. Thus, D.C. Official Code § 32-1511(a)(6) is used to calculate the average weekly wage of an employee who sustains an injury in a job that the employee has not held for substantially the whole of the 26 weeks preceding the injury.

Herein, the evidence shows that the Petitioner was employed in the position he held when his injury occurred, *i.e*., professional stagehand, for the entire 26 week period prior to his injury. Claimant Exhibit I. That the Petitioner's work, by his own admission, was sporadic in nature and he did not work a 40-hours per week is not sufficient to warrant the use of D.C. Official Code § 32-1511(a)(6). HT at pp. 90, 115-117, 131-132, 156-157, 160-162. Indeed, the Petitioner's interpretation of the subsection would result in an average weekly wage which exceeds his actual average weekly wage. Such a result is contrary to the purpose of the Act which is to provide "income replacement benefits to workers who are unable to earn a living or suffer a reduction in wages because of a work-related injury or illness." *See* COMMITTEE ON HOUSING AND ECONOMIC DEVELOPMENT, REPORT ON THE DISTRICT OF COLUMBIA WORKERS' COMPENSATION ACT ON 1979, Bill 3-106 at 2 (January 29, 1980).

The Petitioner asserts that the ALJ erred in failing to award temporary partial disability benefits continuing from December 17, 2003 although there was no evidence in the record that he could return to work as a stagehand. In the Compensation Order, the ALJ found,

> On April 7, 2004, . . . Claimant was seen by Dr. Worrell, who authored a disability slip retroactive to December 18, 2003 through the recuperative period following knee surgery to be scheduled.

Compensation Order at p. 5.

The ALJ later found,

> Claimant's disability status as found in this Compensation Order is due to his treating physician having recanted an authorization to return to work without restriction, previously issued on December 17, 2003, the recantation being based upon continuing complaints of pain coupled with a positive MRI suggestive of a torn meniscus, and leading to surgery performed on June 28, 2004. Although the surgery failed to disclose the suspected torn meniscus, it did reveal pathologies that have the potential to explain Claimant's ongoing complaints, and which could have resulted from or been aggravated by the work injury.

Compensation Order at p. 5.

In the Discussion portion of the Compensation Order, the ALJ later stated,

> Regarding the nature and extent issues in dispute, Employer does not contend that Claimant was capable of returning to his pre-injury job prior to "six weeks post-surgery", nor, as of the Formal Hearing, does it contest the nature and extent of Claimant's disability prior to that time (HT 201, Employer's closing argument), which would be August 9, 2004.

Compensation Order at p. 7.

Based upon the above excerpts, the Panel agrees that the ALJ simply forgot to make the conclusion of law and award concerning the Petitioner's entitlement to temporary partial disability benefits from December 17, 2003 through August 9, 2004.[9] The portion of the Compensation Order which denied an award for temporary partial disability benefits from December 17, 2003 through August 9, 2004 is reversed.[10]

The Petitioner asserts that the finding that the Respondent was not liable for a "bad faith" penalty although the Respondent refused, without a legitimate basis, to pay benefits and thereafter submitted a frivolous controversion was an error. D.C. Official Code § 32-1528 (b) imposes an additional penalty upon an employer if an employer delays in the payment of any installment of compensation to an injured employee. In order to assess a "bad faith" penalty, an injured employee has the initial burden of making a *prima facie* showing of "bad faith" by demonstrating 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 with a reasonable time. Once an injured employee has made a *prima facie* showing, the burden shifts

[9] Given the statements made in the Compensation Order, no purpose would be served by remanding the case to the ALJ for further proceedings. *See St. Clair v. D.C. Department of Employment Services*, 658 A.2d 1040, 1044 (D.C. 1995).

[10] The ALJ's order that the Petitioner's benefits from and after September 21, 2004 be suspended until such time as the Petitioner agrees to and does submit to an IME as requested by the Respondent is affirmed for reasons stated in this Decision and Order.

to the employer to produce evidence indicating a good faith basis for not paying the benefits. Upon such production by the employer, an injured employee has the additional burden of proving that said evidence is pretextual. *See Plunkett v. Science Application International*, CRB No. 02-87, OHA No. 02-192, OWC No. 541211 (June 14, 2005). If an injured employee fails to meet the additional burden, a "bad faith" penalty will not be assessed.

The ALJ found, and the finding is supported by substantial evidence in the record, that the Respondent did not act in "bad faith" with respect to not paying benefits in this case. The Respondent presented testimony that it did not pay benefits because it did not have any documents supporting the average weekly wage calculation,[11] it had only one medical report relating to the injury, *i.e.,* the emergency room report, it did not know what type of benefits were being sought, and it did not have any information about the Respondent's second employment earnings from a law firm in order to calculate the average weekly wage. HT at pp. 174-175. In response, the Petitioner did not produce any evidence that the Respondent's asserted reasons were pretextual. The Petitioner maintains that "there was never any legitimate dispute of any kind that [his] broken finger made it impossible for him to work as a stage hand". Claimant Memorandum at p. 15. However, the emergency room work limitation form report shows that the Petitioner was released to "altered employment". Claimant Exhibits H and L. Assuming arguendo that the emergency room report was sufficient knowledge, the Respondent could not pay benefits without knowing what kind was being requested[12] and, in this instance since the Petitioner had a second job, the Respondent could not pay benefits without knowing the amount of the Petitioner's second employment earnings to properly calculate benefits.[13] The Petitioner's assertion of error in not assessing a "bad faith" penalty is rejected.

The next error alleged by the Petitioner is the ALJ's actions with respect to the Claimant's Motion in Limine. The Petitioner asserts that the ALJ's failure to rule on the Claimant's Motion in Limine in a timely manner and his denying of the motion were an abuse of discretion. While he argues that the Motion in Limine was not ruled on "in a timely manner", the Petitioner does not cite to, nor is the Panel aware of, any provision in the Act or the regulations which establish a timeframe within which an ALJ must rule a party's motion.[14] Moreover, the record shows that the Petitioner filed discovery requests and Motions to Compel Discovery and For A Protective Order in August 2004, that the ALJ scheduled a status conference for September 9, 2004 to address the parties' issues pertaining to discovery, that the Petitioner knew was the conference was scheduled, that the Petitioner's request to continue the conference was denied "as it was not

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[11] The record shows that the Petitioner prepared the average weekly wage calculation when he was injured. Claimant Exhibit E; HT at pp. 46-47.

[12] There are six (6) types of benefits payable under the Act: temporary partial, temporary total, permanent partial schedule, permanent partial wage loss, permanent total and death benefits. *See* D.C. Official Code §§ 32-1508, 32-1509.

[13] The record shows that when it received information concerning the Petitioner's earnings from his second employment, the Respondent paid benefits. HT at pp. 58-61, 69; Employer Exhibit No. 1m.

[14] The Panel is aware that 7 DCMR § 221.4 permits an ALJ to use the D.C. Superior Court Rules of Civil Procedures as guidelines in procedural matters not addressed in the District of Columbia Administrative Procedure Act and the Act. This regulation, however, does not mandate the use of rules.

in the best interest of promoting an efficient disposition of this matter", that the Petitioner did not appear at the conference and that the Motion for a Protective Order was denied.[15] Conference Transcript (CT) at pp. 6-12. The records also shows that prior to taking evidence at the October 13, 2004 formal hearing, the ALJ took argument from both parties' on the Claimant's Motion in Limine to preclude the admission certain of the Respondent's evidence,[16] that the ALJ offered the Petitioner various remedies other than preclusion, including the possibility of assessing costs against the Respondent, that the Petitioner declined the various remedies and that the Motion in Limine was denied. TR at pp. 12-39. On review, the Panel discerns no actions of the ALJ that constituted a legal error or an abuse of discretion. The Petitioner's allegation of error is rejected.

Lastly, the Petitioner argues the finding that the Respondent's controversion in a letter dated May 20, 2004 met the statutory requirements of D.C. Official Code § 32-1515(d) is erroneous. D.C. Official Code § 32-1515(d) and 7 DCMR § 210.3 set forth the requirements for a controversion. The Respondent's May 20, 2004 letter contained the information required for a controversion. It indicated, *inter alia*, that the Respondent was controverting the Petitioner's retroactive claim for benefits from December 18, 2003 through the date of the surgery.[17] Employer Exhibit No. 1m. The ALJ stated, and the Panel agrees, that "[e]xultation of form over substance is not a practice favored in the law." Compensation Order at p. 9.[18]

CONCLUSION

The portion of the Compensation Order of December 20, 2004 which denied the Petitioner's request for temporary partial disability benefits from December 17, 2003 is not supported by substantial evidence in the record and is not in accordance with the law. All other portions of the Compensation Order are supported by substantial evidence in the record and are in accordance with the law.

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[15] It appears that the Respondent provided the Petitioner with the documents requested through discovery and the Motion to Compel had become moot. CT at pp. 4- 6.

[16] Via his Motion in Limine, the Petitioner sought to preclude the admission of Dr. Scott Worrell's deposition, the IAATSE records and all discovery materials produced by Respondent. It is noteworthy that the evidence shows the Petitioner did not object to the taking of Dr. Worrell's deposition as long as it was taken after September 8, 2004 and the entire transcript was submitted into evidence. Employer Exhibit Nos. 2ag and 2ah.

[17] The Panel notes that the Petitioner, in a letter dated May 20, 2004 to OWC, indicated that Dr. Worrell had retroactively taken him off from work from December 17, 2003 and that he was requesting an award of temporary partial disability benefits based thereon. Employer Exhibit No. 1-l; Claimant Exhibit H. The ALJ found, and the finding is supported by substantial evidence that the Respondent's May 20, 2004 controversion related to the request for benefits was timely. *See* Compensation Order at p. 9.

[18] 7 DCMR § 202 et seq. provides authority to waive strict compliance with the use of forms in workers' compensation proceedings.

ORDER

The Compensation Order of December 20, 2004 is hereby AFFIRMED, IN PART, AND REVERSED, IN PART.

The portion of the Compensation Order which denied the Petitioner's request for temporary partial disability benefits from December 17, 2003 is REVERSED. The Petitioner is awarded temporary partial disability benefits from December 17, 2003 to September 21, 2004 with interest thereon. The ALJ's order that the Petitioner's benefits from and after September 21, 2004 be suspended until such time as the Petitioner agrees to and does submit to an IME as requested by the Respondent is AFFIRMED. All other portions of the Compensation Order are AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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SHARMAN J. MONROE
Administrative Appeals Judge

______January 5, 2006___________
DATE