GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

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DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 17-084

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2017 OCT 20 AM 8 43

SANDY GONZALEZ,
Claimant-Respondent Cross-Petitioner,

v.

HARGROVE, INC., and
BERKSHIRE HATHAWAY HOMESTATE COMPANY,
Employer/Carrier-Petitioner/Cross-Respondent.

Appeal from a July 19, 2017 Compensation Order
by Administrative Law Judge Douglas A. Seymour
AHD No 16-204A, OWC No. 728644

(Decided October 20, 2017)

Benjamin E. Douglas for Claimant
Jose L. Estrada for Employer[1]

Before GENNET PURCELL, HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

GENNET PURCELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Sandy Gonzalez ("Claimant") was employed by Hargrove, Inc., ("Employer") where he was required to bend and stoop while working as a journeyman-carpenter. On April 24, 2015, Claimant was picking up sand bags when he suffered a lower back injury. On April 21, 2016, Dr. Harvinder Pabla diagnosed Claimant with a sprain of the lumbar spine and lumbar radiculopathy, which he related to the April 24, 2015 work accident.

On March 14, 2005, Claimant experienced a different, work-related injury resulting in lower back and right hip nerve pain.[2] Claimant underwent an initial vocational assessment by Cascade

[1] Frank L. Lipshultz appeared on behalf of the Employer at the Formal Hearing before the Administrative Hearings Division.

Disability Management on January 26, 2009, where it was recommended that he begin job search efforts within his physical limitations and abilities.[3] Claimant returned to work after his 2005 work-related back injuries within the restrictions given to him by his treating physician Dr. Pabla and returned to work as a journeyman-carpenter without restrictions form 2010 to April 24, 2015.

After his April 24, 2015 work injury, Claimant continued to treat with Dr. Pabla, seeing him last on February 9, 2017, when he noted Claimant was not a surgical candidate, recommended a Medrox patch, home exercises, and a consultation with a neurosurgeon. Claimant was placed also on permanent modified light duty with ongoing restrictions. Claimant has continued to work in a limited capacity since the date of his April 24, 2015 injury. Claimant's work restrictions prevented him from installing carpets, lifting more than 20 pounds, pushing, pulling, bending over, and picking up metal bases. As a result of his injury, Claimant was also required to keep his back straight.

Claimant called the "20/20 hotline" at his union to locate work. Claimant testified that despite his calls, companies did not call him back with consistent, available work. Due to his back injury, Claimant did not earn any income on December 25, 2016 or January 1, 2017. Claimant has worked intermittently since April 24, 2016, including an eight-hour shift on February 23, 2017, and a four hour shift on February 24, 2107.

At Employer's request, on May 11, 2017, Claimant was examined by Dr. David C. Johnson for an independent medical evaluation ("IME"). Dr. Johnson opined that Claimant sustained a lumbar strain on April 24, 2015, which was superimposed on multilevel degenerative disc disease with an annular tear at L4-L5 and L5-S1. Dr. Johnson further opined that Claimant had " . . . an acute on [sic] chronic condition either caused or aggravated by the April 24, 2015 accident and superimposed on Claimant's back injuries in 2005 and 2009". Dr. Johnson concluded that Claimant's current symptoms related to both his April 24, 2015 work accident and to his pre-existing condition, which was aggravated by the April 24, 2015 accident.

Employer introduced into evidence a Form 10, Claimant's payroll register for the period of April 7, 2016 through April 6, 2017, and a Wage Schedule dated May 28, 2015 reflecting Claimant's intermittent weekly earnings for weeks ending August 14, 2014 through April 23, 2015, although there were not specific entries for every week during these periods.

Claimant introduced into evidence a "Summary of Temporary Partial Disability [O]wed" for the period of April 25, 2016 to the present alleging Claimant is owed a total of $10,029.32 in temporary partial disability ("TPD") benefits.

A full evidentiary hearing was held on April 26, 2017, before an Administrative Law Judge ("ALJ"). Claimant sought an award of temporary partial or permanent partial disability benefits

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[2] On or about December 1, 2009, Claimant entered into a lump sum settlement of his March 14, 2005 work accident for the amount of $102,000.00 and closed medical expenses.

[3] No other vocational rehabilitation reports were entered into the record.

from April 25, 2016 to the present and continuing, penalties and payment of interest on accrued benefits.

On July 19, 2017, the ALJ issued a Compensation Order granting in part and denying in part Claimant's claim for relief and awarding TPD benefits from May 16, 2016 to the present and continuing, interest on accrued benefits and a 10% penalty pursuant to § 32-1515(e) of the Act. *Gonzalez v. Hargrove, Inc.,* AHD No. 16-204A OWC No. 728644 (July 19, 2017) ("CO").

Employer timely appealed the CO to the Compensation Review Board ("CRB") by filing Employer's Application for Review of the Compensation Order and Memorandum of Points and Authorities in Support of Application for Review ("Employer's Brief").

Claimant opposed the appeal by filing Claimant's Response in Opposition to Employer's Application for Review ("Claimant's Brief") and Claimant's Cross-Application for Review of the Compensation Order ("Claimant's Cross-Application").

Employer opposed Claimant's Cross-Application by filing Employer's Response in Opposition to Claimant's Cross-Application for Review of the Compensation Order.

ANALYSIS

Employer argues that the ALJ erred in awarding Claimant TPD benefits as the nature of Claimant's work is seasonal and intermittent and notwithstanding his disability, Claimant is not entitled to benefits for periods where work was not available to him. Employer asserts further that at the formal hearing Claimant testified to the consistent intermittency of his job and the unavailability of regular work:

> Claimant is in a line of work deemed seasonal in nature. When testifying regarding the nature of his work, Claimant stated, "If they need people or they're short of people, then they will give us the job, but there's no security in this type of job—I mean there's no way that you can be secured that you will have a job." (HT, p. 45). He also testified that "when there is a lot of work within the job market, we all work," (HT, pp. 46-47).

Employer's Brief at unnumbered 6.

Relying upon *McMasters v. Willwork, Inc.,,* CRB No. 17-053 (September 7, 2017), and citing to *Larson's on Workers' Compensation, § 93.02[3] (b) Seasonal and (c) Consistently Intermittent Employment,* Employer argues this jurisdiction has held that it is appropriate to include a week devoid of earned wages when calculating a claimant's eligibility for wage loss benefits unless there is evidence that the claimant did not work due to unavoidable causes. *See United Parcel Serv. v. DOES*, 834 A.2d 868 (D.C. 2003) and *Washington Hospital Center v. DOES*, 983 A.2d 961 (D.C. 2009). Employer asserts that "considering this rational to limit the amount a claimant may be entitled to, in the instant case, there were no unavoidable causes resulting in Claimant's lack of earned wages before or after his injury."

In opposition, Claimant argues that the parties agreed that he had been working full duty prior to his injury, Claimant provided uncontroverted testimony establishing this fact, and there was

consensus about Claimant's post-injury restrictions which included Employer's IME and Employer's witness testimony. Claimant asserts Employer failed in its burden to prove that Claimant could work and by extension, could earn wages to offset his entitlement to TPD benefits and failed to refute Claimant's showing that his light duty position resulted in fewer hours, and less work, than his pre-injury position.

Moreover, Claimant asserts that his position as a journeyman-carpenter necessitates him working for numerous employers and further, that despite Claimant's multi-employer situation, Employer only offered evidence from one employer, namely Hargrove, to prove Claimant worked all the hours available to him:

> Employer's witness acknowledged that he could not say whether Mr. Gonzalez was ever denied work due to his work restrictions for employers other than Hargrove, or even whether other supervisors at Hargrove had declined to offer the same number of jobs to Claimant due to his restrictions. (HT 93-95.) Claimant presented evidence of his wage loss, both in (summarized but uncontested) description of post-injury pay (CE2; HT 12) and testimony (HT 44). However, under the Act it is not Claimant's burden to demonstrate this.

Claimant's Brief at 4-5.

To establish a claim for TPD benefits as a result of wage loss, prevailing law mandates that a claimant "must establish an inability to perform his pre-injury position, after which the burden shifts to the Employer to show Claimant can work—and even if it is shown he can do some work, Employer must still pay partial disability for any wage loss that Claimant experiences in his modified duty position." *Logan v. DOES,* 805 A.2d 237 (D.C. 2002) see also *Bengough v. American Conv'n Exhibitors*, CRB No. 12-021 (June 14, 2012). Accordingly, Employer has the right to show some other possible reason for Claimant's wage loss, such as termination, but Employer bears the burden of such a demonstration. *See Johnson v. HD Supply Co.*, CRB No. 15-145 (February 4, 2016).

Employer argues that not all employers knew about Claimant's back condition; also, that employers neverthelesss provided Claimant with work when available regardless of his restrictions. We determine these factors inconsequential in light of the actuality of Claimant's medical work restrictions and his wage loss during the claim period. Whether Claimant acknowledged his work restrictions to potential employers or not, and whether a few employers were aware of the restrictions or not, these factors do not negate the restrictions, the aggregate wage loss, as supported by the evidence, experienced by Claimant during the claim period, nor Claimant's entitlement to wage loss benefits.

In concluding that Claimant was entitled to TPD benefits and did not voluntarily limit his income during the claimed TPD time period, the ALJ reasoned that Claimant's wage loss was not related to "economic reasons" and the availability of "work", but to his injury-related work restrictions. Based on Claimant's credible testimony, the ALJ concluded that Claimant incurred wage loss, lost potential jobs and/or, in the alternative, had to leave secured jobs early when the Employer learned of his injury-related restrictions. The evidentiary record supports the ALJ's findings and conclusions. Employer has failed to establish that the reason for Claimant's wage loss was

related to something other than his injury. Claimant's wage loss was due to his light duty work restrictions. We affirm the CO on this issue.[4]

Employer next argues that the ALJ erred in awarding Claimant penalties for its failure to controvert Claimant's claim for benefits and seeks to submit, to the CRB, the Memorandum of Informal Conference dated November 23, 2016, as material additional evidence in support of its argument. Employer acknowledges that its failure to timely present this evidence was due to Employer's prior counsel's error and states that the Memorandum of Informal Conference should have been taken into consideration during the formal hearing.

In opposition, Claimant argues that the Informal Conference Memorandum is not material, was not admissible as evidence at the Formal Hearing under 7 DCMR § 223.3, and there is no justification for its introduction before the CRB. Claimant also asserts that Employer counsel's disagreement with Employer's "former counsel's strategy" is not reasonable grounds for its non-submission of inadmissible materials. We agree.

Additionally, 7 DCMR § 264.1, which governs the submission of additional evidence pursuant to the Act specifies:

> Where a party requests leave to adduce additional evidence the party must establish:
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> (a) that the additional evidence is material, and
>
> (b) that there existed reasonable grounds for the failure to present the evidence while the case was before the Administrative Hearings Division or the Office of Workers' Compensation (depending on which authority issued the compensation order from which appeal was taken).

We determine that the Informal Conference Memorandum is immaterial to the CRB's review pursuant to 7 DCMR § 264.1. Employer counsel's admission of error on the part of a prior counsel is not reasonable grounds for its failure to offer any evidence it deems material at any stage of the formal proceedings governed by the provisions of the Act. Finally, as it pertains to Claimant's entitlement to penalties on this issue, Employer's failure to file a Notice of Controversion is undisputed. Employer's request for admission of this evidence is denied.

Claimant argues in his Cross-Petition that the ALJ's conclusion that Claimant is not entitled to bad faith penalties pursuant to D.C. Code § 32-1528 (b) in in error.

The issue of a claimant's entitlement to bad faith penalties is governed by the test established in *Bivens v. Chemed/Roto Rooter Plumbing Services*, CRB No. 05-215 (April 28, 2005). That test,

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[4] The CO concluded that Employer failed to cite to any statutory authority or case law to support its arguments at the Formal Hearing asserting that Claimant was previously compensated for his alleged wage loss and Employer was entitled to a credit for Claimant's previous settlement related to his back injury. This argument was rejected by the CO and was not challenged on appeal to the CRB.

as set forth in *Bivens* and as described by the District of Columbia Court of Appeals ("DCCA") in *Asylum Co. v. DOES*, 10 A.3d 619 (D.C. 2010), is as follows:

> [t]o establish a prima facie showing of bad faith, the injured worker must show (1) entitlement to a benefit, (2) knowledge by the employer of a claim to the entitlement, and (3) employer's failure to provide the benefit or to controvert the claimed entitlement within a reasonable time.

Asylum, supra, at 634, quoting from the CRB's decision on appeal therein, *Gonzales v. Asylum Co.*, CRB No. 08-077 (August 22, 2008).

The test outlined in *Bivens* is as follows:

> We hold that to establish a prima facie showing of bad faith in contravention of the Act, the claimant must show (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. Once the claimant has made this showing, the burden shifts to the employer to produce evidence indicating a good faith basis for not paying the benefits. Upon such production by the employer, the claimant has the additional burden of proving that said evidence is pretextual.
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> In 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.
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> Where a controversion has been filed, the employer has asserted a reason for the termination, and the burden remains on the claimant to demonstrate that the asserted reason in the controversion was pretextual, and not based upon existing law, or a good faith argument for expansion, extension or modification of existing law.

Bivens at 10-11.

Upon finding that Claimant met the first and second prong of *Bivens*, the ALJ stated:

> With respect to the third prong of *Bivens*, I have previously found that Employer did not timely controvert the claim. Thus, I find, Claimant has made a *prima facie* case of bad faith pursuant to §32-1528 (b).
>
> Having so found, the burden now shifts to Employer to demonstrate a good faith basis for not paying the requested temporary partial disability benefits after it ceased its voluntary payment of same.

> As noted above, Employer argues, inter alia, that because it offered Claimant all the work that it had available within Claimant's work light-duty restrictions, any alleged wage loss suffered by Claimant is not the responsibility of Employer. EWCA at unnumbered 7, 8. While I have rejected this argument as not persuasive, I nevertheless find that Employer has demonstrated a good faith basis for not paying the requested period of temporary partial disability benefits. Accordingly, I find Claimant is not entitled to penalties pursuant to §32-1528 (b).

CO at 11-12.

In his Cross-Petition, Claimant again asserts that Employer's witness conceded to knowing nothing about the amount of outside work Claimant was offered or obtaining; further, that Claimant was able to secure some light duty work notwithstanding his restrictions. Claimant also notes Employer's failure to file a Notice of Controversion in defense of its arguments on this issue.

Employer opposes Claimant's Cross-Petition asserting that it, in good faith, offered Claimant all the work that it had available. Furthermore, Employer asserts that "solely failing to file a Notice of Controversion does not meet the third prong" of *Bivens* warranting entitlement to bad faith penalties. We agree with Employer's argument on this issue.

We note that Claimant's arguments on this issue do not necessarily contradict Employer's assertion that it offered Claimant all the work it had available. Neither is there in the record any evidence to support Claimant's claim that his TPD benefits were denied in bad faith. The record supports that Employer's efforts to provide work to Claimant remained the same notwithstanding its knowledge of any additional work Claimant obtained during the claim period.

Noting the contradiction of his findings on this issue with his findings on the issue of Employer's defense against Claimant's claim for wage loss the ALJ concluded:

> As noted above, Employer argues, *inter alia*, that because it offered Claimant all the work that it had available within Claimant's work light-duty restrictions, any alleged wage loss suffered by Claimant is not the responsibility of Employer. EWCA at unnumbered 7,8. While I have rejected this argument as not persuasive, I nevertheless find that Employer has demonstrated a good faith basis for not paying the requested period of temporary partial disability benefits. Accordingly, I find Claimant is not entitled to penalties pursuant to §32-1528(b).

CO at 12.

We determine the ALJ's conclusion that Employer demonstrated a good faith basis for not paying the requested TPD benefits is supported by substantial evidence and is in accordance with the law. The CO's conclusion that Claimant is not entitled to bad faith penalties is affirmed.

CONCLUSION AND ORDER

The July 19, 2017 Compensation Order is AFFIRMED.

So ordered.