GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-082

ALFREDO VALDEZ CRUZ[1],
Claimant– Respondent.
v.
THE PARK PLACE AND ERIE INSURANCE GROUP,
Employer/Carrier– Petitioner.
Appeal from a April 20, 2015 Compensation Order by
Administrative Law Judge Douglas A. Seymour
AHD No. 14-480, OWC No. 712919

(Decided September 14, 2015)

Carlos A. Espinosa for Claimant
Zachary I. Shapiro for Employer

Before, LINDA F. JORY, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board:

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Alfredo Valdez Cruz (Claimant) testified that he was an undocumented worker employed as a dishwasher for The Park Place (Employer). On July 27, 2013, Claimant was involved in an incident at work which resulted in Claimant falling onto the floor and sustaining a left tibial fracture. Claimant was taken to Sibley Memorial Hospital and later transferred to the Washington Hospital Center. On August 5, 2013, Dr. James N. Debritz performed an open reduction, internal fixation left bicondylar tibial plateau. Claimant was discharged on August 8, 2013. Claimant did not follow up post-surgically with Dr. Debritz and did not undergo any physical therapy.

Claimant came under the care of Dr. Charles Mess of the Catholic Charities, Archdiocese of Washington on November 8, 2013. Dr. Mess ordered x-rays of the left knee and physical therapy. On August 4, 2014, Dr. Andrew J. Siekanowicz, board certified orthopedic surgeon

[1]The Panel notes that in various documents in the record that Claimant has been identified as Alfredo Valdez Cruz, Alfredo Valdez-Cruz, Alfredo V. Cruz and Alfredo Cruz Valdez and Alfredo Valdez.

examined claimant and diagnosed post-acute bicondylar plateau fracture and recommended more physical therapy after Claimant addressed his non-work related multiple medical issues.

Dr. Siekanowicz released Claimant to light duty work with a lifting restriction of 20 pounds and no repetitive stooping, bending, twisting, prolonged sitting and standing. An IME physician selected by Employer found Claimant able to work in a sedentary position as of June 13, 2014.

Claimant secured part-time employment as a security guard for Megamart in Hyattsville, MD in September 2014. Claimant was paid $150 a week for working on Saturday and Sunday. He was terminated from that position in October 2014. As of March 4, 2015, Dr. Siekanowicz was of the opinion that Claimant could return to medium demand work that corresponds to Claimant's prior work level and Claimant was discharged from his care.

A full evidentiary hearing occurred on January 29, 2015. Claimant sought temporary total disability benefits from July 28, 2013 to September 2, 2014, temporary partial disability benefits from September 3, 2014 to October 14, 2014 and temporary total disability benefits from October 15, 2014 to the present and continuing and payment of causally related medical expenses.

An administrative law judge (ALJ) of the Administrative Hearings Division (AHD) issued a Compensation Order (CO) on April 20, 2015. The ALJ concluded Claimant's injuries arose out of and in the course of his employment on July 27, 2013; that Claimant met his burden of establishing entitlement to temporary total disability from July 28, 2013 to September 2, 2014; temporary partial disability from September 3, 2014 to October 14, 2014; temporary total disability from October 15, 2014 to March 3, 2015 as well as causally related medical expenses.

Employer timely appealed. Employer asserts the ALJ erred in finding Claimant's injuries arose out of and in the course of his employment and that the ALJ erred in finding Claimant was entitled to temporary total disability without addressing Claimant's immigration status.

Claimant has responded asserting the CO should be affirmed as it is supported by substantial evidence.

ISSUE ON APPEAL[2]

Is the April 20, 2015 Compensation Order supported by substantial evidence and in accordance with the law?

[2] The scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the District of Columbia Workers' Compensation Act, as amended, D.C. Code § 32-1521.01(d)(2)(A) (the Act) and as contained in the governing regulations is limited to making a determination as to whether the factual findings of the CO are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law "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. DOES* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this panel are bound to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

ANALYSIS

Injury by Accident

With regard to the ALJ's conclusion that Claimant's sustained an injury that arose out of and in the course of his employment, Employer asserts:

> In the case at issue, the [ALJ] committed legal error by determining the Employer and Carrier did not rebut the presumption of compensability. The Employer and Carrier provided specific and comprehensive information to rebut the presumption. The Employer and Carrier relied on the case law of *Fazio* which held that a purely personal difficulty with a co-employee having no relation to the employment does not give rise to a compensable work accident. *Fazio v. Cardillo*, 109 F2d. 835 (1940). The *Fazio* Court determined the Claimant stepped outside of his employment by engaging in horseplay. Therefore the accident was not a natural incident of his work employment.
>
> In the case at issue, under the *Fazio* test the Employer and Carrier rebutted the presumption of compensability. Specifically, the Claimant was engaged in a purely personal altercation and horseplay which does not give rise to a compensable work accident. The Claimant was admittedly not within his employment duties by getting in the altercation with Tovar. HT p 62. The Claimant admitted that he was defending himself and made a conscious decision to get into a fight with Tovar. Moreover, the Claimant admitted the discussion leading to the physical altercation were not about work HT p. 55. In fact the [CO] acknowledges the Claimant attempted to push Tovar. CO p. 4. Under the Fazio test it is clear the Claimant was engaged in a purely personal conflict, stepped outside of his employment and was engaged in horseplay which was not a natural incident of his employment.

Employer' Brief at 5, 6.

We find Employer's reliance on a 1940 Longshore Harbor Workers' Compensation Act (LHWCA) case involving an altercation between a white employee and a black employee in a restroom designated for only white people, to be misplaced as more current case law exists under the Act that involves horseplay and fights in the workplace. We further find that the two-part test for altercation cases adopted by the Director of this agency in *William v. Upperman Plumbing Corp*, Dir., Dkt. No. 88-07, H&AS No. 86-716 (November 23, 1988) (citing *Bird v. Advance Security*, H&AS No. 84069, OWC No.. 015644 (June 7, 1985) is still precedent in this jurisdiction. *Graber v. Sequoia Restaurant*, CRB No. 11-045, AHD No. 10-063 (July 25, 2011).

Although the ALJ cited only to the *Bird* decision at the AHD level, he correctly stated:

> For cases involving fights or assaults in the workplace, it has been held those claims are compensable only when: (1) the nature of the employment requires regular contact between the participants which increases the likelihood of friction; and (2) the injured party is not the aggressor. *Bird v. Advance Security*, OHA No.

> 84-69, OWC No. 0015644 (Director's Proposed Compensation Order, June 7, 1985) . . .

The ALJ applied the two-part test and stated:

> In this case, the video of the incident of July 27, 2013 established that the altercation was directly related to claimant's employment duties. The video established that claimant and Tovar were working extremely close proximity, working back to back, performing their duties as dishwashers. Claimant testified that he and Tovar had worked together for four to six months prior to the altercation, The testimony from all the witnesses, including claimant, was that there was no prior history of fighting or altercations between claimant and Tovar. The testimony and the video established that Tovar repeatedly initiated the touching or stroking of the claimant on the day of question, despite claimant's requests that he stop doing so. Accordingly, I find that the first prong of the test has been met.
>
> With respect to the second prong, the video establishes that the co-employee, Tovar, initiated touching claimant, in a variety of manners, on three separate occasions between the 36th second mark of the video and 1 minute, 31st second mark of the video. After the third touching of claimant by Tovar, the situation escalated into a shoving match. At the 1 minute 40th second of the video, Tovar is seen grabbing claimant, putting a leg out to trip him, and then throwing claimant to the floor. JE 1.
>
> Based on the video, and testimony of claimant and Antonio Tino, I find Tovar and not claimant, was the aggressor in this altercation. In view of my finding that Tovar, and not claimant was the aggressor, I reject employer's argument as being without merit and the presumption is not rebutted.

CO at 7.

Having reviewed the video, we accept that it supports the ALJ's interpretation of the incident, and reject Employer's argument that it was Claimant's violently striking Tovar after the third non-violent touching which is the precise reason the situation escalated". Employer' Brief at 7.

We further conclude the ALJ properly applied the two-prong test and his conclusion that Claimant and Tovar worked in extremely close proximity and Claimant was not the aggressor is supported by the record. The ALJ's conclusion that Claimant's injuries arose out of and in the course of his employment is accordingly affirmed.

Nature and Extent of Claimant's Disability

Employer's primary argument with regard to the ALJ's conclusion that claimant had met his burden of establishing entitlement to benefits through the date his treating physician released him to his pre-injury duties is that the ALJ failed to address Claimant's immigration status.

Specifically, Employer asserts:

> The [CO] is not supported by substantial evidence as the [ALJ] did not address the Claimant's immigration status. In 2010, the D.C. Court of Appeals held that an undocumented or illegal alien is an "employee" under the Act. *Asylum Co. v. [DOES]*, 10 A.3d 619 (DC. 2010). The court further found that undocumented aliens are entitled to temporary total disability benefits for the duration of the temporary total disability and medical benefits for so long as they would be available to a legal or documented worker. *Id* at 628 (emphasis added). *In Rivera v. United Masonry*, et al., 948 F.2d 774 (D.C. 1991), the Court of Appeals upheld a decision of the Benefits Review Board ("BRB") finding an employer proved that suitable alternative employment was available. The BRB and the Court of Appeals further found that an employer who proved the availability of "suitable" illegal jobs would, by showing their availability facilitate the violation of immigration laws. *Id*.
>
> The Claimant testified at the Formal Hearing that he is not legally authorized to work in the United States. HT p. 64. Undersigned counsel argued the Claimant['s] temporary total disability benefits should terminate on the date the Claimant received light duty restrictions from Dr. Hinkes on June 13, 2014 and was no longer totally disabled under *Asylum Co*. HT p.7-8, 134. EE 3, p. 5-7. In the alternative, temporary total disability benefits should terminate when the Claimant returned to work at Megamart on September 3, 2014 as the Employer demonstrated the availability of alternate employment under *Rivera*. The Compensation Order is not supported by substantial evidence and must be vacated as the [ALJ] did not address the Claimant's immigration status.

Employer's Brief at 8, 9.

After setting forth the burden shifting process set forth in *Logan v. D.C. Dept. of Employment Services*, 805 A.2d 237, 242-243 (D.C. 2002)(*Logan*) and finding Employer met its evidentiary burden of rebutting Claimant's *prima facie* case of total disability, the ALJ weighed the medical evidence and afforded Claimant's treating physician Dr. Siekanowicz the treating physician preference and concluded:

> Having found nothing in the opinions of Employer's IME physician which require the undersigned to disregard the opinions of the Claimant's treating physicians that Claimant was incapable of returning to his pre-injury duties prior to March 4, 2015, I find that the Claimant is entitled to the treating physician's preference I further find, based on Dr. Siekanowicz' March 4, 2015 report, that Claimant could return to his pre-injury duties as of that date.
>
> Upon review of the record evidence, I give more weight to the treating physician's well substantiated findings and find claimant was totally disabled for July 28, 2013 to September 2, 2014, temporary disabled from September 3, 2014

> to October 14, 2014, and then temporarily and totally disabled form October 15, 2014 to March 3, 2015, based on Claimant's credible testimony, history complaints and medical treatment, Employer presented no evidence of suitable alternative employment for the Claimant, *Logan, supra*.

CO at 9.

While we agree the ALJ did not indicate in the CO that Claimant was not legally authorized to work in the United States, we do not agree that the mere fact Claimant is undocumented bars him from receiving temporary partial benefits. Moreover, the facts of the instant matter differ from *Asylum* as the Claimant in *Asylum* (*Gonzales*) did not voluntarily find part-time work with a wage loss, although he was not legally authorized to do so.

Nevertheless, with his mention of "Employer presented no evidence of suitable alternative employment for the Claimant, *Logan, supra"* we cannot ascertain if the ALJ considered that under *Asylum,* Employer does not carry a burden to prove any alternative employment especially when Claimant is found to be able to return to his pre-injury duties.

The Court in *Asylum* affirmed the CRB's analysis and conclusion that "based upon the plain meaning of the language of the Act and the legislative intent, an undocumented or illegal alien is an 'employee' as defined in the Act." *Gonzales v. Asylum Co.*, CRB No. 08-077, AHD No. 06-224, OWC No. 617421 (August 22, 2008)(*Gonzales*) .

In *Gonzales*, the CRB cited *Rivera v. United Masonry*, et al., 948 F.2d 774 (D.C. 1991) (*Rivera*) case, a decision that arose under the predecessor statute to the Act, the Longshore and Harbor Workers' Compensation Act (LHWCA) which involved:

> …an undocumented worker, and whether the fact that a worker is undocumented has any potential impact upon entitlement to ongoing wage loss benefits after the worker has regained the physical (but not legal) capacity to return to work. Although presented in a somewhat awkward way rendering the result subject to some degree of misapprehension if not analyzed carefully, the Appeals Court held because a worker's undocumented status prevents legally employing the worker, the worker's continued wage loss is not, by itself, sufficient to support an award of ongoing disability compensation if, had the worker been documented, the worker could have returned to gainful employment. The Panel agrees.

Gonzales at 24. The CRB went on to state:

> Thus, the Panel notes the usual formulations of an employer's obligations following an injury must be read in a different context where an undocumented alien's status is discovered following a work injury. For example, while it is frequently stated that an employer is obligated to return a worker either to his pre-injury job or a modified position within his physical capacity, or to demonstrate the availability of suitable alternative employment, *see Logan v. D.C. Department of Employment Services*, 805 A.2d 237 (2002), in the case of an undocumented

> alien, an employer is forbidden by federal law from continuing to employ the undocumented alien. Similarly, among the benefits to which an injured worker is entitled under the Act is vocational rehabilitation, which frequently means providing job placement assistance. Again, however, it could be a crime for an employer or its rehabilitation service provider to seek to place an undocumented alien in a position with some unwitting third party employer, or seek to place the undocumented alien with a third party employer in knowing collusive violation of federal law.
>
> In such circumstances, the undocumented status appears to limit the range of options to (1) establishing whether and when an injured worker has recovered physically sufficiently to be able to return to work in some gainful capacity, assuming a legal status, (2) establishing whether at that point the level of wages that would be expected to be earned if the worker were documented is above, at, or below the pre-injury wage, and (3) adjusting the ongoing wage loss benefits, if any, accordingly.
>
> The Panel repeats this formulation is required not because the Act does not apply to undocumented aliens; it does. It is necessary because federal law makes illegal the provision of some types of benefits (e.g., job placement services) and forbids employers to conduct themselves in certain ways (i.e., retain the worker on the payroll and/or provide modified employment) where the worker is undocumented, which are legal and/or required if the worker is documented. A corollary of this analysis, as noted in *Rivera* and with which the Panel agrees, is that if wage loss benefits were awarded to an undocumented alien merely because it is illegal for the worker to return to employment, an undocumented alien would be entitled to benefits to which a documented worker in the same situation would not, a scenario the Panel does not believe the legislature intended when it created the workers' compensation system in this jurisdiction. *See Rivera, supra*, at 776.

Gonzales at 27-32.

While the Panel is mindful that a remand on this issue may render the same result, we cannot overlook the fact that the ALJ failed to make findings of fact with regard to Claimant's work status and failed to analyze the disability issue according to *Gonzales.* As the CO contains both error of fact and error of law, the Compensation Order is not supported by substantial evidence, is not in accordance with the law, and is VACATED in part.

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant has established that his left leg injury arose out of and in the course of his employment is supported by substantial evidence is in accordance with the law and is **AFFIRMED**.

The Compensation Order fails to adequately analyze Claimant's entitlement to temporary total and temporary partial disability benefits. Consequently, the portion of the April 20, 2015 Compensation Order granting Claimant's disability benefits is **VACATED**.

This matter is **REMANDED** for further consideration and analysis of the nature and extent of Claimant's disability consistent with the CRB's decision in *Gonzales*.

So Ordered