COMPENSATION REVIEW BOARD

CRB No. 13-065

MICHAEL A. BLUE, JR.
Claimant–Respondent,

v.

CONWAY CONSTRUCTION and ARGONAUT INSURANCE GROUP,
Employer/Carrier-Petitioner

Appeal from an April 30, 2013 Compensation Order by
Administrative Law Judge Saundra M. McNair
AHD No. 12-532, OWC No. 66416

Eric M. May, Esquire, for the Claimant/Respondent
Sarah M. Burton, Esquire, for the Employer-Carrier/Petitioner

Before: HENRY W. MCCOY and MELISSA LIN JONES, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

PROCEDURAL HISTORY AND FACTS OF RECORD

This appeal follows the issuance on April 30, 2013 of a Compensation Order (CO) from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). The Administrative Law Judge (ALJ) granted Claimant's request for an order assessing a penalty against Employer for acting in bad faith when it failed to make timely disability payments.[1]

[1] *Blue v. Conway Construction*, AHD No. 12-532, OWC No. 664416 (April 30, 2013).

Claimant worked for Employer as a roofer. On October 13, 2009, he slipped and fell in the course of his employment and injured his back, which required surgical intervention on August 2, 2010. Employer voluntarily paid medical and disability compensation benefits until July 17, 2012.

On June 27, 2011, Claimant was involved in a non-work related automobile accident, which caused pain and stiffness to the neck, shoulders, left arm, left foot, and some pain to the back. The ALJ found that Claimant received physical therapy to his shoulders, head, neck, and left arm but not his back. Claimant did not inform Employer of this accident and Employer continued paying voluntary disability compensation.

More than a year later, on July 17, 2012, when it learned of the accident, Employer terminated Claimant's workers' compensation benefits. On July 20, 2012, Employer filed a Notice of Controversion asserting the intervening June 27, 2011 automobile accident severed the causal relationship between Claimant's disability and the October 13, 2009 workplace accident.

This matter went to informal conference. Employer filed an Application for Formal Hearing (AFH) September 17, 2012 and a formal hearing was set for January 23, 2013.

On December 18, 2012, Employer filed a motion to withdraw its application without prejudice and with leave for either party to re-file. Claimant opposed the motion because he had raised the independent issue of bad faith by Employer for terminating his benefits when there was no medical evidence to indicate medical causal relationship had been severed by the intervening automobile accident. On this date, Employer also made a lump sum payment in the amount of $7,158.15 for temporary total disability benefits for the period July 18, 2012 through October 21, 2012; with the balance, $549.43, paid on January 3, 2013.

The ALJ granted Employer's motion in an order issued on January 2, 2013. In a January 8, 2013 Order, the ALJ also permitted Claimant to file a "Motion to Re-Open" the record, to set a formal hearing on an expedited basis, that being the previously set January 23, 2013 hearing date, and to file simultaneously with the motion, an AFH. Claimant filed the motion, but failed to file the AFH. Claimant presented the AFH when the formal hearing convened as scheduled and the ALJ accepted it *nunc pro tunc*, ostensibly as of the date the motion was filed, and the hearing proceeded.

In addition to Claimant's issue that Employer terminated his benefits in bad faith, the hearing proceeded on Employer's claim that the ALJ lacked jurisdiction to convene the hearing as there was no AFH pending. In the April 30, 2013 CO, the ALJ determined that she did have jurisdiction to hear the case and granted Claimant's request for penalties assessed against Employer pursuant to D.C. Code § 32-1528. Employer filed a timely appeal and Claimant filed an opposition.

On appeal, Employer argues the ALJ lacked jurisdiction to hear Claimant's claim and, with regard to the bad faith ruling, that the ALJ erred by accepting improper evidence in

violation of the regulations and that it acted in good faith when it terminated benefits. Claimant argues to the contrary that the CO should be affirmed.

ANALYSIS

The scope of review by the CRB, 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 (CO) are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.[2] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a CO 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.

In the lead-up to the January 23, 2013 formal hearing, Employer moved to withdraw its AFH. While the ALJ eventually granted this motion, Claimant, who had identified a separate issue on the joint prehearing statement, was granted leave to file a motion to re-open the record and file an AFH, which would be heard on an expedited basis. Claimant filed the motion but not the AFH. However, the ALJ allowed Claimant to submit the application at the hearing and accepted it *nunc pro tunc* over the objections of Employer.

At the formal hearing, Employer argued the ALJ lacked jurisdiction because with the dismissal of its AFH, there was no AFH pending that gave the ALJ jurisdiction to hold the formal hearing. In the instant appeal, Employer makes this singular assertion in the background statement of its memorandum of points and authorities but the detailed jurisdictional argument voiced at the formal hearing is not carried forward in the instant appeal. Although Employer restricted its detailed argument in the instant appeal to whether it acted in bad faith, we deem it best to address the jurisdictional question so as to put the matter to rest.

In the CO, the ALJ addressed and disposed of all the arguments advanced by Employer that jurisdiction was lacking and finally summarized by ruling:

> Thus the failure of Claimant's Counsel to file the AFH along with the Motion for Expedited Hearing was harmless error; the Employer had sufficient notice in order to prepare for the hearing; the Employer was not prejudiced; the Employer stipulated to jurisdiction; the *nunc pro tunc* ruling to accept the AFH on January 23, 2013 was done to promote

[2] "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 International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

> judicial economy and to fulfill the humanitarian purposes of the Act; and at all times, the ALJ had jurisdiction to conduct the formal hearing.[3]

We agree that it was within the ALJ's discretion to accept Claimant's AFH at the hearing convened on January 23, 2013 and in effect deem it filed *nunc pro tunc* as of the date the Motion for Expedited Hearing was filed. As the ALJ reasoned, Employer was on notice with the issuance of the January 8, 2013 Order, that Claimant was granted leave to file the AFH with the motion so the originally scheduled formal hearing could and would go forward on the issue of bad faith. As Employer suffered no prejudice as it was prepared to defend against the claim when the ALJ ruled that the hearing would go forward, Claimant's failure to submit the AFH with the motion was harmless error.

In challenging the ultimate ruling that it acted in bad faith, Employer first argues that the ALJ committed reversible error by accepting into evidence exhibits expressly prohibited by the regulations. Over Employer's objections, the ALJ accepted into evidence the May 25, 2010 Memorandum of Informal Conference (CE 6), and the September 11, 2010 Memorandum of Informal Conference (CE 9). Employer points to 7 DCMR § 223.3, which states in pertinent part: "[U]nder no circumstances shall the Memorandum of Informal Conference be admitted into evidence." Given this clear prohibition, the ALJ erred in admitting these documents into evidence, unless it comes within the limited exception of being admitted to establish notice of a party's address.[4]

In *Hard Rock Café v. DOES*, the Court specifically noted and condoned the CRB's reliance on a record containing "Memorandums of Informal Conference", to establish that the employer had notice of the claimant's new address.[5] Claimant in the instant matter argues that its exhibits 6 and 9 were placed into evidence to show Employer had notice of the work injury and the on-going disability. Use of these documents to give "notice" of the work-injury and of on-going disability is not permitted. In addition, Claimant's primary purpose in submitting these documents was to support his claim for bad faith by trying to prove Employer knew he was entitled to benefits even when the contents of the documents only authorize back surgery and do not award disability benefits.

Even though the ALJ erred in admitting the contested documents, we find in our review of the CO that the ALJ placed no express reliance on them in determining that Claimant had met his burden in establishing Employer acted in bad faith. Again, while we find the ALJ committed error in admitting the Memorandums of Informal Conference, CE 6 and CE 9; we deem that error to be harmless.

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[3] CO, p. 10.

[4] See *Hard Rock Café v. DOES*, 911 A.2d 1217, 1219, fn. 2 (D.C. 2006).

[5] While 7 DCMR § 223.3 prohibits introducing the Memorandum of Informal Conference (MIC) at the formal hearing, we further qualify the limited exception to its introduction to state the MIC certificate of service may be admitted to show notice of a party's current address. *Hard Rock Café, supra*.

Finally, Employer argues that the ALJ erred in determining that it acted in bad faith, in contravention of D.C. Code § 32-1528(b)[6], when it terminated Claimant's benefits. Employer contends the ALJ acknowledged that it had a good faith basis to terminate benefits by finding that Claimant was involved in an automobile accident while receiving benefits, Claimant failed to notify anyone of this accident for 13 months, and the June 27, 2011 medical report from Johns Hopkins University Hospital reported complaints of diffuse neck and back pain. We find some merit in this argument.

The ALJ commenced her analysis by stating that the current state of the law in this jurisdiction is the application of a three pronged test that is used to establish a *prima facie* case of bad faith. While the ALJ correctly cites to the *Bivens*[7] case for the test to be applied, both she and Claimant do not quote the prongs of the test verbatim, which we now set forth. As the CRB stated in *Bivens*:

> 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.[8]

Employer argues that Claimant has not made a *prima facie* showing under the first two prongs of *Bivens* because he has not shown he is entitled to ongoing temporary total disability benefits and that it knew of this entitlement to benefits. It is Employer's position that Claimant must show actual entitlement to the denied benefit and that the contested May 25, 2010 Memorandum of Informal Conference (CE 6) and the July 14, 2010 Final Order (CE 7) do not show that entitlement because they authorize Claimant's request for back surgery and not disability benefits. We disagree, but for a different reason.

In determining that Claimant had made a *prima facie* showing of bad faith, the ALJ reasoned:

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[6] Section 32-1528(b) states: "If the Mayor or court determines that an employer or carrier has delayed the payment of any installment of compensation to an employee in bad faith, the employer shall pay to the injured employee, for the duration of the delay, the actual weekly wage of the employee for the period that the employee is eligible to receive workers' compensation benefits under this chapter. The penalty shall be in addition to any amount paid pursuant to § 32-1515."

[7] *Bivens v. Chemed/Roto Rooter Plumbing Services*, CRB No. 05-215, AHD No. 01-002B, OWC No. 560668 (April 28, 2005).

[8] *Bivens, supra*, at 5.

> In the instant matter, it is uncontested that the Claimant was receiving voluntary compensation payments and that those payments terminated on July 17, 2012; that the Employer had notice of fact [sic] that the Claimant's injuries arose out of and in the course of his employment; that the Employer was made aware that as a result of the injury, he incurred medical expenses and was entitled to receive benefits; and that as of July 17, 2012, the Employer terminated payment of those benefits. What is contested is whether the intervening automobile accident severed the medical causal relationship; and therefore provided the Employer with a good faith basis upon which to terminate benefits. It is clear that the Claimant has with the introduction of these facts into the record, made a *prima facie* case that the Employer's subsequent delay in paying his compensation benefits was in bad faith. Thus, the claim for bad faith penalties, in this case, is understandable, and Employer's decision to terminate Claimant's benefits is now questionable.[9]

As the ALJ noted, it is uncontested that following Claimant's work-related injury, Employer commenced voluntary payments of disability benefits. As mandated by D.C. Code § 32-1515(a), compensation "shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer." By not controverting Claimant's initial claim to compensation and commencing voluntary payments without an award, Employer acknowledged Claimant was entitled to that benefit and that it had knowledge of that entitlement, thus satisfying the first two prongs of the *Bivens* test.

However, the ALJ is mistaken in her determination that Claimant has made a prima facie showing of bad faith because Employer's termination of benefits was occasioned by the filing of a notice of controversion. With the filing of a the notice of controversion, the third prong of the *Bivens* test was not met, the *prima facie* showing was not made, and the burden did not shift. It therefore remained for Claimant to show that the "asserted reason" in the controversion was pretextual.

As the CRB stated in *Bivens*:

> 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.

[9] CO, p. 11.

> 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.[10]

In making its argument that it acted in good faith, Employer correctly points out that the ALJ acknowledged that it had a good faith basis for terminating benefits. With regard to the controversion filed by Employer in the instant matter, the ALJ reasoned and determined:

> Here, the Employer presented substantial credible evidence that the Claimant was involved in an automobile accident during the time he was receiving compensation benefits; that the Claimant failed to notify anyone (Employer, or Claimant's worker's (sic) compensation attorney) for more than 13 months of the automobile accident; and that there was documentation for the automobile accident that suggested that the Claimant had not been truthful in his representations to Geico. The Employer believed it was obligated to investigate both the automobile accident and Claimant's injuries from the automobile accident; and the veracity of the Claimant's representations to Geico. The Employer timely filed its controversion of Claimant's benefits after learning about the automobile accident. Thus, the ALJ is satisfied that the Employer provided persuasive evidence to shift the burden back to the Claimant to show that the investigation and the reason for the delay in benefits was merely pretext.[11]

In shifting the burden back to Claimant, albeit a burden that should not have been shifted, the ALJ proceeded to determine whether Claimant met his burden to show not only that the controversion but also the subsequent failure to pay benefits were pretextual. In doing so, the ALJ reasoned and concluded:

> The Claimant seeks to establish that the Employer's delay in payment of benefits is merely pretext by showing, even in viewing the evidence presented by the Employer in a light most favorable to the Employer, the Employer failed to establish that the intervening automobile accident severed the causal relationship between the injury and the workplace accident. The Claimant presented the deposition testimony of Lawrence O'Brien, the claims adjuster who decided to controvert the payment of benefits for the Carrier. In the deposition, Mr. O'Brien admitted that the benefits were terminated upon receipt of an index report identifying the June 27, 2011 accident and the emergency room report mentioning the Claimant's previous back injury. Mr. O'Brien further admitted that the

[10] *Bivens, supra*, p. 5.

[11] CO, p. 12.

> subsequent medical reports from Maryland Orthopedics did not indicate that the Claimant injured his back in the June 27, 2011 automobile accident. As the agent for the Employer, Mr. O'Brien, in not restoring the benefits upon completion of the investigation and a determination that there was no mention of back pain in the medical reports acted in a manner inconsistent with the Act. Finally, Mr. O'Brien asserted that the termination of benefits was pending the results of an IME to determine causal relationship. However, the IME was not requested until late October 2012, nearly 3 months after benefits were terminated. Therefore, Employer's Counsel's arguments fall short and are without merit in that at the time of controversion, the Employer did not have specific or comprehensive medical evidence that severed the causal relationship between the injury and the workplace accident; and the Claimant did not receive the delayed disability benefits until December 2012, despite the Employer (sic) lack of specific or comprehensive evidence severing the causal relationship. Thus, it is the opinion of the undersigned, based upon evidence presented, that the Claimant has met his burden of establishing that the Employer's argument is merely pretext. As such, the Employer's basis for termination of benefits is not persuasive and bad faith can be found in this case.[12]

In conducting her analysis of the shifting burdens pursuant to the test under *Bivens*, the ALJ determined that in filing a controversion, Employer had a reason for terminating benefits and shifted the burden back to Claimant to show that the reason was pretextual. However, as seen in the above quoted passage, the ALJ appears to have maintained the burden on Employer and this we deem to be error.

Although she initially determined that Employer had good reason to file a controversion, the ALJ subsequently has determined that Employer needed "specific and comprehensive medical evidence that severed the causal relationship" and appears to require that Employer have Claimant submit to an independent medical evaluation (IME) prior to the termination of benefits. We are aware of no such evidentiary burdens in the determination of bad faith under the Act.

Employer argues that if the ALJ is going to place reliance on the deposition testimony of the claims adjuster, Mr. O'Brien, to show that upon receipt of Dr. Drapkin's records showing a lack of causal relationship, there needs to be a concomitant finding of when Employer received those records in order to establish bad faith by continuing to delay benefit payments. We agree.

Employer received notice of the intervening automobile accident 13 months after it occurred and only then from a third party source. The record contains copies of Dr. Drapkin's reports starting two days after the accident on June 29, 2011 up until December 14, 2011. Claimant's benefits were terminated on July 17, 2012 and controverted on July 20, 2012. In the Notice of Controversion, Employer checked "no causal relationship" as one of the reasons. In

[12] *Id.*

addition, Employer contested Claimant's continuing disability citing the lack of updated treatment records since March 30, 2011.

The record does contain sufficient evidence that would allow the ALJ to draw the reasonable inference that Employer became aware of the intervening accident on or about July 17, 2012 when it terminated benefits. The termination of benefits continued until they were reinstated on or about December 18, 2012, ostensibly based upon a reading of Dr. Drapkin's medical reports. However, there is no finding when Employer received Dr. Drapkin's medical reports to show it was dilatory in evaluating Claimant's condition.

There is also the matter of the compartmentalized treatment Claimant received at Maryland Orthopedic, with Dr. Cohen solely focused on Claimant's back pain emanating from the work injury and Dr. Drapkin focused solely on the pain complaints resulting from the automobile accident. The ALJ needs to determine, in her assessment of Employer's actions, whether there was a legitimate basis for Employer to continue to withhold benefits while evaluating Claimant's separate medical reports.

It would be more telling in the establishment of bad faith to determine what were the elements and timing of any ensuing investigation by Employer in supporting its assertion that causal relationship had been severed. To establish whether bad faith ensued by continuing to delay benefit payments, it needs to be determined when Employer initially became aware of a lack of causal relationship and whether its ensuing actions to obtain a second opinion were reasonable or merely pretextual. On remand, the ALJ shall make that determination.

CONCLUSION AND ORDER

The conclusion that Employer unreasonably delayed the payment of compensation benefits and is therefore subject to the assessment of penalties pursuant to D.C. Code § 32-1528(a) is not supported by substantial evidence in the record. Accordingly, the April 30, 2013 Compensation Order is REVERSED and REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

September 23, 2013
DATE