GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-053

ROBERT T. BUTLER,
Claimant-Petitioner,

v.

FORT MYER CONSTRUCTION CORPORATION,
Employer/Insurer-Respondent.

Appeal from a April 11, 2013 Compensation Order By
Administrative Law Judge Leslie A. Meek
AHD No. 12-209, OWC No. 685055

Robert T. Butler, *Pro Se*
Gerald Emig, Esquire for the Respondent

Before HEATHER C LESLIE, HENRY W. MCCOY, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the April 11, 2013, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ found that the Claimant failed to prove the Employer acted in bad faith, that the Employer was not required to provide health insurance, that the Claimant failed to prove Employer's decision to not award the Claimant a bonus did not amount to discrimination, and that the Claimant did not show that the Employer failed to provide medical care to the Claimant. The CO awarded the Claimant penalties for 3 periods for which installments of benefits were paid late, and found the Employer failed to provide Claimant with a statement of employee's rights. We affirm all of the ALJ's determinations except the determination that the Claimant was not entitled to penalties for the

late payment of the first installment of disability benefits and remand for entry of an order awarding penalties for said late payment.

BACKGROUND AND FACTS OF RECORD

The Claimant was injured while working for the Employer on October 4, 2011.[1] The Claimant sought medical care for his injuries with various hospitals and physicians. The Claimant was ultimately restricted to light duty which the Employer was able to accommodate.

A dispute arose and a Formal Hearing was requested. A full evidentiary hearing was held on July 25, 2012. The Claimant sought penalties from the Employer for various violations of the Act. The issues presented were the following:

> Has Employer failed to provide a statement of employee's rights pursuant to Section 32-1532(a) of the Act?
>
> Has Employer failed to timely pay Claimant compensation pursuant to Section 32-1515(a)(b)(e) of the Act?
>
> Has Employer delayed the payment of compensation to Claimant in bad faith?
>
> Is Employer required to provide health insurance coverage to Claimant pursuant to Section 32-1507(a-1)(1)(3)(4) of the Act?
>
> Has Employer discriminated against Claimant as defined in Section 32-1452[2] of the Act?
>
> Has Employer failed to provide Claimant with appropriate medical care pursuant to Section 32-1507(a)(6)(D)[3]?

CO at 2.

A CO was issued on April 11, 2013. In that CO, the ALJ concluded the following:

> Employer failed to provide Claimant with a statement of employee's rights. Employer must pay a $ 1000.00 civil penalty as required by Section 32-1532 of the Act.
>
> Employer failed to timely pay Claimant's compensation, and is therefore required to pay to Claimant ten percent of the monetary value of the installment payments that were late.
>
> Claimant has failed to prove Employer acted in bad faith.
>
> Employer is not required to provide Claimant health insurance coverage pursuant to Section 32-1507(a-1)(1)(3)(4) of the Act.
>
> Claimant failed to prove Employer's decision to forgo awarding Claimant a bonus in 2011 amounted to discrimination under Section 32-1452 of the Act.

---

[1] It is unclear on the record before us how the Claimant was injured. .

[2] The CO refers to § 32-1452 of the Act when discussing retaliatory actions by the employer. It is clear this is in error and the ALJ meant to refer to § 32-1542, the section of the Act that refers to retaliatory actions.

[3] The CO continuously refers to §32-1507(a)(6)(D) of the Act when discussing disputes over the sufficiency of medical care. It is clear this is in error and the ALJ meant to refer to § 32-1507(b)(6)(D), the section of the Act that does refer disputes over the sufficiency of medical care rendered.

Claimant has not met his burden to show Employer failed to provide timely and sufficient medical care to Claimant.

CO at 10.[4]

The CO awarded the Claimant penalties for 3 periods where installments of benefits were paid late.

The Claimant timely appealed. The Claimant argues: 1), the ALJ was in error in failing to order the Employer/Carrier to pay the balance owed to Claimant; 2) the ALJ was in error in not awarding penalties for the first payment of compensation pursuant to 32-1515(b) and further the ALJ was in error in not awarding penalties based on a weekly pay period schedule, as established and followed by the Employer; 3) the ALJ erred in not awarding bad faith penalties; 4) the ALJ erred in not finding the Employer failed to provide timely and sufficient medical care to the Claimant; and 5) the ALJ erred in not finding the Employer retaliated against him by not awarding a bonus.

The Employer opposes the Claimant's appeal, arguing the CO is supported by the substantial evidence in the record and is in accordance with the law and should be affirmed.

THE STANDARD OF REVIEW

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

DISCUSSION AND ANALYSIS

We must first address the attachments submitted with the Claimant's application for review. We remind the Claimant that pursuant to 7 DCMR §§ 230.1 and 230.2, we require only the submission of the CO and the application for review. We are constrained to only review evidence and testimony submitted at the formal hearing. Our review will focus solely on the arguments presented by the Claimant and the evidence submitted at the formal hearing.

The Claimant's first argument is that the ALJ erred in not ordering the Employer to pay a "balance owed." The Claimant summarizes several issues that arose with the Employer, including the issue of average weekly wage (AWW) and an unspecified amount of compensation owed.

The Claimant specifically states,

[4]The Employer did not appeal the finding that it failed to provide the Claimant with a statement of the employee's rights and the penalty assessed against it. The Employer also did not appeal the finding that it did not timely compensate the Claimant pursuant to 32-1515(a)(b)(e) of the Act. Similarly, the Claimant did not appeal the CO's finding that the Employer was not required to provide health insurance coverage. Thus, those issues will not be discussed in the decision and order.

> Yet again, Employer/Carrier stipulates that Petitioner's AWW is $1548.72 and again promises to correct Petitioner's AWW and to provide him with any balance due. As of this 10th day of May 2013, 10 months after the evidentiary hearing, Employer/Carrier has again broken their promise to correct Petitioner's AWW and to provide him any balance due. It is clear that Employer/Carrier stipulate issues to avoid an Order and has no intention on following through on their promises.

Claimant's argument at 2.

A review of the transcript reveals extensive discussion regarding the Claimant's average weekly wage which the parties ultimately stipulated to as being $1548.72. The Employer represented that they had been paying the Claimant disability benefits and would adjust the disability benefits based on the stipulated average weekly wage and make up any difference. As this was no longer a contested issue properly before the ALJ, the CO does not address any balance owed.

The Claimant's main concern seems to be how the Employer handled his claim before the Formal Hearing. The Employer did stipulate to the correct average weekly wage at the Formal Hearing, which is now memorialized in a CO. If the Employer becomes delinquent, as the Claimant alleges recently occurred, the Claimant can apply for a Formal Hearing if he so chooses. However, there is no identifiable issue that the CRB can address at this time based upon the established record. The Claimant's first argument is rejected.

The Claimant next argues that the ALJ erred in not awarding penalties due to the late payment of the first installment due. The Claimant points to his testimony that he did not receive the check until October 28, 2011 and as he notified his employer on October 7, 2011, the payment was more than 14 days late. Pursuant to D.C. Code § 32-1515(b), the Claimant argues, the first installment of disability benefits was late.

Section 32-1515(b) states,

> The first installment of compensation shall become due on the 14th day after the employer has knowledge of the job-related injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, biweekly, except where the Mayor determines that payment in installments should be made monthly or at some other period.

The uncontroverted evidence in the record is that the Claimant informed the Employer of the injury on October 7, 2011.[5] Thus, the Claimant should have received the first installment of

[5] We note that the CO, while including a section titled findings of facts, did not make any factual findings, but rather listed several conclusions of law. Normally, this would cause us to remand the matter for further findings on the specific issues addressed. However, we need not remand "in futility." *WMATA v. DOES and Payne Intervenor*, 992 A.2d 1276 (D.C. 2010). Because the testimony of the Claimant, uncontroverted by the Employer, established that the Claimant informed the Employer on October 7, 2011 of the injury, the issue of whether or not the Claimant received the check within 14 days after it was due is easily discernable. Stated another way, the evidence presented in the case compels one conclusion over the other to the exclusion of any other inference. *Payne, supra* at 1282.

compensation on or before October 21, 2011. The evidence presented shows the Claimant did not receive the first installment of benefits until after October 21, 2011. Indeed, the first check date was October 25, 2011. Thus, we conclude the Claimant was entitled to penalties pursuant 32-1515(e). Upon remand, the ALJ shall issue an order awarding penalties for the late payment of the first installment of benefits.

The Claimant further argues that the Employer should be required to pay benefits on a weekly rather than a biweekly schedule. Specifically, the Claimant argues,

> Petitioner further believes that after the 1st payment of compensation subsequent payments are not absolutely subject to the bi-weekly rules of section 32-1515(b), as the ALJ applied, but shall be paid thereafter according to Employer's pay frequency already in place.

The Claimant argues that the pay frequency should reflect the frequency of pay of the Claimant prior to the injury. The Claimant points to no authority to support this proposition. As the Claimant points out, the plain meaning of the statute only identifies biweekly installments "except where the mayor determines that payment in installments should be made monthly or at some other period." Moreover, there is nothing in the statute or case law that mandates or suggests that disability payment schedules must follow Employer's payment schedules. We reject the Claimant's argument.

Claimant also contends that the employer acted in bad faith in failing to make compensation payments and the ALJ erred in not finding bad faith. As the claimant correctly points out, he must first establish a *prima facie* case of an employer's "bad faith," for which the following test must be met under D.C. Code § 32-1528(b): the claimant must establish that (1) the employer has made a decision not to pay an installment of compensation benefits to the claimant, and (2) said decision was made in bad faith (i.e., the delay is not warranted by the existence of any controverting fact, the existing law, or employer's good faith interpretation thereof). *Bivins v. Chemed/Roto Rooter Plumbing Servs*., AHD No. 01-202B (February 7, 2005), See also *Asylum v DOES,* 10 A.3d 619 (D.C. 2010)

On this point, the ALJ stated:

> Claimant has failed to show Employer acted in bad faith when it was late with Claimant's compensation payments. Employer made about 43 payments to Claimant for the pay periods covering October 9, 2011 to July 2, 2012. Employer's payments to Claimant were late on three occasions. Employer was two days late with two compensation payments, and nine days late with one compensation payment. These late payments, while terribly inconvenient to Claimant, were not excessive and do not constitute bad faith on Employer's part.

CO at 8.

The Claimant argues that as 12 of 15 payments were late, this is evidence of bad faith. However, this argument is based on the assumption that installments of compensation are due weekly. As

we discussed above, we reject this argument. Moreover, the Claimant argues as evidence of bad faith that there are three periods where the Claimant was not paid. Yet, the Claimant does concede receiving a $2,500.00 payment to cover any such non-payment. Claimant's argument at 7. We also agree with the Employer's position that during certain time periods, there was a dispute over the Claimant's AWW as well as the nature and extent of the Claimant's disability. We do not find these late payments to be evidence of bad faith and reject the Claimant's argument.

The Claimant's next argument is that the ALJ erred in not finding the Employer did not provide sufficient medical care pursuant to Section 32-1507(a)(6)(D). Prior to discussing this argument we note that the Claimant is asking to introduce two attachments into evidence, attachment O and P. As stated above, the CRB is constrained to consider only the evidence submitted at the Formal Hearing. Moreover, the Claimant has not argued that he attempted to introduce these documents below and was denied, or that the documents are of such relevance that this matter should be returned to the ALJ to consider re-opening the record. We deny the Claimant's request to consider attachment O and P.

Turning to the Claimant's argument, the ALJ noted,

> At hearing Claimant testified he received medical care when he required it and was in the process of deliberating whether he should undergo epidural injections or undergo a surgical procedure. (TR pp. 65 and 134). Claimant testified although he was contemplating undergoing surgery to alleviate his medical complaints, he did not make any request of Employer to provide the surgery. (TR p. 68). Claimant testified he requested, and the Employer authorized one epidural injection. (TR p. 68). Claimant takes issue with the fact that the Employer authorized only one injection when he requested three injections. (TR p. 68).
>
> Claimant has requested this Tribunal order Employer to authorize three injections as the process of authorization is lengthy and he prefers to have the option of having additional injections readily available to him. (TR pp. 68 and 75). Despite having the epidural injection authorized by Employer, Claimant did not obtain the medical treatment and did not have any epidural injections. (Tr p. 71).
>
> Claimant's evidence shows he received medical care when he required it. His evidence shows his own actions, at times, prohibited him from obtaining the medical care he required. There is no evidence in the record to show Employer deliberately delayed his medical care or provided insufficient medical care.

CO at 9-10.

While the Claimant may disagree with the ALJ's reasoning, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott, supra*. What the Claimant is asking us to do is re-weigh the evidence, a task we cannot do.

The Claimant's final argument is that the ALJ erred in not finding the Employer retaliated against the Claimant by not giving him his year-end bonus, relying upon D.C. Code §32-1542. We affirm the ALJ's ruling, but on different grounds.

D.C. Code §32-1542, states in relevant part,

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee *as to his employment* because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter. (Emphasis added.)

Thus, we agree with the Employer that D.C. Code §32-1542 applies only to discharges or any discriminate manner which affects the Claimant's employment. A review of case law shows that D.C. Code §32-1542 has been applied only in cases where the Employee was discharged for filing a worker's compensation claim.[6] Not receiving a bonus does not affect the Claimant's employment. Indeed, the Claimant returned to work for the Employer. Thus, no retaliatory discharge occurred and we decline to find the lack of a bonus to qualify under D.C. Code §32-1542.

CONCLUSION AND ORDER

The April 11, 2013 Compensation Order is REMANDED with instructions to the ALJ to enter an award granting the Claimant's request for penalties pursuant to D.C. Code § 32-1515(e) for the late payment of the first installment of disability benefits, October 9 – 15, 2011. All other aspects of the April 13, 2013 Compensation Order are affirmed.

FOR THE COMPENSATION REVIEW BOARD:

_____

HEATHER C. LESLIE
Administrative Appeals Judge

June 20, 2013
DATE

[6] *See, Children's Defense Fund v. DOES,* 726 A.2d 1242 (D.C. 1999); *St. Clair v. DOES,,* 658 A.2d 1040 (D.C. 1995); *Abramson Associates v. DOES,* 596 A.2d 549 (D.C. 1991); *Lyles v. DOES,* 572 A.2d 81 (D.C. 1990).