

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-171

DANIEL SACKY,
Claimant–Petitioner,

v.

HOWARD UNIVERSITY,
Employer/Insurer-Petitioners.

Appeal from a November 26, 2013 Order of
Claims Examiner Edith Tyler and Claims Supervisor Lisa Baxter
OWC No. 522093

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 APR 28 PM 12 09

Benjamin T. Boscolo for the Petitioner
William H. Schladt for the Respondent

Before Lawrence D. Tarr, *Chief Administrative Appeals Judge*, HENRY W. MCCOY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board,

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The parties submitted and on October 30, 2007 the Office of Workers' Compensation (OWC) approved a written voluntary agreement under which Respondent agreed to make payments of temporary total disability on an open ended basis, with conditions. The agreement contained the proviso that said payments could be modified or terminated "so long as a good faith basis exists pursuant to the Act". On May 28, 2013 Respondent filed a "Notice of Final Payment of Compensation Payments", stating that "employer/insurer question entitlement to benefits", and terminated further benefits.

Petitioner sought an award of penalties for late payment and compensation rate enhancement for failure to pay in bad faith pursuant to D.C. Code §§ 32-1514 and 1528, by letter to OWC, asserting that no good faith basis for terminating benefits existed. Respondent opposed the request, asserting that the termination was justified because Petitioner had failed to produce earnings records when requested to do so at three separate informal conferences.

OWC, through the Claims Examiner and Claims Supervisor, denied the requests in an “Order on Claimant’s Motion for Order Declaring Penalties” (the Order) issued November 26, 2013.

Petitioner appealed the denial to the Compensation Review Board (CRB) on December 26, 2013, to which appeal Respondent filed an opposition on January 10, 2014.

We affirm the OWC Order.

THE STANDARD OF REVIEW

As an initial matter, in its review of an appeal from OWC, the CRB must affirm said decision unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See*, 6 Stein, Mitchell & Mezones, ADMINISTRATIVE LAW § 51.03 (2001).

DISCUSSION AND ANALYSIS

After recounting in detail the respective positions of the parties regarding the arguments of the parties, including specific reasons for the termination (i.e., failing to produce earnings records) and Petitioner’s response to those reasons (i.e., he had no earnings thus there are no records to produce), OWC denied the Motion for the following reason:

This office carefully reviewed the claimant’s claim as well as the position of employer/carrier. In reviewing claimant’s claim, counsel for claimant initially began requesting penalties pursuant to Section 32-1515 (e) and Section 32-1528 (b) but later began reference to Section 32-1514 (3) and Section 32-1528 (b). After careful review of the information submitted by both parties, claimant’s request for bad faith and penalties for late payment are hereby denied. This office had determined that the documentation contained in the administrative case file does not support the claim for bad faith or the issuance of a penalty for late payment.

Order, page 3.

Generally speaking, this explanation for the decision of OWC would not provide us with sufficient information to assess why the decision was made, and hence would frustrate any attempt on our part to assess whether the reasons are justifiable under the standard referred to above.

However, review of the terms of the Stipulation underlying the agreement to pay benefits indicate that it imposed no greater obligations upon Respondent than Respondent would have had in its absence.¹ In other words, it merely represented an agreement by Respondent to pay temporary partial disability benefits for so long as it was willing to voluntarily pay them, and that they would stop if the respondent had a good faith basis to stop them. Respondent filed a Notice of Final Payment prior to terminating the payments, which is the prescribed method for avoiding a late payment penalty. It is, as a practical matter, the equivalent of a Notice of Controversion in those

¹ We note further that it is not and does not purport to be a full and final settlement as contemplated by D.C. Code § 32-1508 (8). Thus, Respondent was not subject to the same obligations as it would have been had the Stipulation been a Compensation Order.

cases where an employer initially accepts a claim as compensable, commences payments, then determines that, for some reason, those payments should end. See, *Bivens v. Chem/Ed*, CRB No. 05-215, AHD No. 01-002B, OWC No. 560668 (April 28, 2005).

Similarly, the failure to pay an installment of benefits where the right to receive those benefits is disputed, as they were upon the filing of the Notice of Final Payment, does not amount to bad faith, particularly in the absence of any showing of animus of which none is referred to anywhere in the documents or pleadings filed by Petitioner. As the CRB wrote 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.

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.

Id., at 11.

CONCLUSION AND ORDER

The denial of the claim for penalties and imposition of an enhanced compensation rate for bad faith contained in the November 26, 2013 “Order on Claimant’s Motion for Order Declaring Penalties” is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Jeffrey P. Russell
JEFFREY P. RUSSELL
Administrative Appeals Judge

April 28, 2014
DATE