GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-166

DONYALE STEVENS,
Claimant–Respondent,

v.

GOEL ENTERPRISES, INC. and
ARCH INSURANCE COMPANY,
Employer/Insurer-Petitioner.

Appeal from a November 28, 2016 Compensation Order
by Administrative Law Judge Gregory P. Lambert
AHD No. 16-404, OWC No. 744929

(Decided April 4, 2017)

Allen J. Lowe for Claimant
Jacob L. White for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, and GENNET PURCELL, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This matter arises out of a claim for workers' compensation benefits pursuant to D.C. Code § 32-1501, *et seq.* the District of Columbia Workers' Compensation Act of 1979, as amended (the "Act").

Pending before us is an appeal from a Compensation Order issued November 28, 2016 ("CO") by an administrative law judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Hearings and Adjudications Section ("H&AS") of the District of Columbia Department of Employment Services ("DOES").

The CO followed a formal hearing at which Donyale Stevens ("Claimant") sought benefits under the Act for injuries sustained while he was employed by Goel Enterprises ("Employer"). The

following is taken from the Findings of Fact section of the CO, and are not in dispute in this appeal. Evidentiary references are to the Hearing Transcript ("HT"), and to Claimant's Exhibits ("CE") and Employer's Exhibits ("EE") presented at the formal hearing.

> Mr. Stevens is forty years old, married, and worked for Goel Services on April 4, 2016. HT at 27. At the time he was hired, Mr. Stevens signed an application form, which included boilerplate language that provided that he could be fired for drug or alcohol use under certain circumstances. HT at 47; EE 7.
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> Working at Saint Elizabeth's Hospital, he was removing asbestos when he was injured. HT at 27-28. The work was physical and required activities like bending, lifting, and climbing ladders. HT at 28. ...
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> * * *
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> In the evening, around 7:00 p.m., Mr. Stevens was assigned the task of collecting fire proof doors that were in various places around the facility. HT at 31. Doing so required the removal of the doors from their hinges and moving them to [a] staging area ... HT at 31. ...
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> * * *
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> One of th[e] smaller doors [in the staging area] was on the floor and concealed a hole, which was covered with a piece of plastic sheeting and opened up into the ceiling below. HT at 32-33. Unaware of the hazard, Mr. Stevens picked up [a] door and slipped into the hole. HT at 33. Because they only worked together on moving the large doors, [Mr. Stevens's co-worker] did not see Mr. Stevens fall. HT at 52, 69-70.
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> As he went into the hole, the door he had been carrying slipped from his hands and hit him on the head. HT at 52-53. At nearly the same moment, by extending his elbows, Mr. Stevens was able to catch himself before he fell completely through the floor. HT at 33. Now dangling from the floor above, he was about 15 feet from the floor on the level below. HT at 34. He did not remain suspended for long: his shoulders soon gave out, his elbows slipped above his head, and Mr. Stevens passed through the floor, effectively falling from the ceiling of the level below. HT at 34. There was another door covering another hole on that floor too. HT at 34.
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> Mr. Stevens fell awkwardly when he landed on that door, but avoided falling through the second hole. HT at 34. Instead, one foot went into the second hole while his body fell to his left side and onto the door, which, because it was filled

with asbestos, was hollow and compressed slightly from the impact. HT at 34-35, 53; CE 13.

He rested there momentarily. HT at 56. The fall cut his eye and created a swollen knot on his head. HT at 35. Later, in addition to headaches, dizziness, and trouble sleeping, medical files record injuries to his cervical spine, lumbar spine, left elbow, right shoulder, left shoulder, left hip, left leg, and right foot. CE 1.

* * *

He went to Philips & Green, a medical group, for care. HT at 40; CE 1. Dr. Salter and Dr. Wagner are Mr. Stevens's treating physicians. His treating physicians recommended that Mr. Stevens receive an MRI of his left elbow and left shoulder. HT at 41; CE 1. He received a prescription for physical therapy, which he undertook and found helpful. HT at 41.

Since the fall, the strength in Mr. Stevens's hands has weakened. HT at 42. He experiences pain in his shoulders constantly, both during the day and at night. HT at 42. He has trouble sleeping, falling asleep around four or five in the morning. HT at 42-43. He received pain medicine from his treating physicians, which helped. HT at 43. He currently takes Motrin, aspirin, and other over the counter medicines, which are not as effective. HT at 43-44.

* * *

Mr. Stevens could not afford to travel because he was not earning income. The first time that Mr. Stevens was scheduled to see Dr. [Clifford] Hinkes for an independent medical evaluation, the two did not meet because Goel did not arrange for necessary transportation. HT at 44; CE 9. Once transportation was arranged, Mr. Stevens did meet with Dr. Hinkes on August 31, 2016. HT at 44.

* * *

The August 24, 2016 Notice of Controversion [filed by Employer] alleges a "[f]ailure to cooperate under section 32-1507(d) of the D.C. Workers' Compensation Act." CE 7.

CO at 2 – 4.

Following the formal hearing, on November 28, 2016, the ALJ issued the CO in which the ALJ found that Claimant had sustained a work-related injury on April 4, 2016, that he has been temporarily totally disabled as a result of that injury since it occurred, that because Employer failed to provide transportation to Claimant and Claimant had access to none, Claimant did not unreasonably fail to attend an independent medical evaluation ("IME") scheduled by Employer with Dr. Clifford Hinkes, and that Employer's failure to provide Claimant benefits under the Act constituted bad faith pursuant to D.C. Code § 32-1528 (b), which provides that if an employer is

determined to have "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 ...." The ALJ awarded Claimant the temporary total disability benefits, medical benefits, and the penalty as provided by the statute.

Employer timely appealed the penalty award to the Compensation Review Board ("CRB") by filing Employer/Insurer's Application for Review and Memorandum of Points and Authorities in Support of Employer/Insurer's Application for Review ("Employer's Brief") on December 28, 2016.

Claimant opposed the appeal by filing a Memorandum of Points and Authorities in Opposition to Employer/Insurer's Application for Review ("Claimant's Brief") on January 12, 2017.

Because the determination that Employer delayed payment of benefits in bad faith is supported by substantial evidence, we affirm the CO.

ANALYSIS

The sole issue before us is whether the ALJ's determination that Employer's failure to pay benefits from the date of injury to the date of the formal hearing was such that Claimant is entitled to payment of full wages, as opposed to temporary total disability benefits calculated at the compensation rate established under the Act, is supported by substantial evidence.

Employer argues that its failure to pay was "warranted by the existence of some controverting fact or Employer's good faith interpretation thereof", being that the accident was unwitnessed, Claimant's supervisor's assessment of Claimant's appearance after the accident convinced the supervisor that no such accident had occurred, and Claimant had recently failed a pre-employment drug screening test by testing positive for marijuana. Employer's Brief at 5 – 6.

Employer further posits that Claimant had failed to appear at a scheduled IME which rendered the non-payment thereafter "in good faith", even if the ALJ determined that Employer's failure to provide transportation to the appointment rendered the failure to appear reasonable. Employer's Brief at 7.

Claimant argues that Employer's suspicions about whether Claimant was faking the injury did not justify the failure to pay benefits, and the four month interval from the date of the accident to the filing of a Notice of Controversion for failing to appear at an IME evidences a bad faith delay basis in the failure to pay any of the claimed befits prior to that delay. Claimant's Brief at unnumbered pages 5 – 8.

The parties agree that the issue is governed by the rule and tests established in *Bivens v. Chemed/Roto Rooter Plumbing Services*, CRB No. 05-215 (April 28, 2005). That test, 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).[1]

The test enunciated 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.

The ALJ stated:

> Mr. Stevens showed a *prima facie* case of bad faith. Goel did not produce evidence indicating a good faith basis for not paying benefits. Even if it had, Goels reasons for not paying Mr. Stevens were pretextual. This includes both the stated basis for controversion- failure to cooperate- and the other reasons raised at the hearing.

* * *

[1] We note that, although the DCCA did not question the CRB's formulation of the test, it did not explicitly affirm it. In *Asylum* the CRB's affirmance of the ALJ was reversed because neither the CRB nor the ALJ considered employer Asylum's evidence and contention that, despite ultimately being wrong about whether undocumented workers are barred from compensation under the Act, its reliance upon that belief as a basis for delaying payment was not pre-textual.

> I do not find evidence of good faith for not paying Mr. Stevens's benefits. Mr. Stevens never received benefits for months before the claim was controverted. Once it was, the controversion was based upon an allegedly unreasonable failure to cooperate, which does not address whether Stevens was entitled to benefits in the first place. CE 7. Regardless, Mr. Stevens's failure to attend a single IME because he had no transportation was clearly not unreasonable, making Goel's controversion pretextual. So, too, are Goel's other arguments.
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> Until Mr. Stevens did not attend the IME, Goel could not have relied upon a failure to cooperate to justify not paying Mr. Stevens's claim. To explain its failure to provide benefits prior to the controversion, Goel relied upon unfounded conjecture that there was no injury....

CO at 8.

We disagree with the logic of the ALJ's initial formulation, "Mr. Stevens's failure to attend a single IME because he had no transportation was clearly not unreasonable, making Goel's controversion pretextual". CO at 8.

Merely because the ALJ, acting properly and within his discretion, determined that Claimant's failure to attend the single IME was not unreasonable, it does not follow that therefore the filing of a Notice of Controversion stating that failing to attend an IME was necessarily pretextual and in bad faith. The ALJ accepted that Claimant did, in fact, fail to attend an IME, and that fact alone can by itself be reason enough to suspend benefits pending a resolution of the issue.

However, the second portion of the ALJ's formulation renders this analytic flaw of no consequence. The ALJ determined, and it is undisputed, that Employer's failure to pay commenced prior to the Notice of Controversion being filed. In that regard, the ALJ reasoned that "[u]ntil Mr. Stevens did not attend the IME, Goel could not have relied upon a failure to cooperate to justify not paying Mr. Stevens's claim". *Id.* This logic is unassailable.

Most of the remaining alleged bases for delay or non-payment (those related to Employer's doubts about Claimant having sustained the injury in the first place) were based upon facts or circumstances known to Employer at the time of the Notice of Controversion, yet were not included in the notice as reasons for non-payment, and the other reasons raised by Employer in this appeal and at the formal hearing (the opinion of the IME physician and the emergency room staff that Claimant could work) were never identified in the notice that was filed or any subsequent Notice of Controversion as a reason for non-payment. The fact that a Notice of Controversion was filed that did not include these alternative justifications raised at the formal hearing renders the ALJ's rejection of them as pretextual a rational conclusion supported by substantial evidence. And, importantly, the raising of these additional pretextual reasons allows an inference that the reason included in the notice that *was* filed was itself pretextual.

It is undisputed that Employer filed a Notice of Controversion that did not include any of these rationales, beyond the failure to attend the initial IME four months post-injury, and that Employer never filed a Notice of Controversion that included those additional rationales. The ALJ's conclusion that these additional rationales are pretextual flows rationally from these facts.

CONCLUSION AND ORDER

The determination that Employer delayed payment of compensation in bad faith is supported by substantial evidence, is in accordance with the Act, and is AFFIRMED.

So ordered.