

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-126

PALEMON CASARRUBIA GONZALEZ,
Claimant,

v.

ASYLUM COMPANY AND INSURANCE DESIGNERS OF MARYLAND,
Employer and Carrier.

Appeal from a Compensation Order on Remand By
Administrative Law Judge David L. Boddie
AHD No. 06-224, OWC No. 617421

Manuel Rivera, Esquire, for the Claimant
Richard W Galiher, Jr., Esquire for the Employer and Carrier

Before LAWRENCE D. TARR, MELISSA LIN JONES, and HEATHER C. LESLIE,¹ *Administrative Appeals Judges.*

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Review Panel.

DECISION AND ORDER

This case is before the Compensation Review Board (CRB) on the request by the claimant for review of the October 14, 2011, Compensation Order on Remand, issued by an Administrative Law Judge (ALJ) from the Hearings and Adjudication Section, Office of Hearings and Adjudication in the District of Columbia Department of Employment Services (DOES).

In the Compensation Order on Remand (COR), the ALJ held the employer had not acted in bad faith when it failed to pay the claimant benefits and therefore was not liable for paying the average weekly wage penalty in D.C. Code §32-1528 (b). For the reasons stated, we AFFIRM.

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

The claimant worked as a busboy and bar bus at a restaurant and bar owned by the employer. When he was hired, the claimant was an unauthorized alien.²

¹ Judge Leslie was appointed by the Director of DOES as a CRB member pursuant to DOES Policy Issuance No. 12-02-04 (June 20, 2012).

² The previous CRB decision described the claimant as an “undocumented alien.” As the Court of Appeals noted, the Immigration Reform and Control Act of 1986 (IRCA) uses the term “unauthorized alien,” which is defined as a person not lawfully admitted for permanent residence or not authorized to be employed by IRCA or the Attorney General.,

On June 30, 2005, the claimant was injured when he was struck in the eye by a bottle thrown by a customer of the bar. He was taken by another employee to a nearby hospital for treatment. The claimant's supervisor, David Karim, who also was an owner of the bar and had responsibility for hiring new employees, testified that he was confused when he received hospital bills that listed the claimant's name as "Palemon Casarrubias Gonzalez" because he knew the claimant by two other names, "Armando Casarrubias" and "Armando Casarrubias Gonzalez."

On July 17, 2005, although not yet medically cleared for work after eye surgery, the claimant went to the restaurant and asked Mr. Karim for part-time work. Although the claimant testified otherwise, according to Karim, this was the first time that he learned the claimant was an unauthorized alien and that the claimant had used his cousin's documentation to obtain work. Karim testified that he gave the claimant \$1,000.00 to help pay expenses and also told the claimant he could not legally hire him because of his undocumented status.

The claimant was released by his treating physician to return to work as of January 25, 2006, and began working for another employer in February 2006. In August 2005, he filed a claim for temporary total workers' compensation benefits disability benefits from the date of the accident through the date he was cleared to work; June 30, 2005 to January 26, 2006.

After an evidentiary hearing, an ALJ issued a Compensation Order (CO) on August 1, 2007 in which he found the claimant was entitled to temporary total disability benefits for the period claimed, the claimant did not voluntarily limit his income, and the claimant was not fired in retaliation for filing a workers' compensation claim.

The ALJ also found that the employer failed to timely file a notice of controversion and had withheld compensation payments in bad faith. The ALJ awarded the claimant an additional 10% as penalty because of the employer's failure to timely controvert the claim. The ALJ also determined that the claimant's wage loss benefits should be based on his actual weekly wage because of the employer's bad faith delay in paying benefits. *Gonzales v. Asylum Company*, AHD No. 06-224, OWC No. 617421 (August 1, 2007).

Of significance to the present controversy, with respect to the bad faith issue, the ALJ analyzed the evidence in conformance with *Bivens v. Chemed/Roto Rooter Plumbing Services*, CRB No. 05-215, AHD No. 01-002B, OWC No. 560668 (April 28, 2005). In *Bivens*, the CRB stated a three-step "shifting burden of proof" analysis for determining whether an employer acted in bad faith:

(1)The claimant must first prove three elements to establish a *prima facie* showing of bad faith in contravention of the Act:

- (i) Entitlement to a benefit,
- (ii) Knowledge by the employer of a claim to the entitlement, and
- (iii) Failure to pay or controvert the claimed entitlement within a reasonable time.

Asylum Company v. DOES and Palemon Casarrubia Gonzalez, Intervenor, 10 A. 3d 619 (D.C. 2010) at *fn.1*. We, as did the DCCA, shall primarily use the term unauthorized alien.

(2) If the claimant makes a *prima facie* showing of bad faith, the burden shifts to the employer to produce evidence indicating a good faith basis for not paying the benefits.

(3) If the employer establishes a good faith basis for non-payment, the burden then reverts to the claimant to prove the employer's evidence of good faith was pre-textual.

The ALJ held the claimant established the three elements necessary to establish a *prima facie* showing of bad faith. The ALJ further determined the employer did not meet its burden as to the second step--establishing a good faith basis for not paying the benefits. The ALJ wrote:

Mr. Karim testified that while he handled practically all aspects of running and operation of the employer's business . . . he did not know what a notice of controversion was and he did not file one.

Therefore, considering the analysis in *Bivens*, there being no record or evidence anywhere as to the employer's reasons for not paying or controverting the claimant's claim for workers' compensation benefits . . . their bad faith for non-payment may therefore be inferred. Assuming the employer declined to pay benefits to the claimant upon the same basis they gave for not rehiring claimant, that he was an undocumented worker, there is no legal basis for taking that position because while employers are legally barred from hiring undocumented workers, that has no application to their eligibility for workers compensation benefits. D.C. Code § 32-1501 (9). *Dorantes v. Component Assembly Systems, Inc.*, OHA No. 03-082, OWC No. 571430 (Final Compensation Order, May 15, 2003).

Considering the evidence in the record, I find that the employer's failure or delay in paying workers' compensation benefits to the claimant was in bad faith and that he is entitled to penalties pursuant to D.C. Code § 32-1528 (b).³

CO at 11.

The employer appealed the CO to the CRB. Among the employer's several points of appeal were the arguments that IRCA required benefits to end on July 17, 2005 (the date after the accident the claimant asked the employer for work) and that the ALJ, when considering penalties, should have considered the employer's good faith effort to obey IRCA when it did not pay the claimant benefits..

The CRB affirmed each of the ALJ's findings because all were supported by substantial evidence and in accordance with the law. *Gonzales v. Asylum Company*, CRB No. 08-077, AHD No. 06-224,

³ D.C. Code §32-1528 (b) provides:

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.

OWC No. 617421 (August 22, 2008). In its decision, the CRB noted that while two earlier non-binding ALJ decisions had awarded benefits to unauthorized aliens, the issue was one of first impression:

The question of whether IRCA preempts the Act preventing an undocumented alien from receiving benefits under the Act and excusing an employer from complying with the Act has not been addressed either by the Director, DOES, or the CRB. As the Director, and now the CRB, has final responsibility for interpreting the Act, *see Vieira v. D.C. Department of Employment Services*, 721 A.2d 579 (1998), the Panel takes this opportunity to address the question.

Gonzales v. Asylum Company, CRB No. 08-077, AHD No. 06-224, OWC No. 617421 (August 22 2008) at 6.

The CRB affirmed the ALJ's finding that an unauthorized alien was an "employee" within the Workers' Compensation Act (Act), affirmed the finding that IRCA did not preempt or excuse the employer's compliance with the Act, and affirmed the ALJ's determination that the employer acted in bad faith.

The employer appealed to the District of Columbia Court of Appeals (DCCA). The DCCA, also stating that the issue was one of first impression, held that an unauthorized alien was eligible to receive workers' compensation benefits in our jurisdiction and that IRCA did not prevent the claimant from receiving benefits after July 17, 2005. The DCCA also affirmed the award of indemnity benefits and the 10% penalty imposed because the employer did not timely file a notice of controversion. *Asylum Company v. DOES and Gonzalez, Intervenor*, 10 A. 3d 619 (DC 2010).

The Court did not affirm the ALJ's determination that the employer acted in bad faith. The DCCA held the ALJ erred in his analysis of this contested issue because he did not consider the evidence of good faith and did not shift the burden back to the claimant to prove the employer's reasons were pretextual:

The Employer contends that the CRB erred in affirming the finding of bad faith, because the ALJ did not consider the Employer's evidence of good faith and failed to shift the burden back to Claimant to show that petitioners' reasons for nonpayment were pretextual. We agree. As shown by the quoted material from the compensation order, the ALJ did not shift the burden back to Claimant because he found "no record or evidence anywhere as to the employer's reasons for not paying or else controverting the claimant's claim." In making that statement, the ALJ appears to have assumed -- incorrectly in either case -- that filing a notice of controversion is sufficient to negate bad faith or that failure to file a notice of controversion is sufficient by itself to demonstrate bad faith.

The DCCA then identified several instances in the hearing transcript where Karim testified why he did not controvert or pay benefits:

In addition, in finding that there was no evidence in the record of a reason for the Employer's delay in paying or controverting the claim, the ALJ ignored Karim's

testimony that he did not know what a notice of controversion was (an assertion that, if credited, would make it inappropriate to treat the failure to file such a notice as evidence of bad faith). In addressing the issue of bad faith failure to pay wage-loss benefits, the ALJ also did not take into account Karim's testimony about his "confusion" and did not discuss the significance of Karim's testimony that his "understanding of the law was that [Claimant] was an illegal, and I cannot hire an illegal." Nor did the ALJ assess the (undisputed) evidence about Karim having voluntarily paid Claimant \$ 1,000. Another fact that potentially was relevant to the issue of bad faith, but which the ALJ did not discuss, is Claimant's attempt to return to work on July 17, 2005 -- an effort that the ALJ found was contrary to medical advice, but that may be relevant to whether the Employer was aware of, or had a reason to be skeptical about, Claimant's ongoing physical incapacity. At least arguably, all of this evidence was pertinent to whether the Employer acted in bad faith -- i.e., to whether the Employer effected a "delay of payment of compensation which [was] not warranted by fact, existing law, or a good faith interpretation of the law," Report on Bill 8-74 at 24, or acted with "dishonesty of . . . purpose," or made an "unreasonable and unfounded . . . refusal to provide coverage." BLACK'S LAW DICTIONARY 149 (8th ed. 2004).

The DCCA held that while all these factors would not excuse the penalty for not timely controverting the claim, they may be material to the determination of the employer's bad faith:

The ALJ correctly perceived that factors such as those listed above did not excuse the Employer from the ten percent penalty for failure to pay promptly or to file a timely notice of controversion, because that penalty applies without regard to bad faith. However, the factors cited above may be relevant to bad faith *vel non*, and thus to whether the Employer should be required to pay the average-weekly-wage penalty.

Id. at 635-636. (Emphasis added).

The DCCA reversed that portion of the ALJ's award that required indemnity payments at the claimant's actual weekly wage because the ALJ did not consider this evidence:

However, we reverse that portion of the CRB's ruling sustaining the average weekly-wage award, because we conclude that the ALJ failed to consider all of the evidence of record in determining that the Employer acted in bad faith, and that rejection of the Employer's arguments centering on Claimant's undocumented status was not enough to establish bad faith. We remand for further proceedings not inconsistent with this opinion.

Id. at 637.

The CRB remanded the case to the ALJ who issued the COR that is the subject of this review.

In the COR, the ALJ denied the claim for penalties, finding no bad faith. The claimant timely appealed to the CRB. On review, the claimant argues that the ALJ misinterpreted the DCCA's

remand instructions as requiring him to find that the employer did not act in bad faith. The claimant further argues that the ALJ erred by not considering whether the employer's reasons for not paying benefits were pretextual.

In Opposition, the employer notes that although the ALJ devoted a large part of the COR to explaining why he disagreed with the DCCA's determinations, ultimately made his own determination that the employer did not act in bad faith and that this determination is supported by substantial evidence.

STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed order 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" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501 et seq., (the "Act") at § 32-1521.01(d) (2) (A).

Consistent with this standard of review, the CRB is constrained to uphold an 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*.

ANALYSIS

We recognize that part of the confusion the parties had in analyzing the COR is because the ALJ took the unorthodox approach of discussing the DCCA's decision by first identifying the "litany of instances of evidence presented by the Employer which (the DCCA) stated did not receive the consideration [in the CO] that it should have" and then responded by defending his original analysis.

However, despite his stated belief in the correctness of his original CO, the ALJ acknowledged his responsibility to follow the decision of a higher authority:

Therefore, regarding this error committed in the November 1, 2007 Compensation Order, I acknowledge the error, and having now had pointed out to me, what passes as reasons given sufficient enough to be required to be accepted, as showing a good faith basis in delaying the payment of compensation, so as to cause the burden to shift back to the Claimant to show that they are pretextual, I shall move to consider that evidence anew.

After considering the evidence, the ALJ ended the Analysis section of the COR with these words:

I find nothing in this testimony of Karim, or the other evidence cited, that persuades me that the reasons and explanations given as basis and in defense for refusing to pay and delaying payment of compensation to the Claimant, that may be accepted as reasonable. Nor do I find that the reasons given by the Employer were warranted by fact, existing law, or a good faith interpretation of the law.

The foregoing language cited from District Council hearings when the bad faith legislation was being considered, I believe implies that an employer's reasons or explanations given for their refusal to pay or delay in paying workers' compensation benefits should be at least reasonable or rational explanations, and not just simply words that bear no relation to the issue, in causing the burden to shift back to the Claimant to rebut them or show them to be pretextual. I continue to be unconvinced by the reasons given here for failing to pay compensation to the Claimant, should excuse the Employer's actions or did not constitute bad faith.

However, as noted above, the Court explicitly noted that the Employer's lack of knowledge of forms that may be required to be filed when contesting a claim, or confusion regarding the current state of the law, may not serve as an adequate basis to find that an employer acted in bad faith in delaying the payment of workers' compensation benefits. I therefore find that due to the Employer's confusion about what a notice of controversion was and that it was required to be filed under the District's Workers' Compensation Act in cases where they contest the employee's claim and their liability, as well as the Employer's confusion as to whether they were allowed to pay workers' compensation benefits to an unauthorized alien, without being in violation of immigration law, excuses the Employer's delay in paying compensation to the Claimant.

The ALJ then, as his Conclusion of Law, stated:

I conclude that the Employer's refusal and delay in paying workers' compensation benefits to the Claimant was not in bad faith.

We agree with the parties that the ALJ's decision is unclear. As the underlined portions of the above show, there seems to be an inconsistency between the Analysis section, wherein the ALJ found bad faith, and the Conclusion of Law section, wherein he found no bad faith.⁴ However, despite this apparent inconsistency, we agree with the ALJ's determination that the employer is not subject to the average-weekly-wage penalty.

Our starting point is the DCCA's finding that the ALJ, and the CRB, erred by not considering the Employer's IRCA argument in determining whether the employer acted in bad faith.⁵

⁴ A possible reading of the underlined portions of these sections that would not be inconsistent would be that despite the ALJ's personal view that the employer acted in bad faith, he is forced to find no bad faith because of the DCCA's decision. If that is what he meant then he has misinterpreted the DCCA's decision.

⁵ The employer's IRCA argument as stated by DCCA was:

In a nutshell, the Employer's argument is that the compensation order effectively required the Employer to pay wages to Claimant for the disability period even though IRCA prohibited the Employer from employing Claimant upon discovery of his undocumented status.

The fact that the ALJ and the CRB rejected the Employer's argument that IRCA precluded the payment of wage-loss benefits to Claimant was not a sufficient basis for holding that the Employer acted in bad faith by withholding payment of such benefits at a time when the law in this jurisdiction was unsettled.

For the foregoing reasons, we conclude that on the present record we cannot uphold the determination that the Employer is subject to the average-weekly-wage penalty. A remand is necessary, so DOES can consider all of the evidence of record that may bear on whether the Employer acted in bad faith....

[W]e conclude the ALJ failed to consider all of the evidence of record in determining that the Employer acted in bad faith, and that rejection of the Employer's arguments centering on Claimant's undocumented status was not enough to establish bad faith.

10 A. 3d 619, 636.

Therefore, consistent with the DCCA's remand instructions, we hold as a matter of law that because the ALJ considered all of the record evidence, the finding that the employer did not act in bad faith is in accordance with the law and supported by the substantial evidence in the record.

We make this determination because the record establishes that the delay in compensation payment was due to the employer's good faith interpretation of existing local and Federal law (IRCA), as to whether undocumented aliens were eligible for workers' compensation benefits and whether the employer could pay such benefits without violating IRCA. The DCCA characterized the law at the time the employer failed to pay as "unsettled." The CRB noted in its 2008 decision that at the time the employer did not pay benefits, the issue of whether an undocumented alien worker could receive workers' compensation benefits had "not been addressed either by the Director, DOES, or the CRB."

We recognize that one interpretation of the evidence could be that the employer's reason for not paying, its reasonable interpretation of the unsettled law that undocumented aliens are not eligible for workers' compensation benefits, merely establishes a good faith basis and that under *Bivens*, the burden shifted to the claimant to show pretext.

Assuming this interpretation is correct; we note that in the CO, the ALJ did not award the average-weekly-wage penalty because he found the employer's reason was pretextual. He awarded the penalty because he found that reason legally insufficient since ignorance of the law would not be a legitimate excuse for not paying.

In interpreting his own decision the ALJ stated his belief that the employer's explanation did not provide a legal basis for excusing the penalty because, in the ALJ's words, "ignorance of the law does not provide a legal excuse for doing or failing to do something that is required by the law, *ignorantia juris non excusat*" COR at 5.

However, at the time the employer acted, the law was unsettled. Therefore, consistent with the DCCA's remand instructions, we have considered the COR in conjunction with all of the evidence

and hold as a matter of law that the employer did not act in ignorance of any law. A good faith interpretation of unsettled law is not pretext.

CONCLUSION AND ORDER

For the reasons stated, the October 14, 2011, Compensation Order on Remand Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

Lawrence D. Tarr

LAWRENCE D. TARR
Administrative Appeals Judge

September 6, 2012
DATE