

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402 - Fax

CRB No. 07-14,
MARGIE T. NEAL,
Claimant – Petitioner,

v.

PORTER, WRIGHT, MORRIS & ARTHUR,
AND CHUBB GROUP INSURANCE,
Employer/Carrier-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Melissa Lin Klemens
AHD No. 06-305, OWC No. 609931

Eric May, Esq., for the Petitioner

Michael D. Dobbs, Esq., for the Respondent

Before LINDA F. JORY, JEFFREY R. RUSSELL, *Administrative Appeals Judges* and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on November 1, 2006, the Administrative Law Judge (ALJ) concluded Petitioner sustained an accidental injury arising out of and in the course of her employment which entitled her to payment of causally related medical expenses and to temporary total disability benefits for the closed period from June 1, 2005 to January 20, 2006; however Petitioner was found not entitled to bad faith penalties under the Act.

The Claimant-Petitioner (Petitioner) now seeks review of that portion of the Compensation Order pertaining to the denial of bad faith penalties pursuant to the District of Columbia Worker's Compensation Act of 1979 as amended, D.C. Code §§ 32-1528.

Specifically Petitioner asserts the ALJ's decision is not based upon substantial evidence as the ALJ failed to consider evidence, specifically deposition testimony of a claims adjuster, which allegedly showed Respondent had no reason for failing to pay benefits.

Respondent filed a Memorandum of Points and Authority with the CRB asserting the evidence Petitioner refers to in her appeal has been taken out of context and that the deposition transcript in question must be read in its entirety.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review Panel, 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 are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. D.C. Official Code §§ 1-633.28(a) and 32-1521.01 (d)(2)(A). "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 Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order 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.

Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

The question before the Panel at this juncture is whether the ALJ's finding that Respondent acted in good faith is supported by substantial evidence and is in accordance with the established law interpreting §32-1528.

As properly cited by the ALJ, in *Bivens v. Chemed/Roto Rooter Plumbing Services*, CRB No. 05-215, AHD No. 01-002B (April 28, 2005) (*Bivens*), the Board recently adopted the three prong test utilized in *Robinson v. Brooks Hair Design*, OWC No. 220370, OHA No. 92-481 (March 2, 1994)² (*Robinson*), to establish a *prima facie* showing of bad faith in contravention of the Act which is:

- (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 pre-textual.

Bivens at 5.

Petitioner is challenging only the ALJ's denial of bad faith penalties pursuant to §33-1528 for the period of June 1, 2005 through January 30, 2006. According to the ALJ, Respondent asserted that Petitioner was not paid wage loss benefits after May 31, 2005 because she had resigned from her position with Employer. Respondent also "repeatedly" asserted that there was an issue as to whether Petitioner was earning income from another source as Petitioner is president of R&M Support Services and president of R&M InveSpec, Inc. The fact that Petitioner resigned from employer to move to Florida to move into a house that she had purchased with her husband before the work injury occurred was never disputed by Petitioner. Moreover, regardless of whether Petitioner would still be entitled to benefits if found disabled after resigning or whether her only income was via a business investment profit³, the Panel agrees Respondent provided two good faith reasons for delaying payment of wage loss benefits until the validity of Petitioner's claim was determined.

Having determined Respondent demonstrated a good faith basis for not paying the benefits the burden switched to Petitioner to show Respondent's reasons were pre-textual. The ALJ found Petitioner presented nothing further to prove Respondent's defenses were pre-textual. The Panel concludes the ALJ's determination is supported by substantial evidence and in accordance with

² See also *Telisa Settles v. Payless Shoe Stores*, Dir. Dkt. No. 99-75, OHA No. 97-96A, OWC 503532 (March 8, 2000).

³ As properly cited by the ALJ, the Court of Appeals in *Washington Post v. DOES*, 675 A.2d 37, 42 (DC 1996) held that profits derived from a business are not be considered as earnings and cannot be accepted as a measure of loss of earning power unless they are almost entirely the direct result of the claimant's personal management and endeavor.

the law and affirms the ALJ's denial of a bad faith penalty with regard to the second period of disability.

Although the Board prefers a step by step approach to a finding of good or bad faith per *Bivens, supra*, the Panel finds no basis for disturbing the ALJ's discretionary determination that Respondent acted in good faith in its delay in payment of Petitioner's wage loss benefits.

CONCLUSION

The ALJ's determination that Respondent demonstrated a good faith basis for not paying Petitioner's benefits for the period of June 1, 2005 through January 30, 2006 is supported by substantial evidence; is in accordance with the law; and accordingly must be affirmed

ORDER

The Compensation Order issued by AHD on November 1, 2006 is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

December 22, 2006
DATE