

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-022

PALEMON CASARRUBIAS GONZALEZ,
Claimant-Petitioner,
v.

ASYLUM COMPANY and
INSURANCE DESIGNERS OF MARYLAND,
Employer and Insurer-Respondents.

Appeal from a January 21, 2016 Second Compensation Order on Remand
by Administrative Law Judge Donna J. Henderson
AHD No. 06-224A, OWC No. 580453

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SERVICES
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BOARD
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Manuel Rivera for Claimant
No appearance on behalf of Employer and Carrier¹

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL and
HEATHER C. LESLIE, *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

This case is before the Compensation Review Board (“CRB”) on the appeal filed by Claimant, Palemon Casarrubias Gonzalez², seeking review of the January 21, 2016 Second Compensation Order on Remand (“SCOR”) issued by an Administrative Law Judge (“ALJ”) in the in the Administrative Hearings Division (“AHD”) of the Department of Employment Services (“DOES”).

Claimant appeals the ALJ’s determination that he was not entitled to penalties because Employer did not delay the payment of his wage-loss benefits in bad faith. For the reasons stated, we AFFIRM the ALJ’s SCOR.

¹ Richard Galiher represented the Employer until June 30, 2014 when he was granted permission to withdraw.

² We should note that previous AHD, CRB and DCCA decisions recite different spellings for Claimant’s name. Our citations shall use the spelling as it appears in the decision.

PERTINENT PROCEDURAL HISTORY AND FACTS OF RECORD

Claimant worked at a restaurant and bar owned by Employer. When he was hired, Claimant was an undocumented worker.³ On June 30, 2005, he was injured when he was struck in the eye by a bottle thrown by a customer.

Claimant's supervisor, David Karim, who was an owner of the bar and had responsibility for hiring, testified that he was confused when he received hospital bills relating to the accident that listed Claimant's name as "Palemon Casarrubias Gonzalez" because he knew Claimant by two other names, "Armando Casarrubias" and "Armando Casarrubias Gonzalez."

On July 17, 2005, although not yet medically cleared for work, Claimant went to the restaurant and asked Mr. Karim for part-time work. According to Karim, this was the first time that he learned Claimant was undocumented and that Claimant had used somebody else's name to obtain work. Karim testified that he gave Claimant \$ 1,000.00 to help pay expenses and also told Claimant he could not legally hire him because of his undocumented worker status.

In August 2005, Claimant filed a claim for temporary total disability benefits from the date of the accident through the date he was cleared to work, January 26, 2006. After an evidentiary hearing, an ALJ issued a Compensation Order (CO) on August 1, 2007 that found Claimant was entitled to temporary total disability benefits for the period claimed, that Claimant did not voluntarily limit his income, and that Claimant was not fired in retaliation for filing a workers' compensation claim.

Of specific interest to the current matter, the ALJ also found that the employer withheld compensation payments from Claimant in bad faith. The ALJ determined that Claimant's wage-loss benefits should be based on his actual weekly wage because of Employer's bad faith in delaying payment.⁴

In concluding that Employer withheld benefits in bad faith, the ALJ analyzed the evidence in conformance with *Bivens v. Chemed/Roto Rooter Plumbing Services*, CRB No. 05-215 (April 28, 2005). The ALJ held Claimant established the three elements necessary to establish a *prima facie* showing of bad faith and further held the employer did not meet its burden as to the second step; establishing a good faith basis for not paying benefits. *Gonzales v. Asylum Company*, AHD No. 06-224, OWC No. 617421 (August 1, 2007).

Employer appealed the CO. The CRB held undocumented workers were eligible for workers' compensation benefits and also affirmed that Employer delayed payments of those benefits in bad faith. *Gonzales v. Asylum Company*, CRB No. 08-077 (August 22, 2008). One of Employer's arguments to the CRB was that in deciding whether it acted in bad faith, the ALJ, when

³ Several previous decisions in this case have referred to Claimant's employment status as an "undocumented alien" and "unauthorized alien." In the SCOR currently on appeal, the ALJ used "undocumented worker" in referencing the Claimant's employment status and we shall too.

⁴ D.C. Code § 32-1528 (b) states "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."

considering penalties, should have considered Employer's good-faith effort to obey IRCA (The Immigration Reform and Control Act of 1986).

On appeal, the District of Columbia Court of Appeals (DCCA) held that the issue of whether undocumented workers were eligible to receive workers' compensation benefits was one of first impression, concluded that they were eligible and affirmed the award of indemnity benefits. However, 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 the bad faith issue. The DCCA stated:

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 identified several instances in the hearing transcript where Karim testified why he did not 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 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.

Asylum Company v. DOES and Gonzalez, Intervenor, 10 A.3d 619, 635-636 (D.C. 2010).

The DCCA reversed and remanded that portion of the ALJ's award that was based on his finding of bad faith:

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.

In his Compensation Order on Remand the ALJ found that Employer acted inconsistently and not in accordance with the law but, inconsistently, concluded that Employer had not acted in bad faith. *Gonzalez v. Asylum Co.*, AHD No. 06-224, OWC No. 580453 (October 14, 2011).

On review, the CRB affirmed the ALJ's decision:

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. However, despite this apparent inconsistency, we agree with the ALJ's determination that the employer is not subject to the average-weekly-wage penalty.

* * *

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 [workers] 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 worker] could receive workers' compensation benefits had "not been addressed either by the Director, DOES, or the CRB."

* * *

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.

Gonzalez v. Asylum Company, CRB No. 11-126 at 7-9 (September 6, 2012). (Footnote omitted, emphasis added).

Claimant appealed the CRB's decision to the DCCA who issued a Memorandum Opinion and Judgment that again remanded this case. With respect to the issue now before the CRB, the Court's remand directed that an ALJ make factual findings only with respect to the third prong of *Bivens*, i.e. whether the employer's reasons failing to make payment were pretextual:

As stated, the shifting burdens of the *Bivens* test describe three distinct stages of a proceeding. First, the claimant must make a *prima facie* case. In this instance, there is no dispute that Gonzalez has accomplished that much. Then, however, the employer must have an opportunity to produce evidence demonstrating a good faith basis for failing to make the payments. Again, at the initial hearing held in this case, Karim testified and explained his ignorance of the requirements of the workers' compensation procedures, his confusion over the interaction between workers' compensation and Federal immigration law, and his interactions with Gonzalez that could have caused him to doubt Gonzalez's medical condition. However, a third and final burden shift must be made, and we find no findings in this record which address whether the employee proved that the reasons given by Asylum were pretextual.

* * *

Accordingly, we vacate the final order and remand with instructions that a new evidentiary hearing be held in front of a different ALJ to resolve the factual questions underlying the third prong of the *Bivens* test.

Gonzalez v. DOES and Asylum Company, Intervenor, No. 12-AA-1603 Mem. Op. & J. (D.C. August 7, 2013). (MOJ) (Emphasis added).

Consistent with the remand instructions, the CRB remanded this case to the AHD for a hearing before a different ALJ. At the new formal hearing on November 16, 2015, Claimant appeared and was represented by counsel. Neither the employer, insurer, nor their counsel appeared at the formal hearing.

The new ALJ issued the SCOR now on review. The ALJ held:

Claimant had the burden to prove by a preponderance of the evidence that Employer's undocumented-worker defense was pretextual. I conclude that Claimant failed to prove, by a preponderance of the evidence, that Employer's real reason for denying the claim was some reason or reasons other than because he was an undocumented worker. I conclude that Claimant failed to prove, by a preponderance of the evidence, that Employer raised the undocumented-worker

defense as a pretext for some other reason, as required by the third prong of *Bivens*. .”

Gonzalez v. The Asylum Company, AHD No. 06-224A, OWC No. 580453 (January 21, 2016) at 20.

Claimant timely appealed the ALJ’s decision and filed and filed a memorandum in support of his appeal. Nothing was filed on behalf of Employer or the Insurer.

ANALYSIS

Claimant argues that the ALJ erred because she misunderstood the DCCA’s remand instructions by deciding only the third prong of *Bivens*:

[The ALJ] incorrectly applied the *Bivens* test, stating that after the prior completed proceedings the solely [sic] remaining prong of the *Bivens* test was the third prong...There has been a misunderstanding on how to conduct the *Bivens* procedure here on remand as stated by the D.C. Court of Appeals (hereinafter DCCA). The tribunal below has interpreted the instructions form the DCCA incorrectly...

* * *

It appears that the DCCA instructions have been misunderstood.

* * *

Thus, it was error for ALJ Henderson, upon remand, to move to the third *Bivens* prong...In error, ALJ Henderson in her January 21, 2016 decision sought to address the third *Bivens* prong.

Claimant’s Memorandum at 2, 3, and 6.

Claimant’s argument is without merit. In the August 7, 2013 MOJ, the DCCA stated in clear and unambiguous terms that this case was remanded solely for the ALJ to resolve the remaining dispute concerning the third prong of the *Bivens* test. The DCCA’s decision stated:

However, a third and final burden shift must be made, and we find no findings in this record which address whether the employee proved that the reasons given by Asylum were pretextual.

* * *

Accordingly, we vacate the final order and remand with instructions that a new evidentiary hearing be held in front of a different ALJ to resolve the factual questions underlying the third prong of the *Bivens* test.

The CRB's January 15, 2014 Order remanded this case to AHD for proceedings consistent with the DCCA's Memorandum Opinion and Judgment. The ALJ did exactly what she was supposed to do. Therefore, the ALJ did not err in only resolving factual questions underlying the third prong of the *Bivens* test as it applies to this case.

Claimant's second argument is that the ALJ should not have reached the third prong of *Bivens* because, in Claimant's view, Employer had not met the second prong. Claimant asserts Employer failed to produce evidence of a good faith basis for its actions:

Thus it was error for ALJ Henderson, upon remand, to move to the third *Bivens* prong, being that Asylum Company had wholly failed to produce evidence-*after* Claimant made his *prima facie* case for bad faith-to counter the bad faith finding. In error, ALJ Henderson in her January 21, 2016 decision sought to address the third *Bivens* prong, even though Employer had failed to produce evidence of good faith as mandated by the second *Bivens* prong, nor had there been an express finding that the second prong had been met.

Claimant's Memorandum at 6.

We also disagree with Claimant's second argument. Not only is this argument inconsistent with the remand instructions of the DCCA's MOJ, that MOJ identified several ways in which Employer met its burden under the second prong when it produced evidence of a good faith:

As stated, the shifting burdens of the *Bivens* test describe three distinct stages of a proceeding. First, the claimant must make a *prima facie* case. In this instance, there is no dispute that Gonzalez has accomplished that much. Then, however, the employer must have an opportunity to produce evidence demonstrating a good faith basis for failing to make the payments. Again, at the initial hearing held in this case, Karim testified and explained his ignorance of the requirements of the workers' compensation procedures, his confusion over the interaction between workers' compensation and Federal immigration law, and his interactions with Gonzalez that could have caused him to doubt Gonzalez's medical condition.

Therefore, the record does not support Claimant's argument that Employer did not satisfy the second prong of *Bivens*.

Claimant argues several times in his memorandum that the ALJ erred in basing her decision on the fact that Employer failed to make compensation payments because Claimant was an undocumented worker. Claimant asserts there is no evidence to support that finding.

Contrary to Claimant's assertion that Employer did not testify that it relied on IRCA, in the first ALJ remand decision, ALJ Boddie's October 14, 2011 Compensation Order on Remand, he noted that Karim testified that one of the reasons he did not pay benefits was his belief that IRCA disallowed hiring an undocumented worker, testimony he ultimately rejected:

Admittedly, while giving other reasons for rejecting the testimony of Karim...as well as rejecting his testimony regarding the hiring of [undocumented workers] as a basis for refusing to pay workers' compensation benefits...

Gonzalez v. Asylum Company, AHD No. 06-224, OWC No. 580453 (October 14, 2011) at 6.

That Employer testified that it relied on IRCA also was identified by DCCA when it held that without evidence of pretext, this belief was not evidence of bad faith:

Heretofore, this court has not addressed the issue of the eligibility of undocumented alien workers for wage-loss benefits under the Act, and, as the Court of Appeals of Maryland has observed, the Supreme Court's opinion in Hoffman "provided the foundation for arguments by employers that undocumented/illegal workers are ineligible for workers' compensation benefits because such benefits are pre-empted or because employment contracts with such workers are illegal." *Design Kitchen & Baths*, 882 A.2d at 829. 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.

Asylum Company v. DOES and Gonzalez, Intervenor, 10 A.3d 619, 637 (D.C. 2010).

In the SCOR now before us, the ALJ discussed each of Claimant's assertions that the undocumented worker defense raised by Employer was pretextual: Employer did not want to pay workers' compensation benefits, Employer failed to file the Notice of Controversion, Employer knowingly hired other undocumented workers, Employer knew, or should have known, that Claimant's documents were illegitimate, Employer terminated Claimant's employment and Employer voluntarily paid Claimant \$1000 for expenses as a way to dissuade Claimant from filing a claim. The ALJ also identified why she was not persuaded that any of these assertions proved pretext.

The ALJ ultimately concluded:

Claimant failed to prove, by a preponderance of the evidence, that Employer's real reason for denying the claim was some reason or reasons other than because he was an undocumented worker. I conclude that Claimant failed to prove, by a preponderance of the evidence, that Employer raised the undocumented-worker defense as a pretext for some other reason, as required by the third prong of *Bivens*.

The ALJ's decision is supported by the evidence and is consistent with the law.

CONCLUSION AND ORDER

The ALJ's Second Compensation on Remand is AFFIRMED.