

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

Labor Standards Bureau

**Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD**



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CRB No. 04-52

MARIO RAMOS,

Claimant – Petitioner,

v.

FT. MYER CONSTRUCTION AND ST. PAUL INSURANCE CO.,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD/OHA No. 04-040, OWC No. 589914

Sheldon A. Noel, Esquire for the Petitioner

Gerard J. Emig, Esquire, for the Respondent

Before LINDA F. JORY, FLOYD LEWIS, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

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 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹ Pursuant

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 20024, Title J, the 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, 32-1522 (2005). In accordance with the 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. Official Code §§ 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.

to 7 D.C.M.R. § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

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 April 29, 2004, the Administrative Law Judge (ALJ), concluded Claimant - Petitioner (Petitioner) was not entitled to an award of penalties in accordance with D.C. Code § 32-1515 or § 32-1528.

As grounds for this appeal, Petitioner alleges the Administrative Law Judge's order is unsupported by the record and the facts as stipulated by the parties and should therefore be reversed. Respondent retorts that the ALJ correctly established the facts in this case and applied the applicable law properly.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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 §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. 2003). Consistent with this scope of review, the CRB and this panel are bound 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.

Following a thorough review of the evidence of record, particularly the hearing transcript from the Formal Hearing, the Panel is in agreement with the ALJ's determination that Petitioner has not met his burden of establishing entitlement to penalty for late payment pursuant to D.C. Code §32-1515. The Panel further finds that the ALJ's determination that Petitioner is not entitled to bad faith penalties pursuant to §32-1524 is supported by the evidentiary record.

Although not included in the Findings of Facts, the record reveals and Petitioner has not opposed, Respondent notified its carrier of the death of Mario Ramos and that a check in the amount of \$5000 was sent to Respondent and given to the deceased's sister who accompanied the deceased's body back to his home country of El Salvador. The ALJ did find that the deceased did not disclose any dependent children on his W-2 form filed with Respondent and the carrier first learned through Ana de Jesus Ramos deceased's sister that he had two surviving dependent children. The ALJ, however, did not include in his findings the stipulation made by the parties at the Formal Hearing

that Respondent as the employer and carrier received Claimant's Exhibit 2 and 3 on August 28, 2003 at the informal conference attended by the parties. The Panel notes CE 2 and 3 are respectively the Family Estate Registries for Jackeline Yessenia and Mario Ernesto, respectively, which is unopposed evidence that the deceased had a son and daughter who were age 7 and 5 respectively.

The Panel notes at the outset the ALJ incorrectly listed as an issue "whether employer failed to controvert the claim in a timely manner". Notwithstanding the fact that Respondent was not controverting its duty to pay benefits, the Panel agrees this error is harmless as the ALJ did ultimately consider the timeliness of Respondent's payment of dependency benefits. However, in his analysis of whether Respondent had timely commenced payment of benefits pursuant to §32-1515, the ALJ referred to and reprinted section (f), which applies to compensation payable under the terms of an award and not paid within 10 days as opposed to section (e), which applies to payments made without an award within 14 days and adds a 10% penalty unless notice is filed under subsection (d) (notice of controversion). In his application of §32-1515(f) to the facts of the instant case, the ALJ concluded only that "since the record evidence does not demonstrate that employer controverted or 'challenged the validity of the claim' for death benefits, rather, it accepted the claim and made payments, claimant's assertion for penalty under §32-1515 is unfounded." CO at 3.

While the ALJ appears to switch back and forth between section (e) and (f), the Panel agrees that this is still harmless error as the finding that Respondent's payment of benefits was timely is supported by the law and the evidence of record. In so concluding, the Panel rejects Petitioner's argument that Respondent had all of the information necessary in order to make payment to the dependents when it received CE 2 and 3 at the informal conference. Review of CE 2 and 3 reveal that the documents entitled "Family Estate Registry" verify that the deceased was the father of 2 dependents who are still minors but the documents contain no information as to where the dependents were living at the time or who should receive the benefits on their behalf. There does not appear to be any dispute that this information was eventually provided on or around the time the Memorandum of Informal Conference issued and that Respondent did make payment of benefits on October 28, 2003. Thus, while the ALJ did not make any findings of fact as to when the October 14, 2003 award became due, even if it was on the date of issue, by making payment on October 28, 2003, the Panel concludes the payment was timely and finds no reason to disturb the ALJ's denial of penalties pursuant to §32-1515.

Moving to Petitioner's appeal of the ALJ's bad faith penalty denial, 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 with a reasonable time.

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

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.

Turning to the specifics of the case under review, the ALJ cited the *Robinson* three prong test and found Petitioner had met the first two prongs but had not established the third requirement that carrier had failed to provide the benefits within a reasonable time. The ALJ explained:

...although carrier had knowledge that the deceased claimant had surviving dependent children, it could not ascertain as to the amount of their entitlement, the name of the payee to whom the benefits check was to be payable until the issuance of Recommendation of Informal Conference on October 14, 2003.

Even though [Respondent] did not send the benefit checks immediately after receiving the Recommendation, instead she mailed them on October 28, 2003, the delay of approximately 14 calendar days, that necessarily included the intervening two Saturdays and two Sundays, cannot be deemed unreasonable.

Surprisingly, although the ALJ did not find [Petitioner] satisfied all three prongs of the *Robinson* test, by including the above, it appears the ALJ shifted the burden to Respondent to produce evidence indicating a good faith basis for not paying the benefits and then returned the burden to Petitioner. The ALJ found Petitioner did not present any evidence of malice or bad faith motivating Respondent in its decision to cause the purported delay and added that “[Respondent’s] motive is clearly apparent from the fact that it did forward two checks within a reasonable time after receiving the Recommendation and has been paying benefits since then without defaulting on a single payment. The ALJ concluded that “all of this suggests that carrier did not bear [Petitioner] any ill will or malice in delaying the payment of death benefits to suspend his benefits. In the ALJ’s words, “Claimant simply maintains there is no evidence Respondent made its decision in good faith”.

Having reviewed the record in its entirety, the Panel concludes that despite the ALJ’s misapplication of the three prong test and the burden shifting device it encompasses, this usage by the ALJ, is not, in the Panel’s opinion, of any consequence as the record contains no evidence, nor does Petitioner cite to any evidence in his appeal of any pretext or malice on the part of employer.

Based upon the foregoing, we accordingly conclude the denial of the claim for bad faith penalties is also supported by substantial evidence in the record and is in accordance with the law.

CONCLUSION

The April 29, 2004 Compensation Order denying Petitioner’s request for an award of penalties in accordance with D.C. Code § 32-1515 and § 32-1528 is supported by substantial evidence, and in accordance with the law.

ORDER

The April 29, 2004 Compensation Order is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

March 2, 2006
DATE