

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-076

MARVIA M. APPLEWHITE
Claimant–Petitioner,

v.

HAWK ONE SECURITY,
Employer-Respondent.

Appeal from a June 5, 2013 Supplementary Compensation Order on Default by
Administrative Law Judge Anand K. Verma
AHD No. 07-218, OWC No. 608539

Matthew Peffer, Esquire, for the Claimant/Petitioner
Leonard L. McCants, Esquire,¹ for the Employer/Respondent

Before: HENRY W. MCCOY, HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

PROCEDURAL HISTORY AND FACTS OF RECORD

This appeal follows the issuance on June 5, 2013 of a Supplementary Compensation Order on Default from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). In that Order, the Administrative Law Judge granted Claimant’s request for an order declaring default for unpaid temporary total disability (TTD) benefits for the period April 22, 2010 to January 14, 2013, in the amount of \$61,267.78.²

¹ Leonard L. McCants, last counsel of record for Employer, is now deceased. As no substitute counsel for the Employer has entered an appearance, a copy of this Decision and Order shall be sent to the address of the law firm at which Mr. McCants worked, in addition to being sent to Employer’s registered agent.

² *Applewhite v. Hawk One Security*, AHD No. 07-218, OWC No. 608539 (June 5, 2013).

In an August 30, 2007 Compensation Order, part of Claimant's award was to receive TTD benefits from October 27, 2005 to the present and continuing. When receipt of those benefits was not forthcoming, Claimant filed a series of motions to declare this Employer in default and orders making that declaration were issued on February 1, 2008, May 19, 2008, and December 3, 2009.

In accordance with D.C. Code § 32-1519(a), Claimant, in May 2010, obtained from the Superior Court of the District of Columbia a judgment order ordering Employer to pay \$60,707.76 in unpaid benefits accrued as of April 21, 2010. Owing to financial inability of Employer to pay, Claimant used the Superior Court judgment order to petition the Special Fund to satisfy this obligation pursuant to D.C. Code § 32-1540(a). The Special Fund accepted Claimant's application and the benefits were paid.

With her benefits continuing to be unpaid, Claimant filed two subsequent motions to declare Employer in default, the first on June 16, 2011 and the second on January 14, 2013. The June 16, 2011 motion, seeking unpaid benefits from April 20, 2010 to June 16, 2011, was denied on December 4, 2012 and was not appealed.

On January 14, 2013, Claimant filed a second motion for an order declaring default seeking unpaid benefits for the period June 16, 2011 to January 10, 2013. After this motion was denied, Claimant appealed not only the denial of this motion but also the denial of the June 16, 2011 motion.

In a May 17, 2013 Decision and Remand Order (DRO), the Compensation Review Board (CRB) first dismissed Claimant's appeal of the June 16, 2011 motion for a default order because it was untimely filed. As for the denial of the January 14, 2013 motion, the CRB vacated that order and remanded the motion for a determination of whether Employer was in default for the period alleged, and if so, for a determination of the amount.³

On remand, the ALJ, in effect, granted Claimant's motion and determined that she was entitled to 133 weeks unpaid TTD benefits in the amount of \$61,267.78 for the period April 22, 2010 to January 14, 2013.⁴ In addition, the ALJ denied what he deemed to be a request by Claimant for the assessment of a 20% penalty against the Special Fund.

Claimant has filed the instant timely appeal with no record of any opposition filed by Employer. The Custodian of the Special Fund filed an opposition to the Application for Review.

On appeal, Claimant argues the ALJ made a mathematical error in the number of weeks in calculating the amount of unpaid benefits to which she is entitled that requires reversal and remand to correct. After due consideration, we amend the order below with regard to the amount in default and vacate any direct award against the Special Fund.

³ *Applewhite v. Hawk One Security*, CRB No. 13-014, AHD No. 07-218, OWC No. 608539 (May 17, 2013).

⁴ *Applewhite v. Hawk One Security*, AHD No. 07-218, OWC No. 608539 (June 5, 2013).

ANALYSIS

The scope of review by the CRB, 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 (CO) are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.⁵ See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a CO 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.

Claimant argues the ALJ committed a mathematical error when calculating the amount of benefits to which she is entitled requiring that this matter be remanded for a correction. Claimant contends that the period of unpaid benefits is 142 weeks and not 133 weeks as determined by the ALJ.

In the order under review, the ALJ noted that Claimant had received from the Special Fund the amount of \$60,707.76 for unpaid disability benefits due and owing as of April 21, 2010 pursuant to a Superior Court judgment. In consideration of Claimant's January 14, 2013 motion, the ALJ found

Claimant has not received any disability benefits accrued after April 21, 2010. The total number of weeks after April 21, 2010 until January 14, 2013 amounts to 133 and, therefore, the weekly benefit rate of \$460.66, multiplied by 133 weeks yields \$61,267.78 in total benefits due and owing.

In counting the number of weeks from April 22, 2010 to January 14, 2013, the ALJ had made a mistake. Counting from and including April 22, 2010 (a Thursday) to and including January 14, 2013 (a Monday) amounts to 999 days, which for our purposes here equates to 142 (999 divided by 7) weeks (rounded down). Accordingly, when the undisputed compensation rate of \$460.66 is then multiplied by 142 weeks, the result is \$65,413.72.

By concluding Claimant was entitled to unpaid benefits in the amount of \$61,267.78, the ALJ in essence also has determined that Employer is in default to that amount. However, as shown above, the ALJ's calculation is in error due to an incorrect finding as to the number of weeks between the given dates, of which there is no dispute. As no other outcome can attain

⁵ "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 International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

under these circumstances, the appropriate course is to amend the Supplementary Compensation Order on Default to insert the correct number of weeks into the calculation to show Claimant is entitled to a default order in the amount of \$65,413.72.⁶

In filing its opposition response to the order under review, the Special Fund argued that the ALJ “has no jurisdiction to determine, designate risk or liability for the Special Fund.” We agree.

In the supplementary default order, the ALJ not only determined that Claimant had a right to receive unpaid disability benefits but also a right to receive those benefits from the Special Fund by stating:

In the instant case, predicated on the available record, Claimant’s right to receive the unpaid compensation benefits from [sic] Special Fund after April 21, 2010 through January 14, 2013, the date Claimant filed her Motion for an Order Declaring Default is determined to be in the amount of \$61,267.78. (Citation omitted).⁷

As the Special Fund argues, the ALJ has no authority to issue an order directing the Special Fund to pay the compensation due. As the CRB has previously stated:

Default proceedings are governed by D.C. Code § 32-1519, and they exist for a specific and limited purpose: to permit a claimant who has not received the compensation that is due under a Compensation Order to obtain a determination of the *amount* due, and take that determination to either the D.C. Superior Court and obtain a judgment in the amount of the default as part of an action to enforce the award (i.e., to commence a debtor/creditor collection action in civil court), or in the case of an insolvent or otherwise recalcitrant employer, seek payment of the amount of the award in default from the Special Fund established in D.C. Code § 32-1540. (Emphasis in original).⁸

After receiving an order declaring default stating the amount due, it is Claimant’s responsibility to take that order to either the D.C. Superior Court or to the Special Fund. Claimant previously obtained a judgment from Superior Court, which she used to make application to the Special Fund, which was accepted and paid. That course of action again is now available to Claimant.

⁶ 7 DCMR § 267.1 states in relevant part: “The designated Review Panel shall dispose of the matter under review, utilizing the standards of review contained in section 266 of this chapter, by issuing a decision:

(c) amending the compensation order or final order based on the Review Panel’s findings;....”

⁷ *Applewhite, supra.*, p. 2-3.

⁸ *Wells v. Falke, Inc.*, CRB No. 11-076, AHD No. 06-401B, OWC No. 581868, p. 3 (September 20, 2011).

CONCLUSION AND ORDER

The June 5, 2013 Supplementary Compensation Order on Default is amended to declare a default against the Employer in the amount of \$65,413.72. The right of Claimant to receive the amount in default from the Special Fund as granted and ordered by the ALJ is VACATED.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

August 23, 2013
DATE