

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. 09-136

GEORGE MORGAN,

Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS,

Employer–Respondent.

Appeal from an Order of
Administrative Law Judge Linda F. Jory.
AHD No. PBL 07-083A, DCP No. 761011-0007-1999-0002

Kirk D. Williams, Esquire, for the Claimant-Petitioner

Kevin J. Turner, Esquire, for the Employer-Respondent

Before HENRY W. MCCOY, MELISSA LIN KLEMENS, AND LAWRENCE D. TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Panel, and Melissa Lin Klemens, *Administrative Appeals Judge, dissenting in part*:

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code § 1-623.28, 7 DCMR § 118, and Department of Employment Services (DOES) Director's Administrative Policy Issuance No. 05-01 (February 5, 2005). The CRB replaces the DOES Office of the Director in providing administrative appellate review of disability compensation claims arising under the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq* (the Act).

OVERVIEW

After a June 5, 2008 evidentiary hearing, the Administrative Hearings Division (AHD) issued a Compensation Order on October 24, 2008 reinstating Claimant-Petitioner's (Petitioner) temporary total disability benefits from November 19, 2000 to the present and continuing. In compliance with the CO, the Disability Compensation Program (DCP) issued Petitioner a check in the amount of \$78,240.64 on December 31, 2008 deducting \$28,608.30 for health insurance premiums. *Morgan v. D.C. Dept. of Public Works*, AHD No. PBL 07-083A (October 24, 2008).

Deeming the deductions for health insurance premiums to be an erroneous double deduction, Petitioner made several unsuccessful attempts to remedy this alleged discrepancy with Employer-Respondent (Respondent). Petitioner stated he then filed an Application for Formal Hearing on February 27, 2009. In a May 11, 2009 Order, AHD dismissed the matter for lack of jurisdiction stating the proper course of action was to file a motion similar to a default motion under the private sector Act.

On July 8, 2009, Petitioner filed with AHD a Motion for Supplemental Order Awarding Additional Compensation. In the motion, Petitioner asserted that the deduction of \$28,608.30 for health insurance duplicated the health insurance premiums deducted from his bi-weekly benefit payments since November 19, 2000. On July 21, 2009, AHD issued an Order to Show Cause to Respondent to show why this was not an erroneous double deduction and why a penalty should not be imposed on Respondent for each 30 day period in which Respondent failed to make timely compensation payments to Petitioner.

When Respondent had not responded to the Order to Show Cause within the mandated ten (10) business days, Petitioner filed a request with AHD on September 1, 2009 for an order awarding the additional compensation sought as provided in the Order to Show Cause.¹ There is no record of a response to this request as there is no record of Respondent filing a timely response to the Order to Show Cause.

On September 8, 2009, counsel for Respondent filed with AHD, in response to the show cause order, copies of two notifications to Petitioner from the Disability Compensation Program (DCP), sent by certified mail the same date: one advising him of an overpayment in the amount of \$3,523.09, the other advising him of an underpayment in the amount of \$3,532.59. Petitioner was informed that a check for the net balance of \$9.50 was being sent to him on the same date. Petitioner was also informed in both letters of the right to contest these determinations by filing within 30 days of the notices either a request for reconsideration or an appeal to the Office of Hearings and Adjudication.

On September 9, 2009, Petitioner filed with AHD a response to the DCP's letters of over and underpayment. Petitioner argued that as these letters were considered responses to the Order to Show Cause they were untimely, that the analysis within the letters was erroneous, and that using

¹ The July 21, 2009 Order to Show Cause stipulated "Failure to timely respond will result in the issuance of an order awarding the requested supplemental compensation and the requested default payment(s)."

the DCP's information supported a conclusion that Petitioner has been underpaid in the amount of \$53,618.26. It also appears that Petitioner filed for a formal hearing on or about September 8, 2009.

In a September 21, 2009 Order, AHD held that just because Petitioner does not agree with Respondent's calculations or the amount paid, he was precluded from receiving a supplemental order awarding additional compensation because a determination of his average weekly wage or compensation rate had not been adjudicated. Accordingly, Petitioner's request for such a supplemental order was denied. The Order made no reference to Petitioner having filed for a formal hearing.

On September 25, 2009, Petitioner filed a timely appeal arguing reversal of the ALJ's order and remand of this matter to AHD. Petitioner asserts the ALJ erred in denying his motion for additional compensation (1) without determining whether Respondent had properly paid him disability benefits in accordance with the Compensation Order; and, (2) without making necessary findings of fact. Respondent made no filing in opposition.

ANALYSIS

Generally, 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 evidence² in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Here, however, there is no evidentiary record to review. We are presented strictly with an issue of law. The CRB, therefore, will affirm the Order under review unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with applicable law. See, 6 Stein, Mitchell & Mezines, *Administrative Law*, § 51.93 (2001).

In the September 21, 2009 Order denying Petitioner's motion for a supplemental order awarding additional compensation, the ALJ stated that "[N]either the calculation of claimant's average weekly wage nor a determination of his compensation rate were raised or discussed in the Compensation Order as issues in dispute." As neither the average weekly wage nor compensation rate had been adjudicated, the ALJ held that Petitioner was "precluded from receiving a Supplemental Order Awarding Additional Compensation because he does not agree with employer's calculations or the amount paid."

Petitioner initially argues that the ALJ erred in denying his motion for additional compensation that was made pursuant to D.C. Official Code § 1-623.24(g)³ because the Compensation Order "was too vague to determine whether the DCP had properly paid." It is

² "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).

³ D.C. Official Code § 1-623.24(g) states in relevant part:

"If the Mayor or his or her designee fails to make payments of the award for compensation as required by subsection (a-3)(1), (a-4)(2), or (b)(3) of this section, the award shall be increased by an amount equal to one month of the compensation for each 30-day period that payment is not made; provided, that the increase shall not exceed 12 months' compensation."

Petitioner's contention that Respondent has underpaid him and this is supported clearly by the CO where the ALJ found there was an "unlawful reduction" in his weekly compensation rate "from \$414.89 per week to \$175.05 per week." Consequently, Petitioner claims the CO awarded him \$100,732.80 (\$239.84 x 420 weeks) but Respondent only paid him \$78,240.64, which was not in accordance with the Act. Claimant's Memorandum of Points and Authorities in Support of Application for Review at 6-7.

Petitioner also asserts that the ALJ erred in denying his motion when she did so without making required findings of fact. Likening his motion to a private sector act default motion, Petitioner is of the opinion, given the discrepancy between his calculations and those of Respondent, a fact-finding hearing was required to resolve the matter.

In making her decision to deny Petitioner's motion, the ALJ relied on this tribunal's decision in the matter of *Ernest Young v. D.C. Dept. of Corrections*, CRB No. 09-043, AHD No. PBL 09-021 (September 16, 2009). The ALJ was of the opinion that Petitioner here, similar to claimant Young, was seeking an order that would contain findings of fact pertaining to his pre-injury wages that could only be speculated upon without an underlying evidentiary record. The ALJ's reliance upon *Young* to support her denial of Petitioner's motion is misplaced.

In *Young*, the claimant was seeking an order of default by summary means without the benefit of a Compensation Order and its attendant evidentiary record. Thus, the CRB review panel ruled that the ALJ properly denied the claimant's request for a default order because AHD provided an appropriate method and procedure, *i.e.*, an Application for Formal Hearing, to resolve any facts of a claim that are in dispute.

In the instant appeal, there is a Compensation Order which ordered the reinstatement of Petitioner's full disability compensation benefits by finding Respondent had

"failed to sustain their burden of proof to establish the Claimant has had a change of condition justifying a reduction in compensation benefits based upon a loss of wage earning capacity,...

Morgan, supra at 11.

In addition and contrary to the ALJ's statement in the Order appealed, the Compensation Order does contain a discussion of the Petitioner's compensation rate. See *Morgan*, supra at 3. As there has been an adjudication of Petitioner's compensation rate with a ruling that the rate was unjustifiably reduced and reinstated at the full rate, no preclusion to contest Respondent's calculations in compliance with the Compensation Order inured to Petitioner.

Given the ALJ's reliance upon *Young*, it is proper to conclude that Petitioner's motion was denied because he also had available to him the option of applying for a formal hearing. As the appeal record includes a copy of an application for a hearing dated September 8, 2009 containing a very faint and illegible date-stamp, it begs the question why the ALJ did not schedule the matter for a fact-finding hearing. On remand, this question can be answered.

Petitioner's attempt to obtain an accurate accounting of his disability compensation benefits by a motion for order awarding additional compensation was improperly denied by the ALJ as the proper vehicle for resolution of the claim was a formal hearing. In addition, as it appears Petitioner filed an application for a hearing, it was incumbent upon the ALJ to acknowledge that filing and schedule the requested hearing. On remand, the ALJ is instructed to schedule the requested formal hearing.

Our colleague in dissent both misapprehends the issue on appeal and the manner in which we have directed the issue presented be resolved. The issue presented is not whether Respondent has timely paid benefits pursuant to the October 2008 Compensation Order but rather the amount. Respondent has paid Petitioner benefits pursuant to the CO. However, Petitioner has argued that duplicate set-offs for health insurance premiums have been improperly deducted from the benefits paid and that he has been significantly underpaid.

Our colleague also takes issue with our directing that this matter be set for a formal hearing when no such entitlement is imparted by the Act. We would agree that the mere existence of an issue does not create an entitlement to a formal hearing. However, we would disagree that when there is presented an issue in dispute as to the entitlement to the amount of benefits and where, as in the instant case, the parties have already set forth their respective calculations and, most importantly, one of the parties appears from the record to have requested a formal hearing, a formal hearing is the proper and most appropriate vehicle to resolve the dispute.

Our colleague likens the dispute between the parties here as purely a default issue where the government employer has failed to make payments of an award and cites D.C. Official Code § 1-623.24(g) as the claimant's only recourse. The majority is of the opinion that this is more than a mere default as payments have been made but the amount of those payments has been called into question.

Our colleague also reads the applicable code section as not requiring a formal hearing for resolution. While we agree, we are also of the opinion that the Act does not foreclose the use of a formal hearing and especially when in the instant case, one appears to have been requested. The specific circumstances of the instant case warrant the holding of a formal hearing to resolve the overall issue of whether the payments made to Petitioner are correct or constitute an underpayment as he alleges.

The decision to return this matter to the ALJ for a formal hearing in no way is intended to create or establish an entitlement to a formal hearing to resolve a default issue under either the public or private sector Acts. We do so here based on the specific facts and circumstances of the case.

CONCLUSION

The September 21, 2009 Order denying Petitioner's Motion for Supplemental Order Awarding Additional Compensation is not in accordance with the law.

ORDER

The September 21, 2009 Order denying Petitioner’s Motion for Supplemental Order Awarding Additional Compensation is **VACATED** and this matter is **REMANDED** to AHD to schedule a formal hearing to resolve Petitioner’s claim that he has been underpaid in compliance with the Compensation Order of October 24, 2008.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

August 17, 2010
DATE

MELISSA LIN KLEMENS, *Administrative Appeals Judge, dissenting in part:*

On October 24, 2008, a Compensation Order issued in *Morgan v. D.C. Department of Public Works*, AHD No. PBL07-083A, DCP No. 761200-0007-1999-002. That Compensation Order awarded Petitioner temporary total disability compensation benefits from November 19, 2000 and payment of medical expenses.

The majority opinion above sets forth the genesis of the dispute culminating in this appeal, and I take no issue with that recitation. Furthermore, I take no issue with the conclusion that the ALJ improperly denied ruling on the merits of Petitioner’s Motion for Supplemental Order Awarding Additional Compensation; however, I must dissent in part.

Pursuant to *Thomas*,⁴ parties are not entitled to a formal hearing if there is no dispute as to a claimant’s “right to benefits.” *Id.* at 1036. There is an issue in controversy in the case on appeal: namely, has Respondent timely paid pursuant to the October 24, 2008 Compensation Order? The mere existence of any issue does not entitle Petitioner to a formal hearing if there is no dispute as to entitlement.

⁴ *Thomas v. DOES*, 547 A.2d 1034 (D.C. 1988). Although *Thomas* is a private sector workers’ compensation case, it is not premised upon the specific wording of the D.C. Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* *Thomas* is premised upon general workers’ compensation principles and, therefore, applies equally to adjudication of both public sector and private sector claims. *Kralick v. DOES*, CRB No. 07-043, OHA/AHD No. PBL XX-885, DCP No. 10092 (March 27, 2007).

A formal hearing's purpose is to determine entitlement to disability compensation benefits.⁵ When a valid Compensation Order already establishes an injured worker's entitlement, the proper procedure to invoke is a request for default pursuant to §1-623.24(g) of the Act.

§1-623.24(g) of the Act states

If the Mayor or his or her designee fails to make payments of the award for compensation as required by subsection (a-3)(1), (a-4)(2), or (b)(3) of this section, the award shall be increased by an amount equal to one month of the compensation for each 30-day period that payment is not made; provided, that the increase shall not exceed 12 months' compensation. In addition, the claimant may file with the Superior Court of the District of Columbia a lien against the Disability Compensation Fund, the General Fund of the District of Columbia, or any other District fund or property to pay the compensation award. The Court shall fix the terms and manner of enforcement of the lien against the compensation award.

Nowhere in §1-623.24(g) of the Act is there any indication that a formal hearing is required for resolution of a default issue. Thus, likening this situation to a default under the D.C. private sector Workers' Compensation Act,⁶ if a motion is presented properly and if it sets forth the required elements, an ALJ has jurisdiction to rule on the motion.

This tribunal exercises only legal review authority concerning the contents of Compensation Orders and final orders. This tribunal lacks administrative control over AHD (a separate office with the Department of Employment Services), and I am unwilling to impose a requirement that an ALJ must hold a hearing to adjudicate a default issue. As such, I respectfully dissent in part.

MELISSA LIN KLEMENS
Administrative Appeals Judge

⁵ "The Director of the Department of Employment Services may review an award for or against payment of compensation." §1-623.28(a) of the Act.

⁶ D.C. Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1519