GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-154

KARLA JONES,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT,
Self-Insured Employer—Respondent

Appeal of an August 31, 2012 Order by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 10-089A, DCP No. 30081072058-0001

Matthew Peffer, Esquire, for the Claimant/Petitioner
Shermineh C. Jones, Esquire, for the Employer/Respondent

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL,[1] and HEATHER C. LESLIE,[2] *Administrative Appeals Judges*.

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

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant sustained a work-related injury on October 2, 2008. The then Office of Risk Management, now Public Sector Workers' Compensation Program, accepted the claim and awarded wage loss and medical benefits, which were subsequently suspended on March 16, 2011 for failing

[1] Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

[2] Judge Leslie has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 23, 2011).

to meaningfully participate in a functional capacity evaluation. Claimant filed for a formal hearing seeking the restoration of her disability benefits.

On April 13, 2012, a Compensation Order (CO) was issued granting Claimant the restoration of wage loss and medical benefits to pre-suspension status.[3] On May 21, 2012, an *Errata* was issued to amend the Conclusion of Law section to delete the entitlement to accrued interest.[4]

On June 29, 2012, Claimant filed a Motion for Order Declaring Default asserting that Employer had failed to timely pay the benefits awarded by the April 13, 2012 CO pursuant to D.C. Code § 1-623.24(b)(3) and therefore was subject to the penalty prescribed in subsection (g).[5] On July 17, 2012, Employer filed a response to Claimant's motion in which it declared its intention to make a lump-sum payment to Claimant in the amount of $22,675.83 on or before July 20, 2012 for the period March 28, 2011 through May 23, 2012 and that it had resumed making biweekly temporary total disability (TTD) payments on May 24, 2012.

On August 31, 2012, an Administrative Law Judge (ALJ) determined that Claimant was correct in his assertion that Employer had not paid the compensation awarded by the May 2012 amended CO in a timely manner. However, the ALJ denied Claimant's motion for default and to assess penalties deeming it facially deficient because Claimant did not provide an accounting of the exact amount he was owed by Employer. Claimant timely appealed with Employer filing in opposition.

On appeal, Claimant argues that neither the statute nor the regulations require him to provide any type of computation or accounting when requesting that the Employer be declared in default. In opposition, Employer contends the ALJ did not abuse his discretion in deciding it was reasonable to expect Claimant to provide that accounting in order to prevail on a motion for default. As the ALJ has placed a requirement on Claimant which has no basis in the statute or regulations, this matter must be returned.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal

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[3] *Jones v. D.C. Metropolitan Police Dept*., AHD No. PBL 10-089A, DCP No. 30081072058-0001 (April 13, 2012).

[4] On May 14, 2012, Employer had filed an Application for Review (AFR) to challenge the award of accrued interest. Upon issuance of the Errata, Employer filed a request on May 29, 2012 to withdraw the AFR, which was granted by the CRB and the AFR was dismissed. *Jones v. D.C. Metropolitan Police Dept*., CRB No. 12-072 (May 31, 2012).

[5] D.C. Code § 1-623.24(b)(3) states "The Mayor…shall begin payment of compensation to the claimant within 30 days after the date of an order from the Department of Employment Services Administrative Law Judge."

D.C. Code § 1-623.24(g) states in pertinent part: "If the Mayor…fails to make payments of the award of compensation as required by subsection … (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."

conclusions drawn from those facts are in accordance with the applicable law.[6] Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq*. ("Act"). Where, as in this case, we are presented with an appeal for which there is no evidentiary record to review, but strictly presented with an issue of law, the Board will affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with applicable law.[7]

After reviewing Claimant's motion for default that Employer had failed to pay the benefits awarded in the April 13, 2012 CO timely in conjunction with Employer's response that it intended to pay Claimant a lump-sum amount and had resumed biweekly TTD payments, the ALJ determined that

> On review of Claimant's Motion for Order Declaring Default and request to have a 20% penalty Assessed [sic] against Employer and after careful consideration of the arguments set forth by the parties, the undersigned finds validation in Claimant's position. Pursuant to D.C. Code§ 1-623.24 (b)(3), the motions filed by both parties acknowledge Employer's failure to timely rendered [sic] the workers' compensation disability payments awarded in the May 2012 amended CO to Claimant in a timely manner.[8]

We have cited the language of the sections of the statute that govern a motion for default and based on the ALJ's order in this matter, he is also familiar with that language. First, § 1-623.24(b)(3) requires payment of an award to commence with 30 days of the date of the compensation order making that award. Next, § 1-623.24(g) provides that if there is failure commence payment within 30 days, 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. Claimant asserted in her motion that Employer was untimely and Employer agreed. With the ALJ finding "validation in Claimant's position" that payment was untimely, this ostensibly should have resolved this matter with the ALJ granting Claimant's motion to declare a default.

However, the ALJ proceeded to state

> However, Claimant failed to provide the amount of disability benefits she is owed. Since Employer's response motion states it intent to pay Claimant a "lump-sum" amount for payments owed, the burden shifts to Claimant to provide an accounting of the exact amount Claimant is presently owed by Employer relevant to its untimely payment of benefits.

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[6] "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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003).

[7] *See* 6 Stein, Mitchell & Mezines, *Administrative Law*, § 51.93 (2001).

[8] Order of Denial, p. 2

> Overall, it is reasonable to expect Claimant to file a computation of the amount of disability compensation benefits that are due, owing and not timely paid, which are sought to be declared in default and the amount of penalties, as well as an accounting of benefits received along with any offsets owed to Claimant.[9]

With this shifting of the burden to Claimant to provide an accounting of the amount of disability benefits that she was owed and finding that she had failed to provide such an accounting, the ALJ deemed Claimant's motion for default to be "facially deficient" and denied the motion. We take issue not only with the ALJ's shifting of the burden to Claimant but also the imposition of a requirement that she provide an accounting of the benefits owed in order prevail on a motion declaring default.

In a motion for default, the claimant generally asserts that payment was untimely and provides evidence as to the date of an award of compensation with a further assertion that as of the date of the motion, payment still has not been made. To the extent there is a shifting burden, it then becomes incumbent upon the employer to show that payment was made timely. It is then left to the ALJ to resolve the discrepancy.

In the instant matter, no such discrepancy existed as Employer basically agreed in its response to Claimant's motion on July 17, 2012 that its payment pursuant to the CO was untimely and that it intended to make a lump-sum payment in the amount of $22,675.83 on or before July 20, 2012.

With it being uncontested that Employer's payment of benefits pursuant to the April 13, 2012 CO was untimely, we are unaware of any requirement in the statute or regulations shifting the burden to requiring Claimant to provide an accounting of the disability benefits owed, especially in this case where that amount was identified by Employer as the "lump-sum" payment it intended to make. There remained nothing further for the ALJ to do but to assess a penalty in an amount equal to one month of the compensation for each 30-day period that payment is not made.[10] To require further of Claimant was arbitrary, capricious, and an abuse of discretion.

CONCLUSION AND ORDER

The order denying Claimant's motion declaring a default because it was facially deficient for failing to provide an accounting of the exact amount of disability benefits owed is arbitrary, capricious, and an abuse of discretion. Accordingly, the August 31, 2012 Order of Denial is VACATED AND REMANDED for further consideration in keeping with this Decision and Remand Order.

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[9] *Id.*

[10] See D.C. Code § 1-623.24(g). Claimant and the ALJ appear to be under the misapprehension that a 20% penalty is to be assessed in the case where a default is declared. There is no such percentage requirement stated in the statute.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

February 12, 2013
DATE