

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 09-125

CAROLYN JONES,
Claimant–Petitioner,

v.

D.C. SPORTS AND ENTERTAINMENT,
Employer–Respondent.

Appeal from an August 17, 2009 Order of
Administrative Law Judge Melissa Lin Klemens
AHD No. PBL 09-012, OWC No. 76100200012003-0001

Kirk D. Williams, Esquire, for the Petitioner
Andrea Comentale, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, AND HENRY W. MCCOY, *Administrative Appeals Judges*, AND
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND¹

Petitioner Carolyn Jones filed a claim for work related injuries sustained on April 19, 2003, which claim was accepted by the Disability Compensation Program (DCP)², and benefits were paid based upon her wages earned working for Respondent Employer. When injured, Petitioner worked a second job at the Federal Bureau of Investigation (FBI), and sought to have her average weekly wage calculated to include the FBI job.

In February 2005 the DCP denied this request. Petitioner sought reconsideration under the reconsideration provisions of D.C. Code § 1-623.24 (a-4)(2), now repealed.

¹ In its review of an appeal of an Order issued when there is no evidentiary record, the Board must affirm the Order unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See*, 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW § 51.03 (2001).

² The Disability Compensation Program has been renamed the Public Sector Workers' Compensation Program (PSWCP). For the purposes of this Decision and Order, "DCP" will be used consistent with the usage at the time the Order under review was issued.

DCP reconsidered the denial, and granted the requested wage calculation adjustment, issuing a Final Decision on Reconsideration on January 24, 2006. In January 2006, Petitioner returned to a limited duty job at the FBI, but at a reduced rate of pay. However, by June 2006, Petitioner's earnings at the returned to her pre-injury level. Petitioner has not returned to her job with Respondent.

On November 12, 2008, DCP issued a Notice of Determination awarding permanent partial disability benefits to Petitioner, but asserting that Petitioner had been overpaid while working. Petitioner and DCP ultimately resolved their dispute over the benefits due³, with Petitioner receiving payment for temporary partial disability for the period June 25, 2006 through January 31, 2009.

Petitioner filed a "Motion for Supplemental Order" with the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES), seeking the imposition of a penalty against Respondent for late payment of the benefits for that period. In other words, Petitioner filed a motion seeking to have an ALJ assess a penalty against Respondent for late payment pursuant to D.C. Code § 1-623.24(g).

On August 17, 2009 an ALJ issued an Order denying the claim for penalties, because AHD lacked jurisdiction to award a penalty when there has been no Compensation Order issued by AHD.

Petitioner appealed that Order to the Compensation Review Board. Respondent has not filed a response.

The CRB finds that because there has been no Notice of Determination issued by DCP, the denial of Petitioner's request for imposition of a penalty is affirmed.

DISCUSSION AND ANALYSIS

D.C. Code § 1-623.24 (g) provides that

If the mayor or his designee fails to make payments of an award of 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 compensation for each 30-day period that payment is not made; provided that the increase will not exceed 12 months of compensation.

Although it is still referenced in subsection (g), subsection (a-4)(2), the provision governing reconsideration of an initial denial of a claim by DCP has been repealed

Subsection (a-3)(1) provides that claims that are not administratively determined within 30 days of a "newly filed claim" are "deemed accepted" by DCP except where DCP issued a written notice to a claimant advising that due to "extenuating circumstances" DCP is "precluded" from issuing a determination within that period. Subsection (b)(3) provides that awards of compensation made by an ALJ in DOES shall be paid within 30 days.

³ Petitioner states in her Memorandum in support of this appeal that she reserves the right to challenge the accuracy of the amount that she was paid in connection with this dispute, but there is no such issue presented in this appeal.

Relying on *Tellish v. D.C. Public Schools*, CRB No. 07-001, OHA PBL No. 05-028A, DCP No. DCPS 007013 (February 16, 2007) and *Buchholz v. D.C. Office of the Attorney General*, CRB No. 07-110, AHD PBL No. 04-027A, DCP No. 761037-0001-2002-0001 (July 27 2007), Petitioner argues that the Act does not proscribe DOES jurisdiction, and asserts that vesting jurisdiction in DOES is the only reasonable manner in which such a penalty process can be effective. It is Petitioner's contention that DOES has the legal authority to assess a penalty against Respondent as an original matter. We disagree.

Quoting from *Jaiyeola v. D.C. Public Service Commission*, CRB No. 13-022, OHA No. PBL 00-058B, DCP No. LT-DPE000340 (July 26, 2013):

It is now settled that a Final Determination by DCP is a prerequisite to AHD's adjudication of a request for benefits. That is to say, AHD does not have jurisdiction to determine a claim unless the employer has issued a determination denying liability for that claim.

In 2012, the CRB overruled *Tellish v. D.C. Public Schools*, CRB No. 07-001, OHA No. PBL 05-028A, DCP No. DCPS 007013 (February 16, 2007) and held that the plain language of D.C. Code §1-623.24 (b) (1) requires that the employer make a determination with respect to a claim before an injured worker may obtain a formal hearing. *Sisney v. DCPS*, CRB No. 08-200, OHA No. PBL08-066, DCP No. DCP007970 (July 2, 2012). Since *Sisney*, the CRB consistently has held that a notice of determination is a prerequisite for AHD to have authority to hold a formal hearing: *Downing v D.C Public Schools*, CRB No. 12-081, AHD No. PBL 11-015, DCP No. 30090824958-0001(August 3, 2012), *Brooks v. DCDMH*, CRB No. 10-062, OHA No. PBL 96-065B, DCP No. 7610100001199-0016 (August 16, 2012), *Newby v. DCPS*, CRB No 10-162, OHA No. PBL 01-064D, DCP No. LT-PARK001712 (September 11, 2012), *Freeman-Cunningham v. D.C. Dept. of Transportation*, CRB 12-104, AHD PBL No. 11-022A, OWC No. 30110173190-0001 (September 19, 2012, *Jackson v. D.C. Housing Authority*, CRB 12-104, AHD PBL No. 11-022A, OWC No. 30110173190-0001 (November 11, 2012), *Bonds. v. D.C. Dep't of Corrections*, CRB No. 12-038,AHD No. PBL08-061D, DCP No. 300903255759-001 (December 6, 2012) and *Buitrago v. D.C. Health HIV/AIDS Administration*, CRB No. 12-076, AHD No. PBL10-032C, DCP No. 761010-006-0001 (March 20, 2013).

Here, Petitioner does not dispute that DCP has not made a determination with respect to the issue presented, that being whether Petitioner is entitled to additional benefits based upon late payment, and if so, how much. Further, Petitioner does not dispute the ALJ's finding that AHD has not issued an award under subsection (b)(3), thus there is no default or delay in making any payment that resulted from the action of an ALJ in DOES.⁴

⁴ Had this case involved a claimed late payment under subsection (b)(3), *Buchholz* might have some application here, but unlike *Buchholz*, it is not an AHD issued Compensation Order that is allegedly in default.

While Petitioner posits that deeming DOES to have jurisdiction over an original claim for a penalty, in the absence of a Notice of Determination or a Compensation Order issued following a hearing is compelled as the only rational way a penalty system could work, Petitioner's assertion is not consistent with the statute.

All requests for benefits under the Act must first be presented to the DCP for a determination prior to formal action by an ALJ in DOES being undertaken.

CONCLUSION

The denial of the request for imposition of a late payment penalty is in conformance with the Act.

ORDER

The denial of the penalty request contained in the Order of August 17, 2009 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

October 3, 2013
DATE