

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-055

**KELVIN JOHNSON,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF GENERAL SERVICES¹,
Employer-Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 AUG 30 PM 2 48

Appeal from a March 25, 2016 "Order Granting
Claimant's Second Motion for Default"
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 05-021G, DCP No. 76102300060050001

(Decided August 30, 2016)

Matthew Peffer for Claimant
Andrea G. Comentale for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY and HEATHER C. LESLIE *Administrative Appeals
Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

A Compensation Order was issued January 20, 2015 awarding Kelvin Johnson (Claimant) temporary total disability benefits under D.C. Code § 1-623.01, *et seq.*, the law governing workers' compensation claims made by employees of the District of Columbia government.

¹ Several prior orders issued by the Administrative Hearing Division are incorrectly captioned as *Kelvin Johnson v. Department of Corrections*. The Employer noted in its Application for Review filed in CRB No. 15-026 that the matter was originally captioned *Kelvin Johnson v D.C. Office of Property Management*, The District's Office of Property Management is now known as the District of Columbia Department of General Services. See *Johnson v District of Columbia Department of General Services*, CRB No. 15-026 (July 21, 2015) at n.1.

Claimant filed a Motion for Default on February 27, 2015 alleging a failure to timely pay the award and seeking imposition of a sanction under D.C. Code § 1-623.24.

An Order to Show Cause (OSC) was issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudications (OHA) in the District of Columbia Department of Employment Services (DOES) on March 10, 2015, ordering Employer to show cause why the sanction should not be imposed.

Employer responded on May 10, 2015 that the ongoing benefits had been recommenced as of March 12, 2015 and that retroactive back benefits had been paid on April 30, 2015.

On July 2, 2015, the ALJ issued a “Supplemental Order Denying Default on Remand”² in which Employer was ordered to “pay Claimant for penalty [sic] in the amount equal to one month of compensation for each 30 day period the payment was not paid not to exceed 12 months compensation”, citing D.C. Code § 1-623.24(g).

Claimant, through counsel, sent several letters to the ALJ thereafter stating that the payments had still not been made and requesting a “Supplemental Order of Default” be issued.

On March 25, 2016, the ALJ issued an “Order Granting Claimant’s Second Motion for Default” (the Order), which concluded:

Based upon the foregoing, it is hereby **ORDERED**, that Employer is in default of the Compensation Order dated January 20, 2015 and the Supplemental Order Denying Default on Remand dated July 2, 2015. Employer is **Ordered** to pay Claimant a penalty in the amount equal to one month of compensation for every month that payment was not received since the July 2, 2015 Default Order.

Order at 2.

Employer filed Petitioner’s Application for Review and Employer-Petitioner’s Memorandum of Points and Authorities in Support of Its Application For Review (Employer’s Brief) with the Compensation Review Board (CRB) arguing the Order is contrary to the law and seeking reversal.

Claimant filed Claimant’s Opposition to the Application for Review (Claimant’s Brief), arguing the Order is in accordance with the law and should be affirmed.

Because the award contained in the Order is in accordance with the law, it is affirmed.

² The title of this order is confusing but need not be clarified in this Decision and Order given the lack of relevance of the title. In addition, there are numerous ambiguities and/or gaps in the filings and orders involved in this case, including the lack of a second Order to Show Cause prior to the issuance of the order under review herein, and the lack of specificity regarding the amounts of the alleged late payments or the amounts of the penalties, that make the procedural history of . However, neither party in this appeal complains that this lack of clarity affects the outcome of the narrow issue before us.

STANDARD OF REVIEW

In the appeal of orders which are not based upon an evidentiary record, the scope of review by the CRB is limited to making a determination as to whether the orders under review are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezines, Administrative Law §51.03 (2001).

DISCUSSION

The order under review and the prior order related thereto, as well as the motions filed seeking the relief at issue, all refer to the present matter as involving a “default”. However, the statutory provision underpinning Claimant’s request for relief in seeking the order, D.C. Code § 1-623.24 (g), does not contain the word “default”, and as far as the administrative adjudicative process is concerned, it is not a default provision. Rather, from the administrative adjudication perspective it is a provision mandating enhancement of an existing compensation award due to lateness of payment, and is in the nature of a penalty. It has application regardless of whether, by the time the matter is adjudicated, the payment has been made (in which case there would be no default, as that term is commonly understood.)

Specifically, that subsection bestows the authority to determine whether an existing award should be “increased by an amount equal to one month of compensation for each 30-day period that payment” for compensation “as required by subsection (a-3)(1), (a-4)(2), or (b)(3)” of the section because it is not made timely.

This is *not* a default provision as far as the power of this Agency is concerned. Although the word “penalty” is also not used, that is the word that best describes what this Agency is empowered to assess under the provision.

To the extent that anything akin to a “default” is also a subject of this subsection, it is governed by the language “In addition, the claimant may file with the Superior Court of the District of Columbia a lien” against the employer. Unlike the private sector act, the PSWCA has no provision for an administrative adjudication concerning the fact or amount of a “default”. *See* D.C. Code § 32-1519 (a) (establishing a procedure for adjudicating a claimant’s application for an order declaring an employer’s default and the amount thereof, and establishing a procedure for enforcement of that order in the Superior Court of the District of Columbia). *And cf.* D.C. Code § 32-1515(e) and (f), (establishing the authority to assess late payment penalties, but not referring to default procedures.) Powers in connection with declaring the existence or amount of a “default” under the law governing District of Columbia employees’ workers’ compensation claims are vested solely in the Superior Court of the District of Columbia.

Although there were two penalty orders issued by AHD in this case, the only one before us is the March 25, 2016 “Order Granting Claimant’s Second Motion for Default”, which includes the following:

ORDERED, that Employer is in default of the Compensation Order dated January 20, 2015 and Supplemental Order Denying Default on Remand dated July 2,

2015. Employer is ORDERED to pay Claimant a penalty in the amount equal to one month of compensation for every month that payment was not received since the July 2, 2015 Default Order.

Order at page 2.

The only complaint raised by Employer in this appeal regarding the Order is stated succinctly:

In this case, Employer-Respondent admittedly failed to timely pay retroactive TTD benefits within thirty (30) days of issuance of the January 20, 2015 CO as required by D.C. Code § 1-623.24(b)(3). Thus, the July 2, 2015 award of a penalty equal to two (2) months compensation was proper and authorized by the Act [footnote omitted]. However, the Act does not provide any time limit for payment of a properly imposed penalty nor does it provide for the payment of a penalty for the failure to pay a penalty within thirty days of issuance of an order awarding a penalty. As a result, under the Act, the ALJ does not have the authority to assess an additional penalty against the Employer in this case.

Employer's Brief at 3.

Claimant responds:

Here, while there is no language in the statute that provides a time limit for the payment of properly imposed penalty [sic] or payment of a penalty for failure to pay a penalty, allowing the party responsible for paying a penalty to remain unchecked should not be permitted. Furthermore, the ALJ was well within his power of judicial discretion when issuing the Order, because his decision was not inconsistent with the regulations, it [sic] is simply silent on the matter. Because the March 25, 2016 Order is neither clearly erroneous nor inconsistent with the plain language of the statute, it must be affirmed.

Claimant's Brief at 3.

While we do not agree with Claimant's reasoning (i.e., we do not agree that the absence of authorization in statute or regulation to make an award can be ignored), we do agree that the Order should be affirmed.

Although the relief contemplated by the statute is in the nature of a penalty, the *mechanism* of imposing the penalty is increasing the compensation award, not assessing a separate penalty. Therefore, any provisions concerning the timing of payment of an award *ab initio* also govern the increase in that award that is ordered for late payment.

There need be no specific additional provision concerning either the timing of payment or the consequences for late payment. Those provisions already exist.

CONCLUSION AND ORDER

The award contained in the Order Granting Claimant's Second Motion for Default is in accordance with the law and is affirmed.

So ordered.

APPEAL RIGHTS

To appeal a final Order or Decision of the Compensation Review Board, you must file a Petition for Review with the District of Columbia Court of Appeals within 30 calendar days of the mailing date shown on the Certificate of Service attached to that Order or Decision.

The D.C. Court of Appeals is located at 430 E Street NW, Washington DC 20001 and is open from 8:30 a.m. to 5:30 p.m., Monday through Friday, except for legal holidays. For information about the D.C. Court of Appeals procedure please call the Court at (202) 879-2700.

In addition to filing a Petition for Review with the D. C. Court of Appeals, to appeal this decision you also must send copies of the Petition for Review to:

- (1) The counsel for the opposing party at the address shown on the Certificate of Service attached to the Order or Decision.**
- (2) Todd S. Kim, Solicitor General
Office of the Attorney General
441 4th Street NW Suite 600S
Washington DC 20001**
- (3) Compensation Review Board
Department of Employment Services
4058 Minnesota Avenue NE Suite 4005
Washington DC 20019**

**JOHNSON v. DISTRICT OF COLUMBIA DEPARTMENT OF GENERAL SERVICES
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CERTIFICATE OF SERVICE

I certify that on August 30, 2016, the attached Decision & Order was sent by U.S. mail, postage pre-paid, or hand-delivered, as noted, addressed as indicated below:

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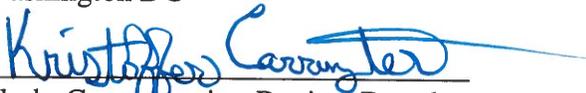
HAND DELIVERY

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Clerk, Compensation Review Board